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REFUGEE CONFERENCE
KEYNOTE ADDRESS

The Hon David K Malcolm AC[*]

I am delighted to have been asked to present the keynote address to this inaugural *Refugee Conference* and I join in welcoming you all to what I am sure will be a most successful convention.

You will have noted on the cover of the conference programme, a statement by the United Nations High Commissioner for Refugees which reads; "the road of the refugee is as long as you make it". Unfortunately, recent reports suggest that for the majority of unauthorised arrivals in Australia, this road is a very long one indeed. This morning I would like to speak to you not so much as Chief Justice, but as a longstanding member of the International Commission of Jurists and Chair of the Western Australian Branch (as well as an Ambassador) of the Red Cross with a particular focus on international humanitarian law. Both organisations have a history in relation to issues relating to refugees.

As you are aware, Australia has been a signatory to the *United Nations Convention Relating to the Status of Refugees* since its inception some 46 years ago. In committing to this convention, and its 1967 protocol, Australia has undertaken to protect and assist those that wish to pursue a claim for refugee status in Australia. The term 'refugee' is defined in Article 1A(2) of the convention as applying to a person who:

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, 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; or who, not having a nationality and being outside the country of his former habitual residence is unable, or owing to such fear, unwilling to return to it.

In essence this means that a refugee is a person who, for one reason or another, is denied the land of their ancestors. The mass dislocations caused by the expulsion of the Jews and the Moors from Spain in the 15th century were the first incidents of refugees in recorded history. However, it wasn't until after World War I that international bodies, such as the League of Nations, created organisations to give assistance to those persons who were dislocated from their homelands. Following World War II, the United Nations Relief and Rehabilitation Administration undertook the responsibility of caring for over 8 million displaced persons. Subsequent conflicts in Korea and throughout Asia and Africa have produced over 23.7 million refugees from the 1956 Hungarian Revolution to the 1971 India-Pakistan war. The beginning of 1999 saw the world refugee population at about 16 million in countries across Europe, Africa and Asia, not including approximately 30 million persons displaced within the boundaries of their own countries.

In recent years the number of people arriving without permission and seeking asylum in Australia has increased. Many of these asylum seekers arrive by boat - a fact perhaps not too surprising for a country which, as our national anthem reminds us, is 'girt by sea'. These people are often branded as "queue-jumpers". It is a familiar refrain and one which is repeated frequently in the press and on talk-back radio. But let us just

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take a moment to analyse this view. Australia's current humanitarian program offers 12,000 places per annum to refugees.[1] Of these 12,000 places, only 2,000 are available for those arriving in Australia illegally and who are subsequently found to satisfy the definition of 'refugee'. Clearly, the current program favours offshore applicants. This is the 'queue' to which I just referred. Of the 10,000 places available to offshore applicants, priority is placed upon applications from the former Yugoslav Republic, the Middle East and Africa.[2] Yet a significant number of our boat arrivals hail from countries within Asia, including Indonesia, Cambodia, Vietnam and China. In these cases, and indeed in cases where there is evidence of a 'reign of terror', access to the 'queue' may well be inhibited. For some, there may appear to be no choice but to seek refuge by unauthorised arrival in this or some other country.

For those that make the difficult decision to leave their country and denounce their citizenship, the hostile connotation of the term 'queue jumper' and the public ill-feeling toward refugees that it generates is simply one more burden they must bear. Of the many other burdens, consider the following.

Many, if not all, of these people have suffered or have reason to fear persecution in their own countries. They have been driven by fear for their lives or liberty to seek asylum in a far away and isolated land. They have often paid large sums of money — which for some represent their entire life savings — to individuals that promise them a better life. They have endured a long journey fraught with unknown peril. They have either been met in territorial waters by naval or patrol vessels or they have arrived upon our shores and been left to fend for themselves in an unknown and sometimes hostile environment. Eventually they have been arrested, and pursuant to our immigration laws, they have been transferred directly to an isolated detention centre. Here they suffer the physical and mental stress that accompanies such detention in the short-term. After prolonged detention they may get used to the often inadequate conditions but are faced with greater concerns for their future as time passes with little word about the status or progress of their applications. Because of the isolation of their detention, they have limited access to legal advice, inadequate facilities for the observance of their religious or cultural practices and restricted specialist medical services. The organisations that try to help them have inadequate resources and frequently do not receive the full co-operation of the authorities. This has certainly been the experience of the International Commission of Jurists of which I am a member.

While the description by one writer of Australia's refugee policy as "the most draconian in the world"[3] may seem emotive, that policy is both restrictive and apparently insensitive by comparison to those of other countries, such as Canada.

Potentially the most objectionable element of current Australian refugee law is that which dictates the mandatory detention of all unauthorised arrivals. In a 1998 report, the Human Rights and Equal Opportunity Commission (HREOC) concluded that the mandatory detention policy is in breach of recognised international human rights standards[4] - an observation repeated by many of the learned commentators writing in the area. Of the case studies described in this report, I have selected one which I

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1 Department of Immigration and Multicultural Affairs Factsheet No. 1, *Immigration: the Background,* at 3.

2 Ibid.

3 Russell, Stuart "A Failure of Democracy" (1995) 20(2) *Alternative Law Journal* 96 at 96.

4 Human Rights and Equal Opportunity Commission, *Those Who've Come Across the Seas,* AGPS, 1998 at iv.

believe serves best to illustrate the enormity of the task ahead if we are to seek a more humane approach to our treatment of refugees.

This case study describes the plight of two Cambodian brothers who arrived in Australia by boat in 1990 as unaccompanied minors. The brothers spent a total of five years in detention at Port Hedland before being granted bridging visas. During this prolonged detention they suffered daily the effects of ennui, depression, sleeplessness and frustration, with one of the brothers eventually developing a dependence upon anti-depressant medication and sleeping pills. The boys were concerned for their own mental health and worried that they had no knowledge of or control over their future. They had little information regarding the status of their application and apparently no access to independent legal advice. Only following the institution of legal proceedings by the Indochina Refugee Association were the bridging visas granted. At the time of publication of the report in 1998, the boys were still awaiting the result of their applications for protection visas.[5]

This case study conveniently encapsulates several aspects of our current refugee regime which attract criticism.

First, as with all cases of prolonged detention, this raises the question of the value we place upon the fundamental right to liberty. This right is one which, although it does not appear in our Constitution, enjoys the protection of the common law and is one of the foundation stones of democracy. Certainly there are instances where such a right may be circumscribed and many such instances are provided for in the criminal laws of all Australian jurisdictions. However there are clear limits pertaining to the restriction of the right to liberty, some of which the current mandatory detention regime offends. Perhaps the most obvious of these limits is that which says that the detention of a person should not be arbitrary. The freedom from arbitrary arrest or detention has been entrenched in international law in Articles 9 & 10 of the *International Covenant on Civil and Political Rights*, to which Australia is a signatory. Whilst the United Nations acknowledges that there may be situations of public emergency where a state will be granted the right to derogate from this principle, it is recognised that the courts are the appropriate place for a determination as to the detention of an individual.[6] This is demonstrated by the frequent use of writs of *habeas corpus* in Hong Kong in relation to detained Vietnamese refugees in the 1980s and 1990s. Clearly, a mandatory policy of detention militates against the type of considered adjudication envisaged here.[7]

More particularly, the case study highlights the special plight of child refugees, and it is in this circumstance that Australia is at risk of breaching another UN convention – the *Convention on the Rights of the Child*. In instances concerning the detention of children, it is widely acknowledged that an order for detention should only be made as a matter of last resort.[8] Many of the children arriving on our shores as refugees have been traumatised by experiences of war or totalitarian regimes. These children are recognised as being especially vulnerable to psychological and emotional suffering, yet there is little provision of specialist services to assist them in coping with the additional trauma of their confinement. These legitimate concerns in the detention of child refugees are further aggravated in cases where, as with the one just described, children arrive in Australia unaccompanied.

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5 Ibid, at 218-219.

6 Hathaway, James C. *The Law of Refugee Status,* Butterworths, Toronto, 1991 at 109.

7 This is noted in the strongest terms by the United Nations High Commission of Refugees in their electronically published handbook. See: http://www.unhcr.ch/un&ref/who/whois.htm.

8 *Convention on the Rights of the Child.,* Article 37 (b).

The case study also points to the significant and often enduring effects of prolonged mandatory detention upon refugees. There is a great deal of evidence of the mental distress caused to detainees in Australian refugee detention facilities. Clinical depression is one of several recurring disorders in long term detainees, in some cases leading to actions of self mutilation and suicide. The lack of information about applying for refugee status, the limited access to independent legal advice and the tardiness of reports on the progress of applications before the Department of Immigration and Multicultural Affairs are a few of the many identified causes of this mental distress. Others pertain to the condition of our detention centres, particularly that of the Port Hedland Detention Centre which currently houses many of Australia's boat arrivals. Whilst the centre is considered acceptable for temporary detention and processing, it is ill- equipped to cater to the needs of long term detainees, particularly in situations where it is filled to over capacity.

In 1998, HREOC noted an identifiable lack of educational and vocational training facilities within detention centres.[9] In isolated centres such as that in Port Hedland, there is very little with which the detainees can productively occupy their time. The effects of this lack of language and skills training are reflected in both the immediate and future existence of a refugee. Apart from adding to the general ennui and mental distress of a refugee applicant during detention, it also has a negative effect on the eventual resettlement of refugees. The difficulties experienced by many resettled refugees in finding employment and properly integrating with their communities is a clear cause for concern.

Many initiatives have been proposed by various parties to overcome some of the problems arising from the prolonged detention of refugees. Some of the more practical solutions offered pertain to the institution of programmes aimed at providing comprehensive information to applicants for refugee status. It is hoped that such programmes would aid in the abolition of ignorance as to refugee application processes and the concomitant negative effects on mental health. More frequent updates on the progress of applications for refugee status may also relieve some of the mental anguish and frustration experienced by detainee applicants.

However, the more serious problem of lack of, or limited access to, independent legal advice is one which requires more costly measures. In its 1998 report, HREOC made recommendations about the relocation of detention centres.[10] It suggested that a location closer to large regional centres or metropolitan cities would greatly benefit detainees by improving access to independent and specialist legal advice, interest groups and resettled ethnic communities, education and vocational training facilities and specialised medical services.

Recently disturbing reports of violence, sexual offences and terms of solitary confinement within Australian detention centres, have brought the need for improvements in our treatment of refugees into sharp relief. There is no doubt that the issues of entrenched ennui and mental distress from prolonged detention, failure to provide activities for productive use of time, lack of adequate facilities and poor access to independent legal advice contribute to the increased incidence of offences within these centres. It is evident that the time has come for a reassessment of our current mandatory detention policy.

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9 "Recommendations on Education and Training" in Human Rights and Equal Opportunity Commission, *Those Who've Come Across the Seas,* AGPS, 1998 at xv-xvi.

10 Ibid, at 235.

There are of course detractors of those who call for better conditions for refugees. Indeed, there is a strong body of public opinion in Australia against granting assistance to refugees arriving in Australia by unauthorised means. However, recent experience has shown that public opinion can change, particularly where refugees are given the opportunity to integrate into a community. Public opinion was strongly supportive of Australia recently providing a temporary safe-haven for a very large number of refugees from Kosovo and East Timor. Australians are not without compassion when they are fully informed. The case of the Kosovar safe-haven refugees who were repatriated and then granted permission to return and live within a Tasmanian community is a clear example of public opinion going against the norm in Australia. Indeed the level of public outcry at the deportation of this family was such that the Tasmanian Government agreed to sponsor their return. I suspect that many more individuals would change their opinion of refugees if they were placed in the community whilst their applications were considered instead of being locked like prisoners in remote detention centres.

In making this observation I am mindful of the fact that community based refugee integration policies have been successfully operating in Canada for sometime. Last year, the United Nations High Commission of Rights noted that Canada's refugee status determination procedure was "in many ways a model of fairness and due process".[11] In that country, detention of refugees for a period of more than a few weeks is generally regarded as outrageous.[12] In such circumstances, writs of habeas corpus are often filed and granted. The humanitarian success of refugee policies and procedures in countries such as Canada, where those seeking asylum are more readily permitted to reside within the community, has been widely noted. Even in Canada, however, there remains a stigma attached to unauthorised arrivals who are seen as somehow less deserving than those who have applied for asylum offshore.[13]

I have often heard the call for balance in the consideration of the interests of Australia as against the interests of those people seeking asylum here. Achieving such a balance is a difficult task, particularly where one recognises the strength of refugee claims to fundamental human rights. This is a well known problem in liberal democracies where the tension between the rights of the individual and the interests of the State is a defining feature. At least in theoretical terms such tension can be resolved by resort to the principles of limited government underpinning liberal democratic theory. In the present case, the appropriate theory to call upon is less apparent. However, if I were pressed to decide between the competing interests of refugee and State, I would seek an approach which acknowledged the contribution that international humanitarian law has to offer. Such an approach need not favour one party at the extreme expense of the other – indeed it may afford an opportunity to strike the balance which we have so long strived for.

In following a community-based resettlement model similar to that found in Canada and thereby making Australia's refugee processing system more humane, we would not only underline our commitment to fundamental human rights, the rule of law and our democratic system of governance – but we would also enhance our international human rights record. The cost to government to support applicants for refugee status may well be comparable to that currently required to house detainees in security facilities and the gains to individuals far greater. Savings would flow down the track if

11 Wilkinson, Ray "Give me your Huddled Masses" (2000) 119 *Refugees* 4 at 8.

12 Russell, Stuart "A Failure of Democracy" (1995) 20(2) *Alternative Law Journal* 96 at 96.

13 Wilkinson, op. cit., at 5-6.

refugees were more sensitively handled in the asylum process. For instance, refugees that have been granted bridging visas and integrated into communities in the early stages of their application for asylum are more likely to better adapt to their new surroundings. The ability to access our public education and vocational training systems during this time would further aid in the integration process. It is likely that such persons would be in a more favourable position for employment than those integrated after many years of idle detention.

Conclusion

Finally, the outcome of the case study concerning the two Cambodian brothers which I earlier described, demonstrates the valuable role which independent refugee watchdog associations, and the legal profession as a whole has to play. Without dedicated organisations and dedicated individuals, the hardships of many detainees may extend beyond what can properly be described as humane.

Our challenge is to uphold the fundamental principles of liberty and equal access to justice that underpin our claims to democracy. If we fail to rise to this challenge, we may one day find ourselves subject to some of the same criticisms as those regimes from which our asylum-seekers presently hail.

FINDING DURABLE SOLUTIONS — THE REFUGEE, THE INTERNATIONAL PROTECTION SYSTEM AND AUSTRALIA

*Robert Illingworth****

Introduction

During the financial year 1999-2000 there was a surge in the number of unauthorised arrivals reaching Australia by boat, with 4,174 people arriving on 75 boats, compared with 920 on 42 boats in 1998-99. Unauthorised air arrivals in Australia also continued at a high though declining rate. There were 1,695 people refused entry at Australia's airports between July 1999 and June 2000, a fall of 411 (or 19 percent) on the previous year.

The rapid increase in the total number of unauthorised arrivals has served to highlight long-held concerns regarding illegal immigration. In particular, this increase has arisen primarily as a result of the influence of people smugglers and recent arrivals have increasingly sought to engage Australia's protection obligations in an effort to be allowed to remain in Australia.

This recent influx has also raised public awareness of Australia's role and level of contribution to the framework of international protection for refugees – a role which extends far beyond the domestic implementation of Australia's international obligations not to return (*refoule*) a refugee who is within our borders. Before considering Australia's more recent responses to the influx of unauthorised arrivals, it is important to recognise the size and nature of the refugee problem.

The United Nations High Commissioner for Refugees (UNHCR) estimates that there are some 22.5 million refugees and displaced people of concern. Many of these people are in countries neighbouring their homeland. For most of these people, the preferred solution is return to their homeland in safety and dignity. In the meantime, the efforts of neighbouring countries and the broader international community focus on providing support and on addressing the root causes of the persecution which has created the refugee situation. In some cases, return is not a viable option and integration into the community in the country providing shelter, or resettlement to a third country, will be the preferred solution.

However, of all the durable solutions, resettlement in a third country is potentially the most disruptive for the individuals concerned. In larger numbers, resettlement can actually help persecutory regimes by 'removing' potentially disruptive influences from the region. It can also weaken the intellectual, cultural, political and economic capacity of the source country to improve its human rights record and its quality of life.

At a very practical level, refugee problems of the magnitude which face the international community cannot be solved by the wholesale resettlement of people to countries such as Australia. Resettlement places are a scarce commodity – Australia is one of a very few countries to offer resettlement opportunities and with 12,000 places funded each year for onshore and offshore visas, is one of the most generous refugee resettlement nations per capita of population. Even so, this commitment comes at a significant cost to the Australian Budget. Every 1000 Humanitarian Program places cost the Australian people over

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$21 million in settlement, welfare and medical costs. This equates to over a quarter of a billion dollars each year for the program.

It is clear that no country could cope with the volumes or the financial impacts of large scale refugee resettlement at anywhere near the levels needed to solve the world's refugee problems. It is important to understand also that the impact of settlement on receiving countries is substantial, irrespective of whether the person comes through an offshore resettlement intake or is identified as in need of protection after arrival. The counting of both onshore refugee and offshore resettlement places within Australia's capped 12,000 place annual Humanitarian Program reflects this underlying and inescapable connection.

The critical challenge for the UNHCR and for countries such as Australia is to ensure that the available refugee resettlement places are assigned to those who are in greatest relative need of resettlement, recognising that for many refugees there are other viable alternatives. This challenge is made more difficult by the growing use of refugee protection processes in desirable migration destinations by people who would otherwise not qualify for residence in those countries.

The recent Australian experience with large numbers of unauthorised boat arrivals to this country from countries some considerable distance away is a reflection of a world-wide trend. Increasingly, large numbers of people – some refugees and some not – are seeing the domestic refugee protection processes in countries such as Australia as an opportunity to gain a preferred migration outcome. Increasingly, also smuggling operations are facilitating and promoting the illegal movement of people over long distances to these 'desirable' destination countries for this purpose.

The growth in numbers of people moving illegally between countries raises a number of serious problems, including:

- the risk of harm to the unauthorised arrival through the method of travel, which frequently involves travel on fraudulent documentation and on unseaworthy vessels;

- the cost to the receiving country of receiving and assessing unauthorised arrivals, processes that are essential if nations are to maintain the integrity of migration and customs controls;

- the encouragement of organised criminal activities which can flow over into other areas of criminal activity in source, transit and destination countries;

- the public perception that nations cannot control their own borders and are subject to the whims of criminals involved in organised people smuggling;

- the undermining of the system developed by the UNHCR and refugee receiving nations for the orderly management of those requiring the support of the international protection system; and

- the very real risk that increasing flows of unauthorised arrivals around the world could draw attention away from the plight of the bulk of refugees displaced worldwide and potentially lead to a reduction of the commitment of many nations to the international protection system.

As a result, the Federal Government has adopted a comprehensive, integrated strategy to combat the problems of unauthorised arrivals and people smuggling. This is a key element of broader strategies to support durable solutions for refugees. It needs to be highlighted

from the outset that Australia remains committed to the provision of protection to those in need and is strongly committed to the international protection system. The changes in 1999 to Australian immigration legislation, particularly those introducing new protection arrangements for unauthorised arrivals found to be refugees, need to be understood as part of this strategy. Their fundamental objective is to ensure that the international system of protection, with Australia as an element of that system, can continue to deliver durable solutions for those in genuine need.

Australia's recent experience

The use of boats to enter Australia unlawfully is not a new phenomenon.

- Between 1975 and 1980, more than 2,000 Indochinese arrived unauthorised by boat in Australia, fleeing oppressive regimes and internal conflict in Vietnam and Cambodia.

- A further 200 Cambodians arrived unauthorised by boat in 1989-90 to escape fighting between the Khmer Rouge and the then new Cambodian government after Vietnamese troops withdrew from Cambodia in 1989.

- Throughout the 1990s there has been a regular flow of unauthorised arrivals by boat from China, with a total of 1,867 arriving between 1989 and 2000.

Similarly, Australia has seen a steady growth in the number of people arriving unauthorised by air from 500 in 1994-95 to 1,694 in 1999-2000, with a peak in that period of 2,106.

There were, however, some notable changes in the pattern of arrivals during 1999-2000 that have been a cause of concern to the Government.

First, the sheer number of arrivals was unprecedented in Australia's recent history. Between July 1999 and June 2000, 4,174 people arrived unauthorised in Australia by boat. By comparison, the total number of people that arrived by boat without authorisation in the period from 1989-90 to 1999-2000 was 8,289. In other words, just on half of the unauthorised boat arrivals over the past ten years arrived in 1999-2000.

Second, there has been a distinct shift in the nationality profile of unauthorised boat arrivals. Australia's previous experience had been of unauthorised arrivals from various parts of Asia, primarily China, Vietnam and Cambodia. During 1999-2000, the bulk of arrivals were from South Asia or the Middle East, with 55 percent claiming they had come from Iraq and 30 percent claiming to be from Afghanistan.

Third, there has been an increase in the percentages of these arrivals who present protection claims. For the period 1 July 1999 to 30 June 2000, 83 percent of unauthorised boat arrivals in Australia made protection visa applications. This compares to 46 percent for the previous twelve months.

The high incidence of document disposal amongst unauthorised arrivals, together with advice from those apprehended, indicates that people smuggling is behind a large proportion of unauthorised arrivals. The disposal of identifying documentation before arrival in Australia obscures the identity of unauthorised arrivals and prevents Australian officials from accessing material which might help to verify the claims made by those arriving.

Global experience of people smuggling

While people smuggling is not a new practice, more people are currently turning to smugglers to facilitate international migration. In part, this reflects the large pool of people now seeking migration and/or protection outcomes. Of the 22.5 million refugees or other displaced persons identified as of concern to the UNHCR, approximately seven million are in Africa, seven million are in Asia (including the Middle East) and six million are in Europe:

- these figures include refugees who have been outside their country of origin for very long periods of time and who can see no prospect of a durable solution for their plight; and

- they also include refugees who are experiencing an erosion of the level of protection that countries of first asylum are now prepared to provide, a percentage of whom have the means to pay people smugglers.

People smuggling is not a trivial industry. The International Organisation for Migration (IOM) estimates that the worldwide proceeds of people smuggling are in the order of US$7 billion per year. The number of countries affected by people smuggling is growing as new routes are created, existing routes are entrenched and as international air travel becomes more accessible and affordable. While it could be argued that people smugglers are merely the conduits for those seeking to access the international protection system, the reality is far more sobering, and less romantic:

- people smugglers are making large amounts of money through exploitation of a largely vulnerable group of people. It is well known that people die during their journey because of the perilous conditions in which they are placed. It can be assumed that others also perish but are not discovered. Many of those that reach their destination safely become dependent on agents and employers and are vulnerable to exploitation in an insecure and unfamiliar environment, particularly when in need of income to pay back the debt incurred to smugglers;

- people smugglers break not only the migration and entry laws of the destination country, but frequently also break the migration, customs and quarantine laws of their country of origin or first asylum, and any transit countries. These acts breach national sovereignty principles of those countries. Nothing in the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Refugees Convention) gives a person a right to arrive without authority and demand entry to another country;

- people smuggling is increasingly being undertaken by organised criminal elements. These criminals are also associated with drug trafficking and the exploitation of women and children in the context of prostitution and economic slavery. People smugglers increase the incidence of these crimes in origin, first asylum, transit and destination countries;

- fraudulent documentation is a large part of the people smuggling industry. People smuggling encourages document forgery and identity fraud in first asylum, transit and destination countries and facilitates greater use of fraudulent documentation in other contexts within those countries; and

- undocumented or fraudulently documented arrivals may also constitute a threat to the national security of the countries they enter. Unauthorised and undocumented arrival makes it extremely difficult for a country to accurately identify a person and undermines the safeguards and security checks that usually assist governments to identify those persons who represent a risk to the community or to national security.

Smuggling of refugees

The above points apply irrespective of the nature of the person being smuggled. However, additional issues arise when smuggled people also seek refugee status in the destination country. Illegal entry undermines the capacity of States to exercise their sovereign right to decide who can enter and stay. Where illegal entry is accompanied by the attempt to choose their country of protection and achieve a simultaneous migration outcome, it is the single most serious threat to the continued viability of the international protection system and to organised efforts to provide durable and appropriate solutions for the millions of refugees in the world:

- smuggling activity diverts the resources of destination countries away from capacity building, integration and resettlement assistance in source countries or countries of first asylum;

- the supply of planned resettlement places offered by the few countries which, like Australia, offer such places is drying up as these same countries grapple with the problems and costs of smuggled refugees; and

- where effective protection has already been provided within the international protection system, people smuggling results in unnecessary cost duplication in destination countries and diversion of international resources and protection away from refugees who lack durable solutions.

At a conservative estimate, Western States are spending, each year, $US10.0 billion on determining refugee status (with the attendant administrative law review arrangements) for half a million asylum-seekers within their borders, of whom only a small percentage are refugees and many of whom already have (or had but abandoned) access to effective protection in alternative jurisdictions.

In contrast, the UNHCR has an annual budget of only some $US1.0 billion with which to respond to the needs of the more than 22 million refugees and people of concern. Savings of just 10% of asylum determination costs could release funds equivalent to a doubling of UNHCR's current budget.

If we are to ensure that the international protection system continues to work towards providing protection for those who need it, it is essential that the international community addresses the problems of unauthorised arrivals and people smuggling. Unless these threats are addressed, it will be the smugglers who determine who will receive resettlement places and this will be on the basis of who can pay, not greatest relative need. The current international protection system is not perfect. This paper describes some of Australia's efforts to improve it. However, the practical implications of a breakdown and dismantling of the system for those refugees who do not have protection alternatives are unthinkable and warrant our best efforts to ensure that this does not happen.

Australia's approach to unauthorised arrivals and people smuggling

Australia has developed a whole of government strategy to address the problem of unauthorised arrivals and organised people smuggling. This strategy relies heavily on efforts to promote international cooperation to address the plight of refugees and also targets the threats posed by the growth in organised people smuggling. It includes three key elements:

1. prevention of the problem by minimising the outflows from countries of origin and secondary outflows from countries of first asylum;

2. working with other countries to disrupt people smugglers and intercept their clients en route to their destination, while ensuring that those people in need of refugee protection are identified and assisted as early as is possible; and

3. developing appropriate reception arrangements for unauthorised arrivals who reach Australia, focusing on the early assessment of the refugee status of the individual, the prompt removal of those who are not refugees, or who are refugees but can access effective protection elsewhere, and the removal of additional benefits not required by the Refugees Convention to minimise the incentive for people to attempt illegal travel to Australia.

A key element of each of these strategies is the development of a broad international consensus on the need for action and strengthened cooperation. Australia is working to this end through our relationships with source, first asylum, donor, destination, and transit countries, in international forums and with the UNHCR and other international organisations.

Resolving refugee problems where they arise

There is a range of influences at work in source countries to generate refugee outflows, these include conflict, human rights abuses and persecution. Outflows of people may also be attributable to economic or environmental factors or to civil war situations and these people may or may not be refugees. Because the causes of refugee flows are diverse, responses designed to achieve sustainable repatriation also cover a wide range, including security, political, social and economic aspects.

Apart from international efforts to encourage improvements in the human rights records of refugee producing countries, Government strategies have focussed on increasing support for sustainable repatriation, and for countries of first asylum, by providing aid and assistance through international agencies operating within the relevant countries. The Government has provided the Department of Immigration and Multicultural Affairs (DIMA) with $20.8 million over four years starting from June 2000 to support responses to the large numbers of displaced Afghans and Iraqis.

In mid-July 2000, $1.7 million of this funding was provided to the World Food Program's drought relief appeal for Afghanistan, which is aimed at alleviating suffering and reducing the likelihood that these people will become displaced. Further opportunities to assist source countries for refugees are being sought out and considered.

Countries of first asylum bear a large responsibility for the immediate humanitarian response to refugee outflows. Further, where the situation within source countries becomes entrenched, as in the case of Iraq and Afghanistan, the ongoing problem for countries of first asylum can be substantial. For example, Iran and Pakistan, as the two countries hosting the largest populations of refugees, have sustained populations of Afghan and Iraqi refugees that have numbered in the millions for the last twenty years. It is estimated that between them they currently host up to 3.5 million Afghan and Iraqi refugees.

The conditions of refugees in countries of first asylum have a significant influence on secondary refugee outflows and the use of people smugglers by these refugees. The level of access to educational and health services, the ability to work and the availability of official opportunities for resettlement all contribute to the decision by asylum-seekers to leave countries of first asylum.

Australia has sought to work with countries of first asylum to assist them in providing temporary protection while durable solutions are found. In June 2000 the Ministers for

Foreign Affairs and Trade, and Immigration and Multicultural Affairs allocated $1.5 million from the 1999/2000 Aid budget to the UNHCR 2000 South-West Asia Appeal which was intended to increase the self-reliance of refugees in Iran and Pakistan. An additional $4.5 million has been reallocated from within Australia's broader aid allocations in 2000-2001 to support efforts to reduce refugee outflows or promote repatriation, as appropriate opportunities arise.

A further component of Australia's strategy involves the development of an information campaign to highlight to would-be unauthorised arrivals the dangers associated with the services offered by people smugglers.

Intercepting and protecting refugees moving illegally

From extensive networks of information exchange, it is clear that the operations of people smugglers are highly organised, complex and flexible with links extending world-wide. It is clear also that the people moving illegally will be doing so for a range of reasons. Some may be refugees and some may not. Efforts to disrupt smuggling activity need to be complemented by arrangements by transit countries, in concert with the UNHCR, to identify and protect those in need of protection and enable the quick return home of those who do not need protection. Organisations such as the IOM have a key role to play in the latter regard.

Australia has been strengthening its information gathering efforts in support of this strategy. This work includes:

- arrangements with a range of countries for the exchange of information on routes used by people moving illegally between countries, and the activities and methods of people smugglers;

- the establishment of a joint Australian Federal Police (AFP) and DIMA team to investigate organised people smuggling;

- the creation of a National Surveillance Centre in Customs to enhance high-level coordination, especially in relation to information sharing between agencies to improve coastal surveillance and the early detection of unauthorised arrivals; and

- emphasising information exchange issues through multilateral fora such as the Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGC) and the Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants (APC).

Australia has also taken a number of measures to strengthen our border integrity and to build technical capacity within countries along the smuggling routes to Australia. In addition, penalties and fines for those involved in people smuggling have been increased to up to 20 years imprisonment and over AUD$220,000 in fines.

Reception arrangements for unauthorised arrivals

The Government's commitment to the maintenance of the international protection system is matched by its commitment to provide protection to those people within Australia who are owed protection obligations under the Refugees Convention - no matter how they have arrived.

That having been said, Australia has in recent years offered benefits in excess of those required by the Refugees Convention to those people within Australia who are found to need refugee protection. The Convention, does not, for example, require that refugees be provided with permanent residence in the first instance, nor family reunion sponsorship rights. It needs to be recognised that offering such generous additional benefits can contribute significantly to the incentives for people to use the services offered by people smugglers.

In the context of an international protection system, it is essential that there be an incentive for those who need protection to seek that protection from the first available source. Those people with adequate protection already should not be encouraged to attempt to trade on their status as refugees in order to gain a more preferable migration outcome in a different country. Accordingly, the Government announced in October 1999 that a range of measures designed to reduce Australia's attractiveness to unauthorised arrivals were to be introduced, including:

- excluding unauthorised arrivals from accessing permanent residence in the first instance by granting those who are refugees a three-year temporary protection visa (TPV);

- TPV holders are not eligible for the full range of settlement services and benefits usually provided to refugees permanently resettling in Australia, including DIMA's Adult Migrant English Program;

- stopping people who have effective protection overseas from gaining onshore protection in Australia; and

- developing stronger identification powers to help to ascertain the identity of asylum seekers.

These measures build on the existing legislation, which requires that, except in extenuating circumstances, all unauthorised arrivals be held in immigration detention until they are either granted a visa or removed.

The TPV measures are aimed at unauthorised arrivals who may have bona fide protection needs, but who are seeking to gain a preferred migration outcome by travelling to their preferred country and using the onshore protection avenues to gain residence and family sponsorship rights. Importantly, the TPV changes are fully consistent with Australia's obligations under the Refugees Convention and guarantee access to Medicare, work rights, appropriate levels of social support and education for minors. Our fundamental obligation not to *refoule* a refugee is guaranteed by arrangements allowing all TPV holders to apply for and obtain permanent refugee protection after 30 months, if they are still owed protection obligations.

The measures were also aimed at strengthening our capacity to verify the identity of people arriving unlawfully. There is no doubt that this poses a serious challenge to Australia. Obtaining any objective verification of the identity and claims of people arriving without authority can be made very difficult where they arrive without identifying documentation of any provenance or reliability. Domestic refugee determination processes, combined with unauthorised entry provide attractive opportunities for people who may not be refugees to try to use new identities to gain residence in countries such as Australia.

The Government has also put in place legislative arrangements to reflect the decision taken by Australian courts that Australia does not owe protection obligations to a person who already has a right to enter and reside in a country where effective protection is available.

Under this legislation, the Minister for Immigration and Multicultural Affairs can, after seeking the views of the UNHCR, declare that a particular country:

- provides adequate access to effective procedures for the assessment of the protection needs of asylum-seekers;
- honours its protection obligations; and
- meets relevant human rights standards.

Such a declaration has the effect of preventing people from making a valid application for a protection visa, where they have a right to re-enter and reside in a declared country and they have previously resided in that country for at least seven days. A Ministerial power is available to enable the Minister to allow an application where he considers this to be in the public interest. As yet no country has been declared under these new provisions.

A further component of the strategy is the need to develop arrangements that provide for the speedy return of people found not to be refugees to their country of nationality, an issue the UNHCR itself recognises as necessary to ensure the integrity of the international protection framework. The non-return of such people fundamentally undermines the institution and public support for those accepted as refugees. Prompt return is even more important if the person found not to be a refugee has used unlawful means of entering a country.

Popular misconceptions – the domestic debate

The new protection visa arrangements preserve, for those refugees who entered Australia lawfully, immediate access to permanent residence, family reunion sponsorship, full settlement services and full access to the social welfare system. But contrary to claims from some quarters, there is no Refugees Convention requirement to provide equal benefits to all refugees. Article 31 of the Refugees Convention identifies some very particular circumstances where member states are not to impose penalties upon refugees because of their unlawful entry. However, differentiation in the level of benefits does not constitute a penalty, particularly so when all refugees still receive the level of protection and support owed them under the Convention. Article 31 also only relates to people "coming directly from a territory where their life or freedom was threatened…". This is hardly a description fitting large numbers of illegal arrivals to Australia who have travelled through many countries, and have often lived outside their homeland for years or decades, before travelling to Australia.

There have been similar claims repeated in domestic debate that the detention of unauthorised arrivals itself constitutes a penalty and is in breach of international obligations. These claims also do not stand up under scrutiny. The High Court of Australia has in fact affirmed that administrative detention of people without visas while a visa application is processed or removal is arranged is lawful and is not punitive in nature.[1] Similarly, the UNHRC has looked at Australia's immigration detention arrangements, and concluded that they "do not per se constitute a breach of Australia's international obligations".[2] Yet some commentators in Australia frequently claim – but do not quote – that these authorities have made findings to the contrary.

There is no international treaty which is offended by Australia's legislative arrangements for detaining unauthorised arrivals. Indeed, even the non-binding guidelines issued by the

1 *Chu Kheng Lim and Others v Minister for Immigration, Local Government and Ethnic Affairs and Another* (1992) 176 CLR 1.

2 *Communication No 560/1993* (1997) United Nations Human Rights Committee.

UNHCR on detention of asylum seekers recognise that States may decide to detain unauthorised arrivals seeking refugee protection while their identity is verified and medical issues are resolved. Where, as is the case in Australia, unauthorised arrivals are very well organised and there is a pattern of document disposal before arrival, identification is critical to any protection decision. Detention periods while waiting for a protection decision are largely attributable to verification of basic identification and closely related matters such as checking for past criminal behaviour or for national security issues which could exclude the person from protection under the Refugees Convention.

What is noteworthy about the recent debate in Australia over domestic refugee protection arrangements is that it has focussed attention on the people who have already reached Australia, at the expense of the much larger numbers of refugees overseas for whom international support is in critical need.

This is not to say that the voices of those people who have arrived in Australia and been granted TPVs – their arguments for greater assistance, for earlier entitlements for benefits such as family reunion sponsorship, or indeed any other concerns they express about their treatment here - should be ignored. However, it is important to balance these voices with those of the much larger number of refugees overseas, those people still in need of a durable solution and for whom resettlement is the only viable option.

TPV-holders are safe – they are protected from *refoulement* and are provided with a range of benefits which places them far beyond the standards of existence of many of the world's refugees who are waiting for resettlement. They are the lucky ones: the ones who could pay the smugglers, who were not hampered by gender, family responsibilities or poor health.

There is no question that refugees in Australia will be protected. The real issue which the TPV arrangements highlights is whether we are prepared to continue to provide additional benefits, beyond those required by our Refugees Convention obligations, in circumstances where we know that this encourages others to place themselves in the hands of people smugglers. Do we really want Australia's finite capacity to resettle those in need to be taken-up on the basis of decisions of organised criminals about who they will ship here? Or would we want to use as many places as possible to resettle those people identified as in greatest need of resettlement through coordinated international efforts under the UNHCR?

Reform of UNHCR and the international protection system

Finally, it is useful to turn briefly to the need for the reform of the UNHCR and the international protection system. In the past 50 years UNHCR has made significant contributions to the protection of refugees and supporting the international system of protection. This system is coming under increasing pressure, not least by those who have access to effective protection but choose to obtain protection elsewhere by paying people smugglers.

Australia is keen for UNHCR to assist countries providing protection to refugees while combating people smuggling. In particular, in the context of the strategy outlined above, Australia has serious concerns about:

- the lack of an effective mechanism for burden sharing, leaving countries of first asylum with insufficient assistance; and

- pressure from a variety of sectors to expand the Refugees Convention definition of "refugee" and its coverage, as this pressure is contributing to misuse of asylum systems and diversion of resources from those most in need of protection.

Accordingly, Australia is working, through its bilateral and multilateral engagements, to seek the reform of the UNHCR and its Executive Committee (EXCOM) to ensure:

- a re-exertion of States' control over the direction of the organisation, complemented by enhanced leadership from the High Commissioner;
- greater leadership and direction from a reinvigorated EXCOM;
- improved review, evaluation and accountability frameworks within UNHCR;
- recognition of the interrelationships between people smuggling, unauthorised arrivals and the international protection framework and the critical role of the UNHCR in international efforts to address these matters;
- greater assistance to countries of first asylum so that the protection system delivers equitable outcomes for refugees; and
- strategies to focus the resources and efforts of member states where this will have the greatest positive impact on solving refugee problems, recognising that key destination countries are currently expending 10 times more on domestic refugee determination processes than is available to the UNHCR to deliver support to the vast bulk of refugees.

Conclusion

Australia remains committed to the international protection system as the best method for assisting those in genuine need of protection. The flow of unauthorised arrivals targeting Australia has not diminished this commitment. However, it has strengthened resolve to ensure that the protection system works for those for whom it was intended and does not provide opportunities for misuse as a defacto migration avenue by people who are not refugees or who have abandoned or ignored protection provided to them elsewhere.

While much can be done by countries such as Australia acting at the national level, no one country holds the key to solving the problems of the millions of refugees displaced worldwide. Enhanced cooperation between countries at the bilateral, regional and multilateral levels is essential if the framework of international protection is to be effective, and particularly if the serious threat posed by large scale illegal movements of people and organised people smuggling to desirable migration countries is to be addressed.

Failure to deal with these problems carries a high price for the refugees themselves if the countries feeling the strain of unauthorised arrivals reduce their support for international protection systems, and if scarce resettlement places are allowed to become a commodity sold off by people smuggling organisations to those who can pay the price.

WHO IS A REFUGEE?
The High Court's Interpretation:
from *Chan* (1989) to *Ibrahim* (2000)

Robert Lindsay[*]

Since 1989, when *Chan v Minister for Immigration and Ethnic Affairs* ("Chan")[1] was decided in the High Court, until October, 2000 when the High Court handed down judgment in *Minister for Immigration and Multicultural Affairs v Ibrahim* ("Ibrahim")[2], there has been here in Australia an evolving jurisprudence which has examined this most universal of legal questions "Who is a refugee?" in the context of the Migration Act 1958 (Cth). This paper examines, albeit in a summary way, whence that definition is derived, how it is presently being construed, and possible future areas of controversy in defining a refugee.

The Migration Act 1958

An applicant for asylum, who is an unauthorised arrival in Australia, has to say enough "to engage Australia's protection obligations" as an essential condition to obtaining a Protection Visa.

Under s36(2) of the Migration Act 1958:

> A criterion for a Protection Visa is that the applicant for the visa is a non citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the refugee protocol.

As explained in s5 of the Act, the Refugees Convention means "the convention relating to the Status of Refugees done at Geneva at 28 July 1951" and the Refugees Protocol means "the Protocol relating to the Status of Refugees done at New York at 31 January 1967".

The 1951 convention defined a refugee as any person who:

> … *as a result of events occurring before 1st January 1951 and* owing to a well founded fear of being persecuted for reasons of race, religion, nationality, 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; or who, not having a nationality and being outside the country of his former habitual residence *as a result of such events*, is unable, or owing to such fear, is unwilling to return to it. (emphasis added)

The Convention included provisions about dual or multiple nationality and the circumstances in which a person may cease to be a refugee or be excluded from the benefits of refugee status.

In 1967 the Protocol achieved the universalisation of the convention definition of refugee status by removing the words which are italicised. The requirement that the claim relate to a pre-1951 event in Europe was eliminated by the Protocol and the Protocol today is read omitting the italicised words. The Convention definition is part of the law of Australia

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* *Barrister, Sir Lawrence Jackson Chambers, Perth.*

1 *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989-90) 169 CLR 379.

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

because, and only because, the Migration Act 1958 in s36(2) recognises the Convention definition.

The Background to the Definition of a Refugee

Before the twentieth century there was little concern about the precise definition of a refugee since most of those who could move from one country to another for shelter were not perceived as a burden but a "source of communal enrichment". However, the adoption of policies by western States during the early twentieth century changed this. Immigration was no longer a right in the individual to exercise self determination but more a vehicle to facilitate the selection by States of new inhabitants who could contribute skills and wealth to the national wellbeing.

In the early twentieth century the most prominent migrations were those of more than one million Russians during and after the Bolshevik revolution and the exodus in the early 1920s of Armenians from Turkey.

Professor Hathaway considers that between 1920 and 1935 refugees were defined in largely jurisdictional terms, which meant that they were treated as refugees because they were groups of persons deprived of formal protection in the country of origin. Mostly these groups were movements of people who found themselves abroad and unable to settle because no nation was prepared to assume responsibility for them.[3]

Between 1935 and 1939 the refugee agreements reflected a social approach to the definition of "Who is a Refugee". Now help would be extended to ensure the refugee's safety or wellbeing because that person had been caught up in an upheaval or dislocation such as National Socialism in Germany.[4]

The third phase comprised the accords between 1938 and 1950 where the refugee was now judged by individualistic standards as a person in search of an escape from perceived injustice and such person desired the opportunity to build a new life abroad. This approach affected the determination procedures because the decision whether a person was a refugee was no longer made strictly, on the basis of political or social categories, but rather on the merits of each applicant's case.[5]

This subjective concept of a refugee, whose individual merit was examined against the tenets and beliefs of the political system from which they came, was not embraced by the Socialist States. During the United Nations debates in 1946 the Socialist States asserted the impropriety of including political dissidents among the ranks of refugees protected by international law.

The definition agreed upon gave priority in protection matters to persons whose flight was motivated by Eurocentric political values. The more numerous western States were able to establish a definition of a refugee moulded to their own wishes. First, the concept of "fear of persecution" was sufficiently open ended to allow ideological dissidents to continue to receive protection from western countries. Secondly, only persons disenfranchised by their States for reasons of race, religion, nationality, membership of a particular social group or political opinion were included. Those were areas of discrimination where the eastern bloc countries were vulnerable. The western States absence of guarantees of socio-economic rights rather than human rights was protected. Victims from third world countries, suffering

3 James C Hathaway, *The Law of Refugee Status*, Toronto, Butterworths 1991, ("Hathaway") at 2-3.

4 Hathaway, at 4.

5 Hathaway, at 5.

from generalised political oppression, absence of health care, food, or education were more likely to be excluded from the definitions as were victims of natural disaster.[6]

The Status of the Convention

In October, 2000 the High Court delivered judgement in *Ibrahim*. Gummow J,[7] with whom the majority agreed, reaffirmed that under customary international law the right of asylum is a right of States, not of the individual, and no individual, including those seeking asylum, may assert a right to enter the territory of a State of which that individual is not a national. Every State has a competence to regulate admission of aliens at will. A State is free to admit anyone it chooses to admit, even at the risk of inviting the displeasure of another State. In the absence of an extradition treaty the asylum State has no international obligation to surrender fugitives to the State from which they have fled and the fugitives are protected against the exercise of jurisdiction by that State.
The 1951 Refugee Convention followed the Universal Declaration of Human Rights adopted in 1948. By Article 14 of the 1948 Declaration, it was declared that "everyone has the right to seek and enjoy another country's asylum from persecution". The "right to seek" asylum was not accompanied by any assurance that the quest would be successful. In the subsequent International Convention on Civil and Political Rights (the ICCPR) which Australia signed on 13 November 1980, Article 12 stipulated freedom to leave any country and forbad arbitrary deprivation of the right to enter one's own country, but the ICCPR did not provide for any right of entry to seek asylum any more than had the Universal Declaration of Human Rights.

The Refugee Convention was negotiated and agreed between States so that it needs to be understood at the State level.

In reinforcing the limited nature of the Convention definition which has been brought into Australian law, Gummow J stated:

> The definition (in Article 1A(2)) does not encompass those fleeing generalised violence or internal turmoil and mass movements of persons fleeing civil war or other armed conflicts, military occupation, natural disasters and bad economic conditions are outside the Convention.[8]

In *Applicant A*,[9] Dawson J had said:

> No matter how devastating may be epidemic, natural disasters or famine, a person fleeing them is not a refugee within the terms of the Convention.

Conversely in *Ibrahim*, Kirby J said:

> this court should not narrowly confine the operation of the Convention language… it is an even more serious mistake to impose upon the Convention definition of "refugee" Eurocentric ideas, which are not, and never have been, a necessary part of the operation of the Convention.[10]

The history of the Convention does, however, suggest a Eurocentric bias in its creation but Kirby J was perhaps indicating that the Convention definition does not of necessity and

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6 Hathaway, at 10.

7 *Ibrahim*, at 619-622.

8 *Ibrahim*, at 622.

9 *Applicant A v Minister for Immigration and Ethnic Affairs* (1996-7) 190 CLR 225.

10 *Ibrahim* at 639-640.

never did require a Eurocentric construction. For now, however, his view that the court should not narrowly confine the Convention language is a minority view.

The 1989 Decision of *Chan*

Much of the Australian case law in the last eleven years may be regarded as the progeny of the 1989 High Court decision in *Chan*. Mr Chan Yee Kin was a member of a faction of the Red Guards who lost a struggle for control of that organisation in his local area. He and members of his faction were questioned by the police and he was detained. On a number of occasions he sought to escape from his local area and each time was captured and imprisoned. He stowed away on a ship to Australia in 1980. His application for refugee status was initially rejected. However, 9 years after his arrival the High Court decided a delegate's decision should be set aside. Some important principles were decided.

First, that the determination of the status of an applicant is to be ascertained at the time when the determination is itself made. Secondly, that the degree of persuasion required to meet the definition is "a real chance" of persecution because this conveys a notion of substantial, as distinct from a remote chance, of persecution occurring.[11] It does not mean that the burden of persuasion is transformed into a standard of "more likely than not"[12] (citing *Immigration and Naturalisation Services v Cardoza-Fonseca*[13]). A real chance is one that is not remote, regardless of whether it is less or more than 50%. Thirdly, the phrase "well founded fear of being persecuted" requires both a subjective and an objective assessment.[14]

As McHugh J said:

> … a fear may be well founded for the purpose of the Convention and Protocol even though persecution is unlikely to occur. As the United States Supreme Court pointed out in *Cardoza-Fonseca*, an applicant for refugee status may have a well founded fear of persecution even though there is only a 10% chance that he may be shot, tortured or otherwise persecuted. Obviously, a far fetched possibility of persecution must be excluded, but if there is a real chance that the applicant will be persecuted, his or her fear should be characterised as "well founded" for the purpose of the Convention and Protocol.[15]

Some features of *Chan's* case have cast their shadows forward. In determining that the status of a refugee turns upon the facts existing when a person seeks recognition rather than deriving from some earlier point in time, the court was acknowledging that the language of the Convention itself tells against a construction that "once a refugee, always a refugee". Under article 1C a person ceases to be a refugee if he or she can no longer, because the circumstances which provided the basis for recognition as a refugee have ceased to exist, continue to refuse to avail him or herself of the protection of the country of nationality (Article 1C(5)). Likewise under Article 1C(6) if the applicant is a person who has no nationality, but because the circumstances in which he or she has been recognised as a refugee have ceased to exist, he or she is able to return to the country of former habitual residence, the applicant ceases to have that status. It could be that the current adoption of temporary protection visas by the government has been influenced in part by Article 1C(5) and (6) of the Convention the limiting effect of which was recognised by Toohey J in *Chan's* case. His Honour said:

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11 *Chan Yee Kin*, per Mason CJ at 389.

12 *Chan Yee Kin*, per Dawson J at 396.

13 1987 480 US 421.

14 *Chan Yee Kin*, per Dawson J at 396.

15 *Chan Yee Kin*, per McHugh J at 429.

> The structure of article 1 implies that status as a refugee is to be determined when recognition by the State party is sought, and that, if granted, the status may thereafter be lost because the circumstances giving rise to recognition have ceased to exist.[16]

Following the decision in *Chan*, the Full Federal Court held that the "real chance" test did not allow the Refugee Review Tribunal to engage in a process of weighing up evidence in order to determine 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 claims on a "balance of possibilities". The court maintained that assessing likelihood of persecution in this fashion ran counter to statements in *Chan* that a real chance of persecution may arise where the likelihood is less than 50%.[17] The Tribunal's decisions were also criticised for avoiding speculation of the likely fate of applicants. In 1996 the Full Court ruled that application of the "correct" real chance test involved a five stage process.[18] This led to a degree of confusion and the High Court criticised the Federal Court for scrutinising too closely the reasons of the Tribunal, and said that there should be a return to a simple application of the test, as framed by the High Court in 1989, the essence of which was to look to the future.[19]

The Scope of Well Founded Fear of Persecution

The High Court in *Chan* also devoted time to interpreting the words "well founded fear of persecution" in the Refugees Convention. Mason CJ saw persecution as a real chance that the applicant will suffer "some serious punishment or penalty or some significant detriment or disadvantage if he returns". Harm or threat of harm as part of a course of selective harassment of a person amounts to persecution if done for a Convention reason. The denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned may constitute such harm though not every deprivation of a guaranteed freedom would do so.[20] Dawson J considered the phrase contained both a subjective and an objective requirement. There must be a state of mind, being fear of persecution, and a basis for that fear which is well founded. A fear can be well founded without any certainty or even probability that it will be realised. On the other hand it must mean something more than plausible.[21]

Clearly a threat to life or freedom may constitute persecution. McHugh J agreed with Toohey J that an applicant for refugee status may have a well founded fear of persecution even though there is only a 10% chance that he or she will be shot, tortured or otherwise persecuted. If there is a real chance that the applicant will be persecuted the fear should be characterised as "well founded". The notion of persecution involves selective harassment. It is not necessary that the conduct should be directed against the person as an individual and he or she may be persecuted because of membership of a group which is the subject of systematic harassment. A single act of oppression may suffice as long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person. The threat need not be the product of any policy of the government or the person's country. It is not confined to harm threatened which will result in loss of life or liberty.[22]

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16 *Chan Yee Kin*, per Toohey J at 405.

17 *Minister for Immigration, Local Government and Ethnic Affairs v Mok Gek Bouy* (1994) 55 FCR 375.

18 *Guo Wei Rong v Minister for Immigration and Ethnic Affairs* (1996) 135 ALR 421.

19 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 278.

20 *Chan*, per Mason CJ at 388.

21 *Chan*, per Dawson J at 397.

22 *Chan*, per McHugh J at 429-430.

McHugh J said in *Chan* that persecution may be loss of employment because of political activities, denial of access to the professions and to education, or the imposition of restrictions traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement.[23]

In April, 2000 the High Court upheld a finding that a Chinese child, whose persecution took the form of discrimination on the grounds of being born outside the Chinese "one child policy", suffered persecution by deprivation of access to essential services such as health care, housing and food, and would be likely to face little prospect of employment.[24]

More recently still in *Ibrahim*, the High Court returned again to examine the meaning of "a well founded fear of persecution". McHugh J said it amounted to more than a random act. To amount to persecution there must be a form of "selective harassment" of an individual or a group of which the individual is a member. One act of selective harassment may be sufficient. The expression "systematic conduct" did not require that the applicant have to fear organised or methodical conduct, akin to the atrocities committed by the Nazis in the Second World War. Selective harassment, which discriminates against a person for a Convention reason, is inherent in the notion of persecution. Because of the misunderstanding that had arisen from using the term "systematic conduct", his Honour considered it was better to refrain from using it in the Convention context, but, if used, it is not to be regarded as requiring, for the purposes of obtaining refugee status, that a person fears persecution and must show a series of coordinated acts directed at him or her which can be said to be not isolated but systematic, but rather it means reference to non random acts.[25] Kirby J commented that McHugh J had thereby qualified his earlier statement in *Chan* about the necessity for "systematic conduct".[26]

The Convention does not require that persecution be perpetrated by the State. It is sufficient if the State is "unable or unwilling" to offer protection against persecution. In *Nagyari*[27] it was said that purely private, individual or sectional persecution does not implicate the controlling authorities of the country of original nationality and does not amount to persecution. However, State acquiescence in persecution may suffice. In 1999 the House of Lords in *R v Immigration Appeal Tribunal ex parte Shah*[28] found that domestic violence practised by the husbands of two applicants when in Pakistan, for which the applicants could not gain protection from the Pakistani authorities, constituted persecution because there was a failure of State protection.

Persecution and Laws of General Application

In *Applicant A*[29] McHugh J said conduct will not constitute persecution if it is appropriate and adapted to achieving some legitimate object of the country. A legitimate object will ordinarily be an object whose pursuit is required to protect the welfare of the State. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution. In *Applicant A*, the applicants were a Chinese couple who had one child, and wanted more, and feared persecution in the form of sterilisation if returned to China. The Chinese "one child policy" was expressed in laws that limited couples as to the number of children permitted.

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23 *Chan*, per McHugh J at 430-431.

24 *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (2000) HCA 19.

25 *Ibrahim*, per McHugh J at 609.

26 *Ibrahim*, per Kirby J at 637.

27 Unreported, Federal Court of Australia, O'Loughlin J, 22 May 1997.

28 [1999] 2 AC 629.

29 Above n 9.

Subsequently in *Chen Shi Hai*,[30] the High Court considered again the Chinese "one child policy", though this time the applicant was a $3^1/_2$ year old child. The High Court first referred with approval to McHugh J's comments in *Applicant A*:

> Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct (but) … on whether it discriminates against the person because of race, religion, nationality, political opinion or membership of a social group.[31]

Their Honours then continued:

> In that context, his Honour (McHugh J) also pointed out that "enforcement of a generally applicable criminal law does not ordinarily constitute persecution." That is because the enforcement of a law of that kind does not ordinarily constitute discrimination. To say, that ordinarily, a law of general application is not discriminatory is not to deny that general laws, which are apparently non discriminatory, may impact differently on different people and, thus, operate discriminatorily. Nor is it to overlook the possibility that the selective enforcement of a law of general application may result in discrimination. As a general rule a law of general application is not discriminatory.[32]

In *Chen Shi Hai* a third child of unmarried parents, would have been deprived by Chinese law of essential benefits such as health care, education and basic foods if returned to China. It was held by the High Court that the child was a victim of persecution even though the State sanctioned penalties against children such as the applicant, who had been born outside the "one child policy". It was argued that China's "one child policy" was expressed in laws of general application, which directly or indirectly penalised children such as Chen Shi Hai but such laws were selective and discriminatory, impacting upon a class, and therefore could properly be regarded as persecutory. Since some of the laws specifically punished the child rather than the parents, these laws even if regarded as laws of general application operated in a discriminatory way and so could be regarded, if sufficiently draconian, as persecutory.

"For reasons of"

The opening words of the preamble to the Convention relating to the status of refugees affirms the principle that:

> Human beings shall enjoy fundamental rights and freedoms without discrimination.

These words were referred to by Brennan CJ in Applicant A as demonstrating that the persecution envisaged must be discriminatory and the term "for reasons of" excludes indiscriminate persecution.[33]

In *Ibrahim*[34] the applicant was born in Somalia. Somalia's population is divided into clans and sub-clans. After the overthrow of Siad Barre, who exercised a dictatorship in Somalia, civil unrest broke out. During the civil unrest the applicant's house was destroyed and another clan took him and his family to a farm, where he was compelled to work in conditions of slavery and his wife was raped. Later the applicant and his family escaped. He made his way to Australia where he told immigration officials that if he was sent back to

30 *Chen She Hai v Minister for Immigration and Multicultural Affairs* (2000) 170 ALR 553.

31 (1997) 190 CLR 225 at 258.

32 At 558-559.

33 (1997) 190 CLR 225 at 233; see also Dawson J at 345, McHugh J at 355.

34 Above n 2.

Somalia his life would be at risk. On one view, it was his membership of a clan or sub-clan that provided the dominant reason for the potential persecution of the applicant. Another view was that the potential persecution that he feared arose because the perpetrator of the persecution, a rival clan, were competing for land and resources. The clans attack anyone who opposes or is perceived to oppose their claims to the land and resources of Somalia. The Tribunal found that the applicant's fear of persecution was not for reasons of his membership of a specific clan but because of the instability, anarchy and murderous shiftings which are the consequence of power struggles between clans and sub-clans. The Tribunal said there was not "a differential impact which is over and above the ordinary risk of clan warfare" likely to be suffered by the applicant because members of the other clans or sub-clans in that area are potential victims of the civil unrest, and so the fear of persecution was not for a Convention reason. In applying the wording "differential impact" the Tribunal was applying language used recently by the House of Lords in the case of *Adan v Secretary of State*[35] which also involved a Somalian. The High Court (by 4 to 3), found that the Tribunal had not erred in concluding that persecution was not "for reasons of" race, religion, nationality, membership of a particular social group or political opinion. The House of Lords test of "differential impact" was not favoured by some members of the High Court.

A claimant needs to show that there is a connection between the persecution feared and one of the five Convention reasons. In *Applicant A*, the two Chinese applicants feared sterilisation once returned to China. It was conceded by the Minister that forced sterilisation, in the particular circumstances, gave rise to a fear of persecution but it was argued by the Minister that it was not "for reasons of" membership of a particular social group or political opinion. It was held by a majority of the court that the persecution was not for reasons of the applicants belonging to a particular social group as the applicants (being Chinese parents with one child and desiring a second) could not be regarded as a "particular social group."

In *Applicant A* it was difficult to escape the conclusion that any definition of the claimants as a "particular social group" relied at least in part upon a definition which had as a component the apprehended fear of persecution.

The Court adopted what had been said by the Full Federal Court in *Ram*:[36]

> Persecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors...

Later in *Chen Shi Hai*,[37] the High Court accepted that although persecution usually contains an element of motivation for the infliction of harm it may be carried out without "enmity" or "malignity", and adopted what French J had said as the single judge:

> Motivation connecting persecution to the relevant attribute is sufficient. Persecution may be carried out ... efficiently and with no element of personal animus directed at its objects.[38]

It is enough that the reason for the persecution is found to lie in one of the five Convention attributes.

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35 [1999] 1 AC 293.

36 *Ram v Minister for Immigration and Ethnic Affairs* (1995) 130 ALR 314 at 317, per Burchett J.

37 (2000) 170 ALR 553.

38 At 561.

Persecution for Reasons of "Race, Religion, Nationality, Membership of a Particular Social Group or Political Opinion"

"Race"

The term "race" arose in *Commonwealth v Tasmania*,[39] where Brennan J said that the word "race" is not a precise concept and constitutional discrimination against racial minorities may not necessarily result in an applicant coming within the definition of the refugee.

In *Uma Chand*[40] a Fijian Indian failed in his claim that effective disenfranchisement under the Fiji Constitution rendered him a refugee on grounds of "race".

"Nationality"

In *Gunaseelan*[41] the applicant was a Malay of Indian descent who claimed that preferential treatment was given to Malays in employment and education and this constituted persecution. The Court held that affirmative action policies may not necessarily involve persecution of the non-assisted group. The nationality ground requires that in order to obtain protection an applicant needs to show an absence of protection in all countries where he or she has nationality. So if an applicant has dual nationality it must be shown that he or she cannot obtain protection in either of the countries for which nationality is claimed. Dr. Crock states where refugee claims are made on grounds of nationality:

- This term seems to be used synonymously with the notion of ethnicity.[42]
- There is some doubt whether "nationality" covers Stateless persons.[43]

"Religion"

Where asylum is sought on grounds of religion cases have often involved oppression of religion on generalised grounds such as destruction of places of worship or proscribing religious observance outside the home. There are some Refugee Review Tribunals which have held that this does not amount to persecution of individuals.[44]

"Particular Social Group"

The "particular social group" category has given rise to the most difficulty. As earlier discussed, in *Applicant A*, the Chinese couple, who claimed persecution on the basis of apprehended sterilisation on return to China, were defined as a social group by reference, at least in part, to the fear of persecution they would share with like couples with one child. The majority in the High Court held that a "particular social group" ground was not intended to be a safety net for those who could not be conveniently classified under one of the other four Convention attributes.

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39 (1983) 159 CLR 1.

40 Unreported, Federal Court of Australia, Branson J, 17 March 1997.

41 Unreported, Federal Court of Australia, French J, 9 May 1997.

42 Mary E Crock, *Immigration and Refugee Law in Australia*, NSW, Federation Press, 1998 at 144.

43 Hathaway, n 3, at 60-63.

44 Crock, n 42 at 145-146.

"Political Opinion"

"Political opinion" has been defined in broad terms as "any opinion or any matter in which the machinary of State, government and policy may be engaged".[45]
There has been Canadian judicial criticism of this passage since the definition assumed persecution was always by the government or ruling party. The Federal Full Court has held in Australia that political opinion need not be expressed outwardly and it need not necessarily be the claimant's true belief.[46] The High Court has said it is sufficient for these purposes that such an opinion is imputed to the claimant by the perpetrators of the persecution.[47]

Persons without Nationality (the Second Half of the Definition)

A reading of the Convention definition of a Refugee shows that it is in two parts separated by a semi colon. The first half refers to a person who is outside his or her country of nationality, the second part to a person without nationality outside his or her country of former habitual residence. The person without nationality (i.e. stateless) on a literal reading of the definition, comes within the definition of a refugee if he or she is "unable to return" to the country of former residence. There is no express requirement that such a person have a well founded fear of persecution for one of the five convention reasons. However, a person, without nationality, who is "unwilling to return" to the former country of residence, has to show that unwillingness is "owing to such fear".

In *MIEA v Savvin*[48] a Full Federal Court held that the definition of a refugee does require that a stateless person prove that inability to return to the place of former habitual residence is "owing to a well founded fear of persecution" for a Convention reason. In so holding their Honours reversed the decision of a single judge[49] who had found that this was not a requirement that Mr and Mrs Savvin had to establish. The couple were Soviet nationals who had resided in Latvia and, on the collapse of the Soviet Union, had continued to reside there without nationality. The Full Federal Court considered that there was "obiter dicta" and support from the House of Lords decision of *Adan*[50] for this view.
The High Court in *Ibrahim* did not unreservedly adopt the reasoning in *Adan*. Furthermore, it is curious that none of the Full Federal Court judgements refer to the weighty view of the author Grahl Madsen who said of the 1951 Convention definition:

> ..he must be outside the said country owing to a well founded fear of being persecuted for any of the reasons set forth in Article 1A(2) …This provision does not, however, apply to a person not having a nationality who is unable to return to the country of his former residence. This exception is of particular import with respect to stateless persons who have been expelled by a new government.[51]

Perhaps *Savvin* may not be the last word on this matter.

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45 Guy S Goodwin-Gill, *The Refugee in International Law*, 2nd ed, 1996 at 49.
46 *Salibu v Minister for Immigration and Ethnic Affairs* (1998) 89 FCR 38 at 46.
47 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 571.
48 (2000) 171 ALR 483.
49 (1999) 166 ALR 348.
50 Above n 35.
51 Grahl Madsen, *The Status of Refugees in International Law*, Vol 1, 1966 at 143-144.

Refugees 'sur place'

A reading of the definition of a refugee under the Convention shows that there is no formal requirement that a refugee be someone who derives his or her fear from experiences in the country of nationality. Indeed, sometimes the claimant may never have set foot in their country of nationality - such was the case with the 3½ year old Chen Shi Hai. On occasions, an adult claimant may derive fear of persecution from their own conduct of defiance outside their country of nationality. But difficult issues arise where a claimant commits acts after arrival in Australia for the purpose of manufacturing or enhancing a claim to refugee status. If someone does deliberately provocative acts which are likely to give rise to a self engineered fear of persecution if returned to the country of nationality, then the question arises whether there is a "bad faith" exemption which applies to the definition.

In *Somaghi*[52] the claimant was Iranian. Having failed to obtain a protection visa *Somaghi* wrote a provocative letter to the Iranian Embassy (amongst others) abusing the Iranian Government. In the Full Federal Court, Gummow J said:

> ... it should be accepted that actions taken outside the country of nationality or, in the case of a person not having a nationality, outside the country of former habitual residence, which were undertaken for the sole purpose of creating a pretext of invoking a claim to a well-founded fear of persecution should not be considered as supporting an application for refugee status. The fear of persecution, to which the Convention refers, in such cases will not be "well-founded.[53]

More recently the Full Federal Court in *Mohammed*[54] considered the circumstances of a Sudanese applicant rejected by the Refugee Review Tribunal who sent a letter to his brother in Sudan. The applicant contended at a second Tribunal hearing that the letter had been intercepted, and his brother interrogated and questions asked about when the applicant himself would be returning to Sudan. It was accepted that he had a well-founded fear of persecution but the Tribunal, influenced by *Somaghi*, found that the applicant had sent the letter expecting that it might be intercepted by the security authorities and so had acted in bad faith in engineering a basis for his subsequent claim. His claim was rejected but, on appeal, Lee J said the Tribunal ought to have considered that the applicant might still have a legitimate basis to fear persecution even if his fear was partly generated by his own conduct.

By majority the Full Federal Court agreed with Lee J and adopted the approach of the English Court of Appeal in *Danian v Secretary of State for the Home Department*,[55] where the court had held that, although a Nigerian cynically and blatantly brought to the attention of the Nigerian authorities his own opposition, this did not of itself defeat a claim for asylum on the basis of "bad faith", though that conduct may well be relevant to his credibility. The English Court of Criminal Appeal had read Lee J's reasons and expressed a preference for his approach over the approach adopted in *Somaghi*. The Minister has now sought special leave to appeal to the High Court.

Exclusion of a Refugee on the Basis of a Safe Third Country and Article 33 of the Convention

Article 1E of the Refugee Convention reads:

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52 *Somaghi v Minister for Immigration and Ethnic Affairs* (1991) 31 FCR 100 and see also *Heshmati v Minister for Immigration and Ethnic Affairs* (1991) 31 FCR 123, decided on the same day.

53 At 118.

54 *Minister for Immigration and Multicultural Affairs v Mohammed* (2000) 173 ALR 23.

55 Unreported, 28 October 1999.

> This Convention shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

It was said by the Full Federal Court in *Thiyagarajah*:[56]

> If it is clear on the information before the decision maker that the applicant has taken residence in a country other than his country of nationality and is recognised by the competent authorities of that country as having rights and obligations which are attracted to the possession of the nationality of that country (so as to come within Article 1E), there is neither need nor practicable purpose in the decision maker exploring whether the applicant still falls, or indeed whether he ever fell, within Article 1A(2).

In recent years there has been some dilution by the courts of what constitutes "rights and obligations which are attached to the possession of the nationality" of a country. To discuss safe third country issues is beyond the scope of this paper but the matter was taken up recently in *Patto*.[57] Where there is a safe third country there is ordinarily no obligation for Australia to consider if the applicant is a refugee. However, a decision maker has to be mindful of Article 33 of the Convention which provides:

> 1. No contracting State shall expel or return "refouler" a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present position may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

In *Patto*, French J drew some conclusions from the case law in relation to Australia's protection obligations under Article 33 and how far an applicant who has stayed in a third country should be assessed under Article 1A(2):

1 Return of a person to the third country will not contravene Article 33 where the person has a right of residence in that country and is not subject to Convention harm therein.

2 Return of the person to the third country will not contravene Article 33, whether or not the person has a right of residence in that country, if that country is a party to the Convention and can be expected to honour its obligations thereunder.

3 Return of the person to a third country will not contravene Article 33 even though the person has no right of residence in that country and the country is not a party to the Convention, provided the country can be expected, nevertheless, to afford the person claiming effective protection against threats to his life or freedom for a Convention reason.[58]

This is not seen as an exhaustive list but raises the question, which is likely to be debated in the courts, about the scope of Article 1E and Article 33 as those articles are applied in the context of the *Migration Act 1958*.

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56 *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 at 555.

57 *Patto v Minister for Immigration and Multicultural Affairs* (2000) FCA 1554.

58 Ibid, at para 37.

Under s36(3) of the Migration Act, Australia does not have protection obligations to a claimant "who has not taken all possible steps to avail himself or herself of a right to enter and reside in … any country apart from Australia" provided that he or she would not apprehend persecution (s36(4) and (5)).

The Future

So what of the future? A few signs can perhaps be discerned. These are:

1 The Convention definition of a refugee is likely to be given a confined meaning, at least in the short term, given Gummow J's interpretation in *Ibrahim* of the Convention's historical legacy.

2 At present a stateless person who is unable to return to their country of habitual residence has to prove a well founded fear of persecution. The High court may one day consider the Full Federal Court's view in *Savvin*.

3 Will Australian Courts require those who have travelled to Australia "from safe third countries" to be assessed against the definition of a refugee under Article 1A(2) or just send them back and, if so, in what circumstances?

4 What are the implications of Article 33 of the Convention and the prohibition contained in that definition about returning a refugee to a country where his or her life or freedom would be threatened?

5 The attitude of the High Court to a "bad faith" exemption under Article 1A(2) of the Convention.

JUDICIAL REVIEW RIGHTS

*Justice R S French**

Introduction

Judicial review is concerned with the supervision by courts of decision-making by public officials. It is about administrative justice. More people encounter that kind of justice than the curial variety. There is a myriad of decisions that governments and public authorities make which affect the lives and wellbeing, the freedoms and opportunities of many. For those claiming Australia's protection under the *Refugee Convention*, the quality of administrative justice may mean the difference between life and death or liberty and imprisonment.

In a society governed by the rule of law it should not be hard to reach agreement on some basic propositions about the content of administrative justice. It will, of course, be justice according to law. Official decision-making must be lawful. Officials, like all of us, must obey the law and no more so than when they exercise the high public trust of making decisions that affect the interests of others. As Justice Gaudron said recently:

> Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less. [1]

The way in which administrative decisions are made should be fair. Ordinarily that will mean that the person affected will have a right to put his or her case either orally or in writing before a final decision is made. That right extends to the right to answer adverse material that might be taken into account by the decision-maker. The person affected should also be able to have confidence that the official making the decision does so impartially. That confidence requires both the appearance and the reality of neutrality. Official decisions should be made so that, when explained, the logic behind them is understandable, even if there are differing views about the outcome. And they should be explained. These considerations reflect what might be called core requirements of just decision-making in a society governed by the rule of law. In summary they are:

- Lawfulness
- Fairness
- Rationality
- Intelligibility

These elements find their place to a greater or lesser extent in basic and well-established grounds of judicial review. The first two, lawfulness and fairness, are covered generally by the grounds of error of law and breach of procedural fairness. The requirement of rationality is reflected in the obligation that the decision-maker take into account relevant factors which must be considered and not take into account irrelevant factors. In an extreme case, a decision will be reviewable on the ground that it is so unreasonable that no reasonable decision-maker could have made it. Although not yet a requirement of the common law, statutory requirements to provide reasons for decisions support the element of intelligibility.

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* *Justice, Federal Court of Australia.*

1 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.

It is a feature of migration law, however, that statutory changes have compromised the maintenance of standards of fairness and rationality applicable to administrative decisions in other areas. There is a tension between the standards of administrative justice imposed by judicial review and other attributes which, from the point of view of the subject and also of the general community, are desirable. These are the attributes of:

- Accessibility.
- Affordability for the individual and for the community.
- Timeliness in processing and disposition.

None of these attributes of administrative justice derives significant support from the common law although sometimes they will be reflected in statutory directions to the decision-maker. So under s 420 of the *Migration Act 1958* (Cth) the Refugee Review Tribunal in carrying out its functions under the Act is required to pursue the objective "…of providing a mechanism of review that is fair, just, economical, informal and quick"

The pressure on officials to deal expeditiously with high volumes of decision-making must be immense and has been recognised by the courts in relation to the application of rules of procedural fairness. There is a balancing process involved. In connection with applications for protection under the Refugees Convention, the question whether procedural fairness requires an oral hearing by the decision-maker in every case was canvassed in *Zhang de Yong v Minister for Immigration Local Government and Ethnic Affairs*[2]. In concluding that there was no universal mandate for an oral hearing by the delegate, The court had regard to the practical implications of the prescription of particular procedures:

> The court has no direct knowledge of the resource implications of particular procedures, nor of the resources available to the department to implement them. Oral hearings by the ultimate decision-makers could be provided for all applicants using the simple artifice of increasing the number of persons with appropriate delegations. However it may be, … such a solution would also put the final decision-making responsibility in the hands of more junior and less experienced officers than those who currently hold delegations. In my opinion, courts should be reluctant to impose in the name of procedural fairness detailed rules of practice, particularly in the area of high volume decision-making involving significant use of public resources.[3]

Judicial review can and must, in a principled way, engage with the practical realities of administrative decision-making. There is a tolerance of non-critical error on review. The courts are warned against scrutinising administrative reasoning with an eye keenly attuned to the perception of error.[4] They are enjoined in effect against judicialising the reasoning processes of administrative decision-makers. Lord Shaw said many years ago in *Local Government Board v Arlidge*:[5]

> …that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitate those of Courts of justice is wholly unfounded.[6]

2 (1993) 118 ALR 165.

3 Ibid, 190-191.

4 *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287 approved by the High Court in *Wu Shan Liang v Minister for Immigration and Ethnic Affairs* (1996) 185 CLR 259.

5 [1915] AC 120.

6 [1915]AC 120, 138.

A special aspect of administrative decision-making, including decision-making at the level of administrative tribunals, not found in judicial decision-making, is the application of administrative policy. Thus like cases are treated similarly which is an essential element of fairness. But there is a tension between the application of policy and the consideration of individual cases where a statutory discretion has to be exercised. The application of policy guidelines has nevertheless been accepted by courts subject to appropriate consideration being given to the individual case where a statutory discretion is to be exercised.

Mechanisms for Achieving Administrative Justice

Judicial review must be put in perspective as one of a menu of mechanisms for ensuring administrative justice. Of fundamental importance to establishing and maintaining proper standards is the education of decision-makers. At lower levels in government departments and authorities there is a turnover of staff, a need to ensure that officers are educated in the basic principles of administrative justice and a need to ensure that that education is up to date.

Administrative justice may be supported by systems of internal review by superior officers and external administrative review by bodies such as the Refugee Review Tribunal, the Administrative Appeals Tribunal and the like. Official mechanisms of external scrutiny are also available through the Ombudsman, the parliamentary member whose constituent is affected by a decision and the Minister who may be the subject of direct representations. Unofficial mechanisms of great importance, not least because of the impact they may have on the political process which affects statutory change, are non-government organisations and the media. Scrutiny of decisions is brought about by access to official documents under freedom of information legislation or statutory requirements for the provision of documents and reasons. Systemic issues may also be addressed by Commonwealth and State Auditors-General. And at the end of the line of official review, is judicial review.

It should not be assumed that judicial review is regarded as the best method of achieving administrative justice. It occupies only a limited territory for the implementation of appropriate standards of administrative justice. Professor Cranston has said:

> … the attention lawyers lavish on judicial review diverts their gaze from more fundamental, if less glamorous, mechanisms to redress citizens' grievances and call government to account.

Professor Mark Aronson has suggested that there is observable a shift from traditional values of administrative justice to an economic paradigm emphasising regulatory flexibility and negotiation, regulation by performance outcome and through economic incentives. This, he says, is linked to an increasing disenchantment with judicial review.[7]

In the 5th edition of de Smith's *Judicial Review of Administrative Action*, the role of judicial review is described as "inevitably sporadic and peripheral". It must be kept in perspective and regarded, particularly by the judges, with that harsh modesty which should follow from a realistic appraisal of the actual outcomes that it generates. Consistently with those limitations however, judicial review plays an important part, in a high public way, of declaring, reasserting and supporting important standards necessary to the rule of law expressed in the delivery of administrative justice as well as redressing departures from those standards in individual cases.

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7 Aronson, A Public Lawyer's Response to Privatisation and Outsourcing in Taggart (ed), The Province of Administrative Law, Hart (1997), 43.

The Limits of Judicial Review

Judicial review permits consideration by courts of questions of lawfulness and fairness and in extreme cases the rationality of the decision under challenge. It does not provide a forum for substituting one administrative decision for another. "Merits review" is a term which is used in a rather imprecise way to describe territory forbidden to judicial review. I say imprecise because a decision which is unlawful or unfair or so unreasonable as to be beyond power might well be thought bad on its merits. Nevertheless, the term has the imprimatur of the High Court which in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[8] approved the observation of Brennan J in *Attorney-General (NSW) v Quin*:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.[9]

It follows that there is no general power in a court to rectify administrative injustice. The support which judicial review processes can give to administrative justice is to that extent circumscribed.

Judicial Review of Migration Decisions in the Federal Court

The general jurisdiction of the Federal Court to review administrative decisions derives from the *Administrative Decisions (Judicial Review) Act 1977*(the AD(JR) Act) as well as s 39B of the *Judiciary Act 1903*. That general jurisdiction, applicable to migration decisions, was removed in 1992 with the introduction of Part 8 of the Migration Act ('the Act'). Part 8 was introduced by the *Migration Reform Act 1992* to limit the volume of applications for review in the Federal Court. It reflected the concerns of the government of the day about the growth in the number of applications for judicial review, the time taken to address appeals, and the costs of the administrative process dealing with review.

The approach of Part 8 of the Act was to replace the generally applicable judicial review scheme with a judicial review scheme specific to that Act and from which was removed grounds of review such as natural justice and unreasonableness.[10]

Part 8 begins in s.475 with a definition of "judicially-reviewable decisions". These are decisions of the Migration Review Tribunal, the Refugee Review Tribunal and other decisions made under the Act or the Regulations relating to visas (s 475(1)). A number of decisions are classified as not judicially reviewable decisions (475(2)). By way of example a decision which itself is subject to review by the Migration Review Tribunal or the Refugee Review Tribunal is not reviewable in the Federal Court. So the decision of a delegate of the Minister refusing a protection visa is not itself reviewable in the Federal Court. That, of course, does not prevent it being reviewable by the High Court under s 75(v) of the Constitution, which is discussed later.

It may be noted in passing that it has been held that a decision of the Administrative Appeals Tribunal setting aside a decision under the Act, is a decision made under the *Administrative Appeals Tribunal Act 1975* (AAT Act). It is not therefore caught by the provisions of Part 8

8 (1996) 185 CLR 259, 272.

9 (1990) 170 CLR 1, 35-36.

10 Ruddock, "Narrowing the Judicial Review in the Migration Context", (1997) 15 *AIAL Forum*, 15.

and thus is subject to an application for review on grounds of error of law under the provisions of the AAT Act and, alternatively, review under the AD(JR) Act.[11] Section 476 sets out the grounds upon which application may be made for review by the Federal Court of a judicially reviewable decision. These grounds, as set out in s.476(1), are:

> (a) that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed;
> (b) that the person who purported to make the decision did not have jurisdiction to make the decision;
> (c) that the decision was not authorised by this Act or the regulations;
> (d) that the decision was an improper exercise of the power conferred by this Act or the regulations;
> (e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;
> (f) that the decision was induced or affected by fraud or by actual bias;
> (g) that there was no evidence or other material to justify the making of the decision.

Subsection 476(2) expressly excludes as grounds for review breach of the rules of natural justice and that the decision involved an exercise of a power that was so unreasonable that no reasonable person could have so exercised the power. Subsection 476(3), the ground relating to improper exercise of power, is confined to the pursuit of improper purposes, acting under dictation and acting in accordance with a rule or policy without regard to the merits of the particular case. Taking irrelevant considerations into account or failing to take relevant considerations into account or exercising the power in bad faith or otherwise abusing the power, are not included as grounds for review. The no evidence ground in par (g) is elaborated in s 475(4) thus:

> The ground specified in paragraph (1)(g) is not to be taken to have been made out unless:
> (a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which the person was entitled to take notice) from which the person could reasonably be satisfied that the matter was established; or
> (b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

Applications are also able to be made in respect of failures to make decisions, such applications being on the ground of unreasonable delay.

Section 478 establishes a time limit of 28 days from the date of notification of the decision within which an application under s 476 or 477 must be made. Subsection 478(2) enjoins the Court thus:

> The Federal Court must not make an order allowing, or which has the effect of allowing, an applicant to lodge an application outside the period specified in paragraph (1)(b).

The time limit set down in s.478 recently survived a constitutional challenge.[12] Notwithstanding that, on its face, s.478(2) might have appeared to breach the separation of legislative and judicial power, it was held to be of no legal effect and therefore no question of its constitutionality arose.

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11 *Powell v Administrative Appeals Tribunal* (1998) 89 FCR 1.

12 *Hocine v Minister for Immigration and Multicultural Affairs* (2000) 99 FCR 269.

The powers of the Court in the exercise of its jurisdiction under Part 8 are set out in s 481. They are the usual powers in respect of judicial review.

The jurisdiction of the Federal Court with respect to judicially reviewable decisions is exclusive of the jurisdiction of all other courts, other than the jurisdiction of the High Court under s 75 of the Constitution.[13] The confinement of the Federal Court's jurisdiction is set out in s 485 in the following terms:

> 485(1) In spite of any other law, including section 39B of the Judiciary Act 1903, the Federal Court does not have any jurisdiction in respect of judicially-reviewable decisions or decisions covered by subsection 475(2) or (3), other than the jurisdiction provided by this Part or by section 44 of the Judiciary Act 1903.
>
> (2) Subsection (1) does not affect the jurisdiction of the Federal Court in relation to appeals under section 44 of the Administrative Appeals Tribunal Act 1975.
>
> (3) If a matter relating to a judicially reviewable decision is remitted to the Federal Court under section 44 of the Judiciary Act 1903, the Federal Court does not have any powers in relation to that matter other than the powers it would have had if the matter had been as a result of an application made under this Part.

It was argued before the High Court in *Abebe v Commonwealth*[14] that various of the provisions, including ss 476(1), (2) and (3) and 485 of the Act were invalid. This was on the basis that conferral on the Federal Court of original jurisdiction under s 77(i) of the Constitution can only be in respect of "matters" as set out in ss 75 and 76 and that a "matter" goes beyond the controversy of which the claim forms part. It was said that when Parliament invests the Court with jurisdiction to determine a "matter" it cannot limit the grounds on which the matter may be dealt with. A matter, it was said, is a single justiciable controversy. The Federal Court must be clothed with full authority essential for the complete adjudication of the matter.

This argument, however, was rejected by a 4:3 majority. The majority comprised Gleeson CJ and McHugh, Kirby and Callinan JJ. Justices Gaudron, Gummow and Hayne dissented. The majority held that nothing in Chapter III of the Constitution requires the Parliament to give a federal court authority to decide every legal right, duty, liability or obligation inherent in a controversy merely because it has jurisdiction over some aspect of that controversy. So long as a law "defines" the jurisdiction of a Federal Court "with respect" to a "matter" within Parliament's authority, it is constitutionally valid.

The scope of the various grounds of review has been agitated in the Federal Court and in the High Court. This is particularly so with respect to paragraph (a) of s.476(1). There was a line of authority in the Federal Court which linked that paragraph to the duty imposed on the Tribunal under s.420 to act according to substantial justice and the merits of the case. Failure to do this reflected, for example, in failure to observe the rules of natural justice, was characterised as a breach of procedures required by the Act. This view was rejected by the High Court in *Minister for Immigration and Multicultural Affairs v Eshetu*[15]. The Court held that s 420(1) did not prescribe a procedure to be observed by the Tribunal in the making of a decision so as to found a right to review under s 476(1)(a). The clear language and purpose of s 476(2)(b) could not be avoided by treating s 420 as conferring rights not limited by that paragraph.

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13 S.486, Migration Act.

14 (1999) 197 CLR 510.

15 (1999) 197 CLR 611.

Another potentially contentious application of s 476(1)(a) arises in cases in which it is asserted that the Tribunal has failed to make findings on material questions of fact. Section 430 of the Act requires that where the Tribunal makes its decision on a review it must prepare a written statement that:

- sets out the decision of the Tribunal on the review;
- sets out the reasons for the decision;
- sets out the findings on any material questions of fact; and
- refers to the evidence or any other material on which the findings of fact were based.

It has been held that a failure to comply with this requirement is a failure to observe procedures required by the Act and therefore is a ground for review under s.476[16]. This is a ground which is being resorted to with increasing frequency as it allows, in effect, a review of the rationality and intelligibility of the Tribunal's decision-making processes.

The scope of judicial review is still substantial notwithstanding its limitations by Part 8. The disconformity between the grounds of review in the Federal Court and the grounds upon which review are available under s 75(v) of the Constitution is, as will be seen, productive of an increasing misdirection of High Court resources to deal with a growing migration list in its original jurisdiction. There is absolutely no justification for continuing that disconformity. This is not to reflect upon the ways in which Australia purports to comply with its obligations under the Refugees Convention. Having recently reviewed the practice of various countries in relation to the so-called safe third country doctrine, it seems to me that, in that area at least, Australia stands up quite well against other countries trying to cope with the growing problem of the international movement of people fleeing persecution and war.

The Irreducible Core of Judicial Review – The Constitutional Jurisdiction of the High Court

In addition to its function as Australia's ultimate appeal court, the High Court has a supervisory role in connection with executive action under Commonwealth law which derives directly from the Constitution. Section 75 of the Constitution provides:

> In all matters:
> .
> .
> .
> (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
>
> the High Court shall have original jurisdiction."

The insertion of s 75(v) was inspired by the decision of Marshall CJ of the United States Supreme Court in *Marbury v Madison*.[17] While the decision is famous for its assertion of the jurisdiction of the court to declare invalid laws contrary to the Constitution, it also held that the court lacked any original jurisdiction to issue writs of mandamus to non-judicial officers of the United States. Andrew Inglis-Clark, who was the Tasmanian Attorney-General in 1891, and had read the case, produced a draft Constitution Bill which included a clause 63 to overcome the effect of *Marbury* and to provide for the original jurisdiction in the Constitution. At the January 1898 Convention Debates in Melbourne Barton moved successfully for the deletion of the clause. In the debate Isaacs thought the power was not expressly given in the United States Constitution but that undoubtedly the court exercised it. Clark became aware

16 *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 469.

17 5 US 1 (Cranch) 137 (1803).

of the deletion and sent a telegram referring to *Marbury*. Barton replied thanking him and remarking "None of us here had read the case mentioned by you of Mabury and Madison or if seen it had been forgotten."

In March 1898, par (v) of s.75 in its present form was reinserted in the draft Constitution on Barton's motion. In so moving he referred to *Marbury* and observed that the words of the provision could do no harm and might "protect us from a great evil".[18] No privative clause has yet been devised which can defeat that constitutional jurisdiction in head-on conflict. However, such provisions have been effective when characterised not as restricting judicial review but rather as defining the true reach of the decision-maker's power.[19]

The High Court is generally empowered under s 44 of the *Judiciary Act 1903* to remit to the Federal Court or any State or Territory court with jurisdiction, matters which are commenced in its original jurisdiction. That is subject, in the case of the Federal Court, to the limitation imposed, in the case of judicial review of migration decisions, by s 485(3) of the *Migration Act*.

The original jurisdiction conferred on the High Court by s 75(v) of the Constitution is also conferred on the Federal Court and the Supreme Courts of the States by s.39B of the *Judiciary Act*. However, the effect of that jurisdiction is also confined by operation of s.485 of the *Migration Act*. It may be an open question whether it is possible for the High Court to remit a matter commenced there under s.75(v) of the Constitution to a State Supreme Court in reliance upon the jurisdiction of the State Supreme Court under s 39 of the *Judiciary Act.* Indeed since this paper was delivered, Lee J has essayed a substantial discussion of the distribution of federal jurisdiction and the remitter question in *Ayub v Minister for Immigration and Multicultural Affairs*,[20] a judgment given on 14 December 2000. His Honour there upheld an objection as to competency as the application for review was made outside the time limited by s 478(1) of the Act. He observed, however, that a Supreme Court has a like jurisdiction "with respect to judicially-reviewable decisions" that is not so confined, including as it does, a concurrent original jurisdiction to provide judicial review by the remedies of injunction or declaratory order.

Whatever flows from the *Ayub* case, the limitations imposed upon the jurisdiction of the Federal Court by Part 8 of the Act, in the meantime, have resulted in an increasing resort to the original jurisdiction of the High Court under s 75(v). For the grounds upon which the constitutional writs may issue include want of natural justice and improper exercise of power by a failure to take into account relevant considerations or taking into account irrelevant considerations as well as so called Wednesbury unreasonableness.

The High Court has recently delivered judgment in *Re Refugee Review Tribunal; Ex parte Aala*[21] in which consideration has been given to the operation of s 75(v). Mr Aala was an Iranian national who claimed to have been employed in the secret police of the former Shah of Iran and subsequently to have been involved in the illegal sale of property owned by the Shah and some of his supporters. He also claimed to have made substantial donations to Mujahideen, an underground counter revolutionary organisation. Between 1990 and his departure from Iran he claimed that members of the Komiteh, the morals police of the new regime, had visited his premises on three occasions apparently looking for documents that

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18 JA La Nauze, *The Making of the Australian Constitution* (1974) pp 233-234; J Thomson, *"Constitutional Authority for Judicial Review: A Contribution from the Framers of the Australian Constitution"* in G Craven (ed) *the Convention Debates 1891-1898 Commentaries Indices and Guide.*

19 *R v Hickman*; *Ex parte Fox and Clinton* (1945) 70 CLR 598.

20 [2000] FCA 1844.

21 (2000) 176 ALR 219, delivered on 16 November 2000.

might disclose his involvement in the sale of the properties. In September 1991 he married an Australian citizen of Afghan ethnic origin. In August 1992 he and his wife separated. In February 1993, a spouse visa was refused. Mr Aala was charged and convicted of the malicious wounding of his wife and sentenced to thirty four months in prison on 16 August 1995. On 20 August 1996 he made an application for a protection visa. That was refused and the refusal was affirmed by the Refugee Review Tribunal. He made application to the Federal Court for an order of review of the Tribunal's decision. His application was dismissed by Beaumont J, but an appeal to the Full Court was successful on the basis that the Tribunal had misdirected itself as to the legal test to be applied in assessing Mr Aala's assertions. The decision of the Full Court preceded that of the High Court in *Eshetu*.

The matter went back to the Refugee Review Tribunal differently constituted. In the course of the hearing the member who constituted the second Tribunal told Mr Aala that she had the "Department of Immigration file and your old Refugee Tribunal file and your new Refugee Tribunal plus all of the Federal Court papers". However, four written statements which had been placed by Mr Aala before Beaumont J in the Federal Court at first instance were not before the Tribunal. The second Tribunal affirmed the decision not to grant Mr Aala a protection visa. Mr Aala sought judicial review of that decision before the Federal Court. His application before Branson J was dismissed. He then appealed to the Full Federal Court. By this time the High Court had handed down its decision in *Eshetu*. In accordance with that decision, the Full Court accepted that it had no jurisdiction "to set aside the decision of the Tribunal on the ground that it denied to the applicant natural justice". It therefore dismissed the appeal.

Mr Aala's next step was to seek relief in the original jurisdiction of the High Court by way of constitutional writs under s 75(v). In December 1999 McHugh J made orders nisi requiring the respondents to show cause why writs of prohibition, certiorari and mandamus should not issue. In the event Mr Aala was successful, certiorari issued to quash the decision of the Tribunal and prohibition issued to prevent the Minister from taking action on the decision of the Tribunal. Mandamus issued requiring the Tribunal to consider and determine the application according to law. In substance, Mr Aala succeeded before the High Court on grounds of breach of the rules of natural justice arising out of the mis-statement by the second Tribunal concerning the papers which it had before it. As Gaudron and Gummow JJ observed, no relief was sought from the High Court which would quash the order of the Full Federal Court dismissing the appeal from Branson J. As they said:

> …the effect of the relief sought in this court would be to outflank and collaterally impeach the respective rights and liabilities under the Act of the prosecutor [Mr Aala] and the Minister by quashing the administrative decision which the order of the Federal Court affirmed.[22]

The pursuit of that course was open to Mr Aala as a consequence of the holding in *Abebe v Commonwealth* that Part 8 of the Act is valid. The Federal Court was specifically precluded from considering, as a ground of review, that a breach of the rules of natural justice occurred in connection with the making of the decision. That ground was precluded by the operation of s 476(2) of the *Migration Act*. But it was a ground which could be considered by the High Court in its original jurisdiction.

Kirby J in his judgment observed:

> In this matter, this Court has been involved, not in the elucidation of some important question of constitutional, statutory or other legal significance. The applicable principles are clear. This Court has been engaged in nothing more than the elucidation of the facts

22 At para 11.

> and the application to them of settled rules of law. In the event that the Parliament was of the opinion that consideration of arguments of procedural fairness (and administrative unreasonableness) was consuming too much time and cost in migration matters, both in the Tribunal and before the Federal Court, there must surely have been a better way of reducing those burdens than by heaping them upon this Court.[23]

In that case, the Minister submitted to the High Court that because the Constitution was silent about the grounds on which mandamus or prohibition could issue, those grounds were fixed according to the practices prevailing at the time the Constitution came into force, that is 1901. It was said to follow as a consequence that prohibition would not lie to prevent a breach of rules of procedural fairness. That contention was rejected by the Court.

It will be recalled that the jurisdiction of the Federal Court under Part 8 of the Act is limited in respect of breach of the rules of natural justice to the ground of actual bias. This has led predictably to a number of cases in which actual bias, as distinct from the appearance or reasonable apprehension of bias, has been raised as a ground of review. One such case was that of *Jia v Minister for Immigration and Multicultural Affairs*.[24] A non-citizen on a student visa was convicted of offences including sexual assault for which he was sentenced to a number of years imprisonment. He was, upon his release, to be the subject of deportation under the criminal deportation policy on the basis that he was not of good character. However, the Administrative Appeals Tribunal decided that, notwithstanding the convictions, it was not satisfied that he was not of good character. The Minister nevertheless cancelled Mr Jia's visa under s.501 (as it was) and declared him to be an excluded person under s.502. The Minister, before making those decisions, had made public statements critical of the Administrative Appeals Tribunal decision. Indeed he had written a letter to the President of the AAT about it and similar decisions. His decisions under s 501 and 502 were challenged in the Federal Court on the grounds of actual bias. At first instance, the application was dismissed on the basis that actual bias had not been established. That decision was reversed by majority in the Full Court. The High Court subsequently granted special leave to appeal and heard the appeal at the Perth sittings recently. In addition, however, to his appeal, Jia sought the issue of constitutional writs in the original jurisdiction of the High Court under s 75(v). The issue of the constitutional writs was based upon grounds of breach of the rules of natural justice which require only the appearance or reasonable apprehension of bias.[25]

The community can no doubt expect to be the beneficiary of a good deal of new learning about the application of s 75(v) and the principles of judicial review from the High Court in its new role as a trial court exercising original jurisdiction in an area in which it now has a rapidly growing case list. The serious misapplication of judicial resources apparent in this distortion of jurisdiction in relation to migration matters should be of serious concern to all who value the rule of law and rational approaches to the way in which court resources are to be applied.

Conclusion

This paper has sought to outline the essentials of the present judicial review process in respect of migration decisions and its connection to general principles of administrative justice. There are undoubtedly problems in the process due to the large and growing number of applications for judicial review. These are exacerbated by the present disconformity between the original jurisdiction of the High Court and the confined jurisdiction of the Federal

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23 At para 133.

24 (1999) 93 FCR 556.

25 Editorial Note: the High Court on 29 March 2001 upheld the Minister's appeal holding that there had been no breach of the bias rule: [2001] HCA17.

Court. The problems are unlikely to be solved by the enactment of more draconian privative clauses. That will merely heighten the disconformity. Real issues of fairness exist in the way the present system operates at a practical level in terms of notification of Tribunal decisions, the extent to which asylum seekers comprehend the decision that has been made in relation to them and, a fortiori, the extent to which they comprehend the limited nature of the judicial review process. Though it may be said that at a theoretical level, notwithstanding the practical problems referred to, Australia has a process for judicial review which complies with the requirements of the Convention, at a practical level that process sometimes approaches the farcical, as the Court is dealing with unrepresented litigants who do not speak English and have no idea of the nature of the process which they have invoked by signing a photocopied application in a detention centre. For the most part, legal aid is not available. It is only through the good offices of lawyers providing their services on a voluntary basis to represent applicants and thereby to assist the Court, that the situation is not a lot more difficult than it is at present. Our ability to deliver administrative justice to those who are acutely in need of it is being tested to the limits in connection with the judicial review of decisions relating to applications for protection visas.

ADMINISTRATIVE ISSUES IN REFUGEE LAW

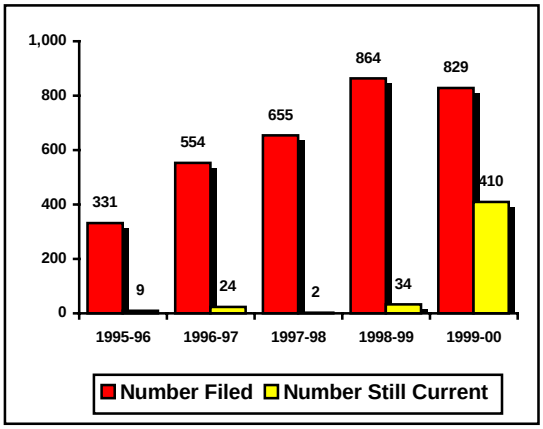
Justice R D Nicholson[*]

The words "Administrative Issues" in the title are chosen to distinguish the issues which will be discussed from issues relating to judicial review, which are addressed elsewhere in the program. To some degree the administrative and judicial issues overlap in their impact on the Federal Court of Australia. Here the focus will be on the impact of the applications for review in the migration jurisdiction of the Federal Court on management of the work of the judges and court staff. That jurisdiction arises under the *Migration Act 1958* (Cth) ("the Migration Act") which gives the Court jurisdiction to review decisions of the Refugee Review Tribunal ("the Tribunal").

Volume of applications

The Annual Report of the Federal Court of Australia 1999 - 2000 shows the following table in figure 6.7(a) at p 140:

Migration Act matters filed and current 1995-96 to 1999-2000



However, some matters were filed by parties under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("the ADJR Act"). This has occurred despite the fact that Part 8 of the Migration Act is an exclusive code. Arguably applications filed under the ADJR Act may evidence lack of representation of the applicants or the continued usage of outmoded documentation in places of detention.

From 1 July 1999 to 8 November 2000, the filings in Migration Act matters by State or Territory were as follows:

NSW	777
VIC	364
QLD	9
WA	141
SA	6
TAS	0
ACT	1
NT	0
TOTAL	1298

The appellate impact of applications is as follows. Appeals lodged by State or Territory between 1 July 1999 and 8 November 2000 were:

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[*] *Judge of the Federal Court of Australia.*

NSW	145
VIC	18
QLD	6
WA	15
SA	3
TAS	0
ACT	1
NT	0
TOTAL	188

In addition, there are five further appeals classified as "migration/refugee", making a total of 194 appellate filings in migration matters out of a total of 530 appeals. This constitutes 36.4% of the appellate work of the Federal Court.

From a judicial perspective, the advent of applications in any particular registry seems to depend less on good planning by either the Federal Court or the Department of Immigration and Multicultural Affairs ("the Department") than on the geographical location of applicants and/or their place of detention. Whatever the reason there can be no doubt from the above figures that the work of the Federal Court, particularly in Sydney, Melbourne and Perth now includes a very significant number of applications to review decisions of the Tribunal.

One feature of the applications for review of such decisions is that normal inhibitions against initiation and continuance of court process has little or no application in respect of them. The sanction of costs is not meaningful in relation to persons who have arrived on the shores of Australia without any resources and who seek to claim refugee status. Additionally, there is the inbuilt motivation of any unsuccessful applicant for such status to avoid or defer repatriation to the feared country of origin and so to seek review of the decision of the Tribunal and, if not successful, to further appeal. Each step holds the possibility that some political change may occur in the feared country which will remove the basis for that fear, whether well-founded or not.

It follows from the volume of applications that there is an increased need for expertise in migration matters on the part of Court staff.

Limited jurisdiction

The limited jurisdiction of the Federal Court in relation to applications under Pt 8 of the Migration Act has been dealt with comprehensively elsewhere (Robert Beech-Jones, "Pt 8 of the *Migration Act 1958* (Cth) and the decisions in *Abebe* and *Eshetu*"[1]). The jurisdiction is confined by Pt 8. It is limited to "judicially reviewable decisions". The grounds of review are significantly narrower than those available under s 5 of ADJR Act and s 39B of the Judiciary Act 1903 (Cth). They are the grounds, now becoming well known to counsel, in s 476(1) of the Act. Applications are restricted by the time within which they must be made.

There are two administrative impacts of this regime of limited jurisdiction. The first is that it forces counsel in the presentation of applications to craft the approach within the limited jurisdiction. Submissions that may have been perhaps more effectively or comprehensively made on another basis are made to some degree to assume the permitted form. The second impact is that judges are constantly dealing with a relatively narrow range of issues, with the focus of argument being on whether facts fall within the permitted narrower range.

1 (2000) 24 *AIAL Forum* 32.

One predicted outcome of the limitation of jurisdiction was more extensive focus on the ground of actual bias: see *Sun Zhan Qui v Minister for Immigration & Multicultural Affairs*.[2] There Wilcox J said:

> [I]f *Eshetu* is overruled, disappointed applicants will have no choice but to search among those few grounds for an arguable ground of review. It will not be surprising if, in their disappointment at the tribunal's decision, many claim actual bias. The result will be to substitute for an inquiry into the character of the decision an inquiry into the character of the decision-maker.

The ground has indeed been relied upon in recent applications to the Court but it is a difficult ground to make out and it is unlikely to be casually included in the grounds of a represented applicant.

Following the decision in *Minister for Immigration & Multicultural Affairs v Singh*,[3] there has also been an increasing use of s 476(1)(a) so far as it can be utilised with respect to the procedural requirements of s 430 of the Act. This involves intense focus on determining what are the material facts. *Singh* gave the following guidance on that issue at par 56:

> Accordingly if a decision, one way or the other, turns upon whether a particular fact does or does not exist, having regard to the process of reasoning the Tribunal has employed as the basis for its decision, then the fact is a material one. But a requirement to set out findings on material questions of fact, and refer to the material on which the findings are based, is not to be translated into a requirement that all pieces of conflicting evidence relating to a material fact be dealt with: *see Re Minister for Immigration & Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at pars [65] and [67].
>
> Thus whilst materiality will not necessarily depend upon how an applicant chooses to present the issues, we do not agree that the only material facts are those on which the Tribunal is legally required to make findings: contrast *Xu v Minister for Immigration & Multicultural Affairs [1999] FCA 1741* at pars [49] and [51]. A fact is material if the decision in the practical circumstances of the particular case turns upon whether that fact exists.

Nevertheless, what this means in the context of a particular case opens up room for extensive factual submissions.

To some degree the impression is left that the present intense scrutiny on how the Tribunal went about its functions is antithetical to the concept that the reasons of tribunals should not be examined with an eye too finely attuned to error. In *Minister for Immigration & Multicultural Affairs v Wu Shan Liang*,[4] Chief Justice Brennan and Justices Toohey, McHugh and Gummow stated:

> It was said in (*Collector of Customs v Pozzolanic* (1993) 43 FCR 280) that a court should not be "concerned with looseness in the language…nor with unhappy phrasing" of the reasons of an administrative decision-maker. The Court continued: "The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error.[5]

The Court continued:

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2 (1997) 151 ALR 515 per Wilcox J at 551.

3 (2000) 98 FCR 469.

4 (1996) 185 CLR 259.

5 At 272.

> These propositions are well settled. They recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed. In the present context, any court reviewing a decision upon refugee status must beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision.

Other areas on which there is a discernible increased focus of argument, perhaps encouraged by the limited jurisdiction, are in respect of the application of the prohibition against refoulement in Article 33 and the Tribunal's examination of the precise conditions and circumstances under which repatriation to a third country would take place.

The limited jurisdiction has of course also had its impacts elsewhere than the Federal Court. The High Court of Australia has found that its original jurisdiction pursuant to s 75(v) of the Australian Constitution is constantly enlivened in respect to issues which now cannot come before the Federal Court in the exercise of its limited jurisdiction. Justice McHugh in *Re Minister for Immigration & Multicultural Affairs; Ex parte Durairajasingham*[6] said:

> In *Abebe v Commonwealth*, Gleeson CJ and I pointed out that:
>
> [T]he parliament has chosen to restrict severely the jurisdiction of the Federal Court to review the legality of decisions of the Refugee Review Tribunal. That restriction may have significant consequences for this court because it must inevitably force or at all events invite applicants for refugee status to invoke the constitutionally entrenched s75(v) jurisdiction of this court. The effect on the business of this court is certain to be serious.

His Honour continued:

> This case is but one of many applications for prerogative relief against the tribunal currently pending in this court. Its procedural history vividly illustrates that the serious effect on the court's business, which Gleeson CJ and I predicted in *Abebe*, is now being experienced. The case also demonstrates, if demonstration were necessary, that the effect of restricting the jurisdiction of the Federal Court to hear applications by persons claiming refugee status will often be to produce two hearings instead of one (a partial remitter to the Federal Court and a hearing in this court), to lengthen the time taken to dispose of those applications and to use the time of the federal judiciary inefficiently. A single judge of the Federal Court can, subject to appeal, dispose of a case in the Federal Court. A justice of this court can only dispose of an application by holding that the applicant has not overcome the low hurdle for the grant of an order nisi. Even then his or her decision may be subject to appeal. If an order nisi is granted, the matter can only be disposed of by the Full Court of this court unless it "appears to be one of urgency".
>
> The effect of restricting the jurisdiction of the Federal Court must inevitably impose on the justices of this court the dilemma of choosing between two unpalatable alternatives. The first alternative is to give preference to the applications of persons held in custody and claiming refugee status to the detriment of the court's general constitutional and appellate jurisdiction. The second alternative is to continue to give preference to the constitutional and appellate jurisdiction of the court with the result that claimants for refugee status are detained in custody for longer periods than is likely to have been the case if the Federal Court had retained all of its jurisdiction to deal with refugee cases.

His Honour concluded:

6 (2000) 168 ALR 408 at 409.

> The reforms brought about by the amendments are plainly in need of reform themselves if this court is to have adequate time for the research and reflection necessary to fulfil its role as "the keystone of the federal arch" and the ultimate appellate court of the nation. I hope that in the near future the parliament will reconsider the jurisdictional issues involved.

Form of application

Most applicants for refugee status are, at least at the time of lodging their application, unrepresented by legal expertise and unadvised by it. The result is that they utilise such form of application and standard statement of grounds as may be available in the place of detention or application.
One of the difficulties with this is that those forms have been either adapted from other cases or formulated with reference to different matters. For example, the forms that have been used by detainees from Port Hedland place heavy reliance upon both limbs of s 476(1)(e) of the Act. The true case for the particular applicant may not necessarily lie in either or one of those limbs.

This is exacerbated by the fact that the applicants are not necessarily familiar with the language in which the application form is drafted. Consequently, they are both linguistically and legally inhibited in making their choice of the case to pursue before the court.

That does not preclude them from subsequently amending the application as permitted by Order 13 r 2(1) of the Federal Court Rules. However, should they remain unrepresented, their case goes to the court in ill-chosen terms.

Would it be preferable to have an application form in simple terms with the opportunity for grounds to be lodged subsequently? Alternatively, for a subsequent opportunity to be given to the Court to assist an applicant in formulating relevant grounds if remaining unrepresented?

Obtaining representation

Sometimes from the environs of the place of detention an applicant will obtain knowledge of the need or desirability of applying for legal assistance as well as forms to enable this to be done. Such forms do not appear to be routinely made available. Opportunity may need to be given for them to be made available to a detained applicant and for him or her to have assistance in completing them if linguistically unable to comprehend them. To this extent an additional burden may be cast on the respondent's representatives either to instigate the occurrence of these arrangements or to assist with them.

An application for such assistance is a relevant consideration to the exercise of the Court's discretion pursuant to O 80 of the Federal Court Rules.
That Order relevantly reads:

> 3 Pro Bono Panel
>
> The Registrar may maintain, in each District Registry, a list of persons:
>
> (a) who are legal practitioners in the State or Territory where the District Registry is located; and
> (b) who have agreed to participate in the scheme.
>
> 4 Referral to a legal practitioner

(1) The Court or a Judge may, if it is in the interests of the administration of justice, refer a litigant to the Registrar for referral to a legal practitioner on the Pro Bono Panel for legal assistance.
(2) For subrule (1), the Court or Judge may take into account:
  (a) the means of the litigant; and
  (b) the capacity of the litigant to obtain legal assistance outside the scheme; and
  (c) the nature and complexity of the proceeding; and
  (d) any other matter that the Court, or Judge, considers appropriate.
(3) A referral to the Registrar is effected by the issue of a Referral Certificate in accordance with Form 161 in relation to the litigant.

(4) If a Referral Certificate has been issued, the Registrar must attempt to arrange for the legal assistance mentioned in the certificate to be provided to the litigant by a legal practitioner on the Pro Bono Panel.
(5) However, the Registrar may refer a litigant to a particular legal practitioner only if the practitioner has agreed to accept the referral.

5 Kind of assistance

A referral may be made for the following kinds of assistance:
(a) advice in relation to the proceeding;
(b) representation on direction, interlocutory or final hearing or mediation;
(c) drafting or settling of documents to be filed or used in the proceeding;
(d) representation generally in the conduct of the proceeding or of part of the proceeding.

Since the introduction of that Rule on 7 December 1998, 42 Barristers and 12 firms of solicitors in Western Australia have assumed membership of the Pro Bono Panel. Nationally the figure is 250 barristers and 98 firms of solicitors.

The following table sets out the numbers of referrals made since the scheme commenced, the number of migration referrals since the scheme commenced and the number of referrals in 2000.

State/Territory	Date at which information compiled	Referrals since scheme commenced	Migration referrals since scheme commenced	Referrals in 2000
ACT	2/00	4	na	na
New South Wales	30/6/00	22	15	10
Queensland	1/8/00	22	3	16
South Australia	-	-	-	-
Tasmania	2/00	1	na	na
Victoria	2/11/00	80	52	52
Western Australia	13/11/00	74	64	52

In 1999 in Western Australia, therefore, a total of 22 referrals were made under O 80 subr 4(3). From 1 January 2000 to 13 November 2000, 52 referrals had been made, all but five of which were made in respect of immigration matters in Western Australia. It can be safely assumed that a large burden is therefore falling on the members of the Panel in respect of unrepresented applicants. The most interesting statistic concerning the work of pro bono panellists would be that which showed the extent to which their work in advice or drafting itself has led to concessions by the respondent.

From a judicial perspective, whether or not an applicant is represented can clearly have a major impact. As previously mentioned, it can affect the grounds upon which the case for an applicant relies. It reflects in the extensiveness of argument. Such is the difference that it may be suspected that an applicant without legal assistance may have a case which even a

court with an eye tuned to the possibility will not appropriately locate in the absence of identification of the issue and argument directed towards it.

Interpreters

Enough has already been said of the linguistic difficulties faced by refugee applicants to highlight the importance of proper interpretation to the operation of the jurisdiction of the Federal Court in relation to them. The role and the need for interpreters is important in the formulation of procedural orders in the directions hearing; in the presentation of an unrepresented applicant's conception of his or her case; in the conduct of the hearing; in the comprehension of the reasons and in the formulation of orders.

Communication with the courts is therefore a significant issue for applicants. It may be complicated by a difficulty in locating an interpreter experienced in the particular language or dialect of the applicant.

Factors identified by the Federal Court to be taken into account in connection with issues relating to interpretation include the following:

- not all interpreters can read the language: the terms of their employment with Translating and Interpreting Service ("TIS") is in relation to the spoken word;
- translating is more expensive than interpreting;
- turn around of translating is 10 days for non-urgent matters, 3 for urgent;
- if documents to be used at directions hearings are to be forwarded to the interpreter, they have to be forwarded to TIS at least 10 days before the appointment and an additional charge would apply;
- their interpreting and translating service at the various detention centres is informal;
- often the time allowed for the interpreter and applicant to go over material to be used at the hearing has been spent in silence.

Directions hearings

Experience has shown that the respondent Minister's representative has played a significant part in assisting the Court and the applicant in formulating procedural directions for the future conduct of the matter. While initially these directions program a matter through to hearing, adjustment is needed where an applicant has not previously had the opportunity or understood the opportunity to apply for legal aid and obtain representation.

Applicants may sometimes be assisted by persons in detention who share with them the same language. Alternatively, they may be assisted by an English speaking friend.

Directions are normally forwarded to the place of detention of an applicant. However, if the applicant is unable to read the English language it is necessary to have the interpreter, who would otherwise be present at the directions hearing, interpret the document to the applicant. Sometimes draft directions are faxed to an applicant at a place of detention and either the fax does not reach them in time for the hearing or they fail to bring it to the hearing. The latter is of no import if the document is in any event interpreted to them. Applicants frequently appear without papers, having left them back in their room.

There is a proposal under consideration in the Federal Court that initial programming directions could be subsumed as part of case management arrangements. This may be an appropriate development. Considerable judicial time is utilised while matters are interpreted at this preliminary stage to unrepresented applicants. However, in the event that references are required to a pro bono panel pursuant to O 80 of the Federal Court Rules, above, that

would require the matter to be remitted to a judge for consideration of that aspect. There would seem no reason why that could not be done on the papers provided there was appropriate evidence from the directions hearing to enable the exercise of the judicial discretion to make the referral in accordance with the requirements of the Rule.

Because they are frequently in detention at the time of lodgement of their applications for review of the decision of the Tribunal, applicants have rarely attended a directions hearing in person. Communication with them has occurred by teleconference. More often than not the interpreter is linked from another place than that at which the applicant is then located. With the introduction of the system of temporary protection visas for intending refugee applicants, this may change.

There is a repetitive but understandable difficulty in having unrepresented applicants comprehend the difference between an error of fact and an error of law. Directions hearings have endeavoured to accommodate this by giving an applicant the opportunity, in lieu of an affidavit, to file a written statement stating in the applicant's own way what he or she sees as the difficulties with the decision of the Tribunal. The Court and the respondent are then left with the task of considering which grounds of the Court's jurisdiction are enlivened by the statement.

Associates are not infrequently rung by refugee applicants seeking information and advice. This of course is not advice which they can deliver.

Consent orders requiring reconsideration by the Tribunal

In *Kovalev v Minister for Immigration & Multicultural Affairs*[7] French J made a consent order in terms which set out the basis upon which the matter was remitted to the Tribunal for reconsideration according to law. He had declined to make an order which did not specify that basis. His reason for requiring the specification was, essentially, that in making a consent order the Court must have regard to the limits of its power and the basis of its exercise. In so deciding, French J acknowledged that there was said to be some difference in the approach taken by the judges of the Court to the making of consent orders of that kind. The decision in *Kovalev* was not appealed by the respondent Minister.

In *Kapagama v Minister for Immigration & Multicultural Affairs*[8] Whitlam J heard submissions from experienced senior counsel for the respondent Minister in opposition to the formulation of orders making the specification as in *Kovalev*. In the result, the orders in *Kapagama* were crafted to delete reference to the words "according to law" and no specification occurred. Principal among the submissions by senior counsel was that the authority to remit for reconsideration in s 481 of the Migration Act removed any basis for the application of the reasoning in *Kovalev*.

There remains a difference in approach to this issue among judges of the Federal Court. The point has arisen in a case and may require resolution.

Hearings

In the case of an unrepresented applicant attendance at a hearing will be by way of video-link. Video courts are now established in the Federal Court which enable the case to be conducted as near as possibly to the mode which would apply should the applicant be present personally in Court. Again, the role of the interpreter is crucial.

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7 [1999] FCA 557.

8 [1999] FCA 1881.

Order 33 r 15 of the Federal Court Rules provides:

> 15(1) Where a party to a proceeding before the Court is in lawful custody, the Court may on the request of that party, or of any other party, or of its own motion make an order requiring production of that party and may make such order in relation to the continuing custody of that party as may in the opinion of the Court be appropriate.
>
> 15(2) An order made under sub-rule (1) may if the Court thinks it appropriate be in accordance with Form 46B in the First Schedule.

To date it has not been necessary to make "bring up" orders to assure the attendance of a party from a prison or detention centre where that is necessary. A letter of request has proved sufficient. Additionally, Registry staff have established a good working arrangement with staff of the various detention centres and are in frequent contact with them.

Where an applicant has legal representation there is no legal need for personal attendance or for any teleconference or video-link to the court. Considerations of expense preclude the provision for such a link when representation is available and being utilised.

Hearings are usually conducted in the capital city nearest the place of an applicant's detention. However, it sometimes occurs that an applicant is in detention in (say) Port Hedland and a hearing is to be located in (say) Sydney. Where there are migration agents acting for the applicant at the place of hearing in that other city or there are relatives of the applicant located there, it may be the case on some occasions that an administrative decision by the Department may be made to transport the applicant to the place where the hearing occurs.

Hearings normally tend to last in the order of two hours. Where interpretation is necessary that occupies considerable time. Likewise, detailed examination of the reasons to bring them within the limited grounds of jurisdiction can also be time consuming. Significant time impacts in this respect can be assisted where counsel puts in writing in advance details of particular perceptions of the reasoning of a Tribunal. This enables both the Court and the respondent to prepare appropriately.

Reasons

One of the impacts on the judiciary of the volume of applications in this jurisdiction is that the members of the judiciary acquire an increasing familiarity with what may be described as the world's trouble spots. Statistics included in the Refugee Review Tribunal's Annual Report 1999 - 2000 indicated that the top ten countries for new applications in that year to the Tribunal were: Indonesia (19.2% of all applications lodged), China (14.5%), Philippines (10.3%), India (8.3%), Malaysia (4.7%), Sri Lanka (3.8%), Bangladesh (3.5%), South Korea (3.2%), Iraq (2.5%) and Fiji (2.4%). Impressionistically, hearings in the Court tend to bring a focus on issues concerning Iraq, Afghanistan and Sri Lanka. It may be that the more complex the issues the more likely applications relating to applicants from those areas will reach the Court.

One feature of the increasing volume of applications is the impact they have on judicial knowledge of country information. Frequency of applications relating to a particular country requires increased advertence in the preparation of reasons to the precise information which was before the Tribunal the decision of which is under review. That, of course, must be a far greater problem for the Tribunal where there is substantially greater likelihood of the same Tribunal member hearing a volume of applications from the same country.

Reasons are sometimes given orally but, particularly where it is necessary to respond to detailed submissions, reasons will be given after reservation and in writing.

Written reasons themselves are not interpreted to an applicant. Where oral reasons are delivered it is possible to have them interpreted to the applicant depending on the time available. There is presently a gap in enabling an applicant to understand the reasoning of the Court should he or she desire to do so.

Appeals

On appeals, the issues of whether the appellant is represented and whether there is an interpreter required retain their significance.

Just as difficulties arise in the formulation of the application itself in the case of an unrepresented applicant, so difficulties arise in the formulation of grounds of appeal. This is quite critical to the progress of the appeal. Likewise, on the hearing of the appeal the articulation of the appellant's case is fundamental to the likely success of the appeal.

There is further equally critical preliminary issue. Who is to prepare the appeal book? It is similar to the sort of issue that arises in a court of criminal appeal in relation to appeals from sentencing by imprisoned appellants. At present, no resource is made available to assist with it in the migration jurisdiction.

The Convention and the future

Applications to appeal the decision of the Tribunal refusing refugee status to an applicant are a significant present proportion of the Federal Court's jurisdiction. Necessarily, the exercise of that portion of its jurisdiction constitutes an avenue of considerable expense for the Court in relation to its staff and interpreters and for others in relation to counsel where they are appointed.

Whether or not such representation should be made available to such applicants or appellants is an issue of policy in the political arena. On the one hand it is consistent with Australia's claim to be a civilised country reflecting the application of the rule of law. On the other, it is resource intensive and occupying an increasing proportion of the judicial time, primary and appellate, of the Federal Court.

The vesting of migration jurisdiction in the Federal Court occurs in application of Australia's obligations under the Refugees Convention. Article 16.1 provides "a refugee shall have free access to the courts of law on the territory of all Contracting States". In Australia this cannot be satisfied by reference to the Tribunal alone for Ch III of the Australian Constitution makes clear the permitted ways in which the federal judicial power can be exercised. For Australia to avoid the administrative impacts of refugee applications on the High Court and Federal Court it would have to resile from the apparent obligation arising under Article 16.1.

Other pressures exist on the Refugees Convention. They have arisen world-wide as a result of the unprecedented movement of people and consequent escalation in the number of refugee applications. Australia does not stand alone in measuring the impact of the Refugees Convention on its institutions, including the Courts and the Tribunal. These global pressures may well lead to political debate on the future form of the Convention. In the meantime, short of resilement from the obligations it has accepted, Australia has no choice but to address the issues experienced by its relevant judicial institutions, to which this contribution to the Conference has directed some attention.