

**International Protection and Refugee Law:
Contemporary Issues Relating to the
Australian Refugee Determination System**

SPEECH TO AILA CONFERENCE

JUNE 2004

By David Bitel, Managing Partner, Parish Patience Immigration – Sydney, Australia

INTRODUCTION AND BACKGROUND

You may have probably heard much about Australia's quite controversial immigration laws in relation to refugees. But first some background.

As a federal jurisdiction, the Constitution of Australia preserves to the Commonwealth Parliament the power to make laws in relation to immigration and aliens.

A starting point for an understanding of the Australian migration laws brings us back to the law pre-1989. Prior to then, the 1958 Migration Act provided that the Minister could do as he (and then they were all men) pleased in terms of the entry or stay of people to Australia and there were very broad, if not absolute discretions vested in the Minister in the application of the law.

In December 1989 the law was subject to significant and radical change. The new regime contained a very complex Act and a regulatory regime which attempted to encapsulate in the Regulations made pursuant to the Act the previous policy regime. A primary intention was to remove the discretions so that there would be certainty and consistency in the administration of the law.

This legal revolution has been a mixed success. Whilst there was certainty, it has also led to inflexibility and many problems.

One of the reasons for the changed law had been the significant growth in immigration litigation in the late 1980s, in part as a consequence of three things: Firstly, the introduction of Freedom of Information legislation in Australia in the mid-80s enabled people to find out and get access to their Departmental files, and also required the Immigration and all other Government Departments to make public their policies, which previously had been kept secret. The second significant change in the early 80s was the introduction or codification of the administrative law remedies of judicial review under the Administrative Decisions (Judicial Review) Act. This Act provided for a simplified process of seeking access to judicial review. The third, in my view, significant change was a High Court decision in the case of *Kioa v West* (1985) 159 CLR 550. *Kioa's* case was seminal in Australian immigration jurisprudence because it basically held that aliens were entitled to the principles of natural justice. Therefore they could use the court system to protect and enforce their rights.

ABSENCE OF A COMPLEMENTARY PROTECTION REGIME

In consequence, in the late 1980s, there was a proliferation of applications for judicial review, largely over one particular section in the old Migration Act, Section 6A(1)(e). Section 6A provided the grounds by which people could apply onshore for permanent residence. There were five grounds, namely the partner ground, the parent ground, the refugee ground, the work sponsored ground and the "strong compassionate or strong humanitarian" ground. Many applications in the Federal Court lead to decisions where judges attempted to explain what those terms actually meant. This judicial activity, or as it was seen intermeddling in the affairs of the Executive, led to what has become a perennial conflict in Australia, and that is the attacks on the judiciary by the members of Parliament, in particular the Minister of Immigration, resulting from the conflict between the Executive and the Judiciary over their respective powers. The Executive declares it has the duty to make decisions in relation to migration, while judges consider they have the duty to interpret and explain the law and thereby to protect people's human rights in this area, usurping the Executive and the Parliament's powers.

The 1989 changes were a legislative attempt to overcome this power struggle. However, one of the big problems in the refugee and asylum area emanates from this change. While all the old rules were meant to be covered in this new regime, there was one significant omission. No regulatory regime was introduced to replace the Section 6A(1)(e) ground for the grant of

on-shore, strong humanitarian or compassionate stay in Australia, independent of the refugee system. Rather, that power was vested in the Minister. who was given a non-compellable, non-delegable power to enable people to stay, intended to be non-justiciable as well. Thus the Minister's absolute unfettered discretion determined which people stay. This was colloquially, but wrongly, called the "humanitarian power".

The law further provided that to access that Ministerial discretionary power, one had to go through the convoluted system of making an application for a visa, be refused, lodge an appeal to one of the three Tribunals which have been set up to deal with various different immigration appeals, be refused by that Tribunal and only then could one appeal to the Minister. An applicant could thus not appeal directly to the Minister.

As many of us foresaw, what happened was, a large number of people who in the past may well have been prime candidates for the grant of residence under the strong compassionate or humanitarian ground now could only get to the Minister by pursuing a refugee application. One of the main reasons they did that was because the filing fee for a refugee application was AU\$30, whereas the filing fee for most other applications was significantly more, and is at present almost AUD\$1800. Even now, this is one of the major concerns of many immigration lawyers: Australia still has no adequate system for complementary protection. A person is either approved as a refugee or if not approved as a refugee, one must appeal to the Minister to be able to stay. There remains no humanitarian and compassionate power vested in Departmental officers, nor even in the appeal Tribunals! European and British statistics indicate that many people who are not refugees are granted residence through one of the other humanitarian or complementary protection regimes. In Australia however, that cannot happen.

Most importantly, this regime has also has lead to many attempts to extend the definition of a refugee, especially in the social group context of the Refugee definition, and much consequential litigation.

REFUGEES AS A POLITICAL FOOTBALL

Now let us move a few years forward to the Tampa imbroglio in September 2001. I assume that you heard of the Norwegian ship "Tampa" which had been in Australian waters and was

diverted to pick up a group of largely Iraqi and Afghan asylum-seekers seeking to enter Australia from Indonesia on a boat which was sinking. The Australian government refused to let it return to Australia with the rescued refugees. It became an international incident. The Australian government used the incident to declare it will control the borders, and make the decision as to who enters the country.

Australia is one of the countries which has ratified the 1951 Refugee Convention and 1964 Protocol, which apply under Australian law, although they are not fully incorporated into Australian domestic law.

I consider the most contentious area in relation to migration has been, in Australia, for some years the issue of how to process refugee applications by persons arriving in Australia. On the one hand, you have the approach encapsulated in the statement which helped our very conservative government win the last national election in October 2001: "We will control the borders" was the election slogan of Prime Minister Howard.

In my view, this view is deceitful because it fails to make reference to the fact that the Refugee Convention is the one major exception to the right of a Government to control the borders, because, almost by definition, refugee flight and entry usually involves some feature of illegality. That point is ignored by our Government in the debate.

I should also make reference to the fact that Australia unlike almost every other Western democracy does not have a Bill of Rights. We don't have any international human rights legislation which binds Australia. We are not a party to any multilateral Treaty, like the European Court of Human Rights. There is also nothing entrenched in the Commonwealth Constitution. Although we are the party to many international human rights instruments, for example the ICCPR, CROC, Genocide Convention and Torture Convention, CERD, none have a binding legal effect on Australia. When complaints have been made under the ICCPR to the Human Rights Committee in New York, which is about the only avenue of extra-territorial human rights appeal that Australians have, the "views", and that's the technical term, of the Human Rights Committee are rarely accepted by the Australian Government. In most cases, they respond to the opinion of the Human Rights Committee with a somewhat sneering statement that that is their "view", but we have a different "view" and we won't

adopt their opinion or amend our laws. This is particularly the case where complaints have been made and decided in relation to Australia's controversial mandatory detention regime.

And so, Government is not accountable in any way to the international community. Indeed in the late 1990s, the populist Pauline Hanson One Nation Party, now almost defunct, had as one of its major platforms the withdrawal of Australia from the United Nations!

The refugee debate has been the most significant human rights debate that I can recall in Australia on an extended basis over many years, and it became particularly so with the election of the Howard Liberal (Conservative) Government at the end of 1996. Australia has always had a very proud record of resettling refugees into Australia pursued without disagreement by both political Parties. We also had a system where those who were granted refugee status in Australia followed a separate stream which did not have any bearing on those who came to Australia through their offshore resettlement process, operated in conjunction with the UNHCR. We still resettle annually more refugees on a per capita basis than any other country.

One of the first acts of the Howard Government was to link the two programs, and it has led to many of the problems which we now have in Australia in this area of debate, because for every person who was granted refugee status in Australia, it would mean one less refugee who came in from overseas. As a consequence, people began to refer to the "refugee queue", which is an absolute misnomer. It has set refugee community against refugee community, most notably the Afghans, many of whom had been trying for years to bring out their relatives from the camps in Pakistan, and now view those Afghans who have come to Australia and claimed onshore asylum and who have then been granted refugee status, (and approximately 95% of Afghans who came to Australia as asylum-seekers, were granted refugee status) as queue jumpers.

If I asked you how many people came to Australia on boats or illegally in the last 13 years, if you listen to the paranoid statements of our politicians, you'd assume it would run into the tens of thousands, if not more. The reality is that something less than 15,000 people have come to Australia in 13 years "illegally". That is a tiny number by international standards. So we are not talking of any significant numbers, but they have been a very successful political tool for the Government which has essentially enabled it to win the last election.

CONTEMPORARY REFUGEE POLICIES IN AUSTRALIA

Australian law was amended a few years ago to provide for two streams of onshore refugee applications categorised by the means of entry to Australia: those who enter Australia lawfully and apply for refugee status, and those who have come to Australia unlawfully, or with false documentation. The former are eligible to be granted permanent residence as refugees, while the latter only receive three-year temporary protection. The Government has been very careful to differentiate the two programs, because the ones who come lawfully and then apply are considered the "good" applicants, while those who arrive unlawfully are the "baddies" in the picture.

But that is not really the end of the story. Let me refer to policies relating to the "good ones", the ones who have lodged their applications after having come to Australia lawfully and see how the government has dealt with those. There have been a series of significant regulatory and legal changes to the way in which applications by these people have been processed, designed to make life more difficult for them during the processing period.

One of the first changes in this area was the provision that where a person made a refugee application after having been in Australia for more than 45 days, then that person is not entitled to permission to work at all and by corollary to access Australian Government funded health care assistance whilst the refugee application was being processed (with the only exception where no primary decision on the application was made within six months of the date of lodgement of the application). That has created untold hardship amongst asylum seekers and has enabled them to be subjected to all forms of abuse by employers and of course has also made them subject to regular harassment by compliance officers, with people being arrested and taken to detention centres, and only released on payment of huge bail conditions which stress the no work condition (the bail range seems to go from AUD\$15,000-\$30,000 to enable release pending assessment).

Asylum seekers are not entitled to social security with the exception that there is a Government payment administered by the Red Cross of a very small sum which is paid to asylum seekers who are in the community and evidence significant hardship. Finally, of course, there is no legal aid to applicants, which is particularly problematic for those seeking to prosecute cases of judicial review.

Now for the illegals – those who have come unlawfully. There will of course be mandatory detention for all persons detained at the border (on ship or plane). Two hundred and odd years ago, Australia was created as a penal colony and our Immigration Department seems to maintain the view that we are still a prison colony. Such applicants are sent to a detention centre, usually in Woomera or Port Hedland in the remotest parts of the country, in the desert regions, and remain there until a decision has been taken to grant refugee status. However, should a decision not be taken to grant refugee status, the person stays there until he or she leaves the country. It doesn't matter whether the applicant is an adult or a child. Indeed, there have been thousands of children who have been in detention centres all over the country,. In maintaining this policy, our Government ignores the Convention on the Rights of the Child and the fact that children are not supposed to be detained with adults. It is in their best interests according to the distorted reasoning of our former Immigration Minister, because if they are let out, who would look after them? The Human Rights Commission in Australia has been looking at the issue of children in detention and in a report published in May 2004, has been severely critical of the Government. Based on past performance, we can assume what the Government's response is going to be to its recommendations.

I refer to one decision of the Full Court of the Federal Court in *MIMIA -v- Al Masri* [2003] FCAFC 70 (15 April 2003), a very interesting decision. Mr Al Masri is a Palestinian who had been refused refugee status in Australia and who indicated he was prepared to return home. However, the Government had been unable to find a country which would agree to take him. Israel wouldn't take him, Syria wouldn't take him, Lebanon wouldn't take him, no country would take Mr Al Masri so he was stuck in indefinite detention in Australia. He appealed to the Federal Court and the Court in what became the first significant recent chink in the armour of mandatory detention found in the particular circumstances of this case that it was unlawful to detain people indefinitely.

You can imagine the outcry from our learned politicians who immediately rushed legislation into the Parliament to overturn the decision to give them the right to detain people indefinitely. The Minister also appealed the decision to the High Court of Australia, the highest court in the country. In the transcript of the hearing there was a fascinating exchange between two judges of the High Court, Justice Michael Kirby and Justice Callaghan. Callaghan J says to Counsel for the applicant: "You're always complaining about leaving

people in detention. What's the matter with the detention centres?" Kirby J replied "I guess they would like to be out. Naturally they don't like to stay in gaol." Callaghan: "What's the matter? If you let them out then they work illegally." Kirby: "I assume they've got to feed themselves." Callaghan: "Well, that's why they should stay in detention, at least they get a feed."

If our High Court Justices think like this, the views of our politicians are understandable. As an aside, the Government resolved Al Masri's problem by finally removing him to a country which agreed to take him, and the High Court then resolved the case by making no decision, on the basis the applicant had left the country!

In addition to mandatory detention, we have developed other significant interdiction policies. These include:

1. Sanctions against carriers for bringing people unlawfully to Australia. Let it be understood, they are seriously applied.
2. Since 1999, we have had a temporary visa regime for anybody who comes to Australia unlawfully. Such persons, if approved, will only be granted a three year temporary protection visa. At the end of the three years, their case is subject to review and the applicant must establish that circumstances still exist back home to justify the grant of permanent protection. Note, the onus is on the applicant, not the Government. Further, persons who hold temporary protection visas are entitled to work, but are not entitled to any Government benefit (except special benefits), are not entitled to any English language training, and for many, most importantly, are not entitled to any family reunion. Indeed, if they leave the country to see a sick spouse or children overseas, the visa holder loses the right to return to Australia! As this is not enough, Government funded agencies have been forbidden to provide support or assistance to temporary protection visa holders, with the threat of defunding if they breach this edict, and exercise a degree of compassion.
3. The seven day rule was imposed. Essentially, if a person arrives in Australia by travelling through another country and resided in that other country for more than seven days, then they cannot be granted a permanent protection visa at all. They will

only be entitled to indefinite reviewable temporary protection visas. Fortunately, the Government has recently announced it will review this particularly iniquitous law.

4. The above laws are not considered sufficient to discourage people coming to Australia illegally. After the *Tampa* crisis, the Government developed the “Pacific solution”. The *Tampa* people were sent either to Nauru, a bankrupt island state in the Pacific or to Manus, which is an island in Papua New Guinea about 400 km north of the PNG coast. Many of the people who went there got seriously ill. A significant proportion of the *Tampa* people who languished in those two islands for many years, have been found to be Convention refugees and have been brought either to New Zealand and been granted permanent residence or to Australia and have been granted temporary visas. The last Manus refugee, a Palestinian, arrived in Melbourne two weeks ago, after spending years there at huge expense to the national budget.

5. But the Pacific Solution wasn't enough, because a few boats did manage to get through to islands close to Mainland Australia. So the Government devised the Excision policy, which provided for the excision from Australia for the purposes of the Migration Act of multitudes of Australian islands along Australia's coast. Persons arriving on these islands cannot make an application for refugee status in Australia. Last year, 14 Kurds from Turkey arrived in Melville Island (not a small island – but a very large island north of Darwin) and were walking along the beach there when found by locals. The Government was faced with a quandary what to do with them, so what they did was to retrospectively excise Melville Island from Australia. But the problem is – this all happened on the same day by the way – the island was excised in the afternoon but the decision was deemed to take place from the midnight of the night before when the Kurds arrived. The issue with those on Melville Island is that they had actually managed to talk to somebody and indicate they wished to apply for refugee status. The Government's next response in absolute breach of Australia's obligations under the Refugee Convention was to put them back on the boat that had brought them and have the Royal Australian Navy escort them at huge expense to the Australian public back to Indonesia. Now, Indonesia is not a signatory to the Refugee Convention. In Indonesia they were interned and then returned to Turkey. This is a case of direct refoulement of people who had sought Australian protection. For the first time that I can recall it led the UNHCR to make a public statement stating

Australia was in breach of its obligations under the Convention, to which the Australian Government was "That's your view - it's not our view." - the usual response! We had descended to new lows in public accountability and morality.

6. There have been other Government initiatives designed to prevent refugees coming to Australia. We now position migration officers at all entry airports in Asia, and they have the power to conduct an inspection on people boarding incoming flights. Not infrequently, people are prevented from boarding flights.
7. For those who have made it lawfully on a plane, and on arrival approach an immigration officer and request "I want to apply for refugee status", that is considered not enough to enliven Australia's obligations under the Refugee Convention to enable the person to make an application for refugee status in Australia. The would-be applicant is then taken aside and questioned by a migration officer at length to justify why he or she is a refugee. Unless something is said which pleases the officer, the applicant is returned to the country last exited. The law contains a specific legal fiction that the person has not legally entered Australia unless he or she has been immigration cleared. That happens to about 400 people a year, according to statistics I last heard. To my knowledge, no statistics are kept on how many people made claims and were returned notwithstanding. This practice has been going on for many years. I consider it a direct case of refoulement of potential refugees. It has never been the subject of serious public comment.
8. Finally, the definitional aspects in relation to refugees has been circumscribed under Australian law. New sections have been added to the Act which have the effect of declaring that persecution is not persecution for the purposes of the Convention unless the act complained of is an essential and significant reason for the persecution and it involves serious harm to the applicant. There also has to be an element of systematic persecution. Further, the legislation now permits adverse inferences in relation to a person's claims, if the person fails to provide information on oath or affirmation, or cannot provide a reasonable explanation for the absence of any identity document. There are also some new sections which limit the definition of the term "social group".

THE REFUGEE STATUS DETERMINATION PROCESS (RSD)

The RSD process in Australia has been the subject of severe criticism.

A primary decision is made by an immigration officer, usually without interview, on the papers, and also usually without even an opportunity being given to applicants to obtain supporting evidence. Special so-called "natural justice" rules apply which oust and severely limit the usual administrative law principles. Needless to say, most applicants are declined at first stage.

Applicants then have the opportunity to appeal to an inquisitorial and supposedly independent Tribunal, consisting of single member panels who conduct closed door hearings.

I now make reference to the political stacking of our Refugee Review Tribunal. The former Minister for Immigration on three occasions of which I am aware publicly stated that if Tribunal members made decisions that he didn't like they would not be reappointed. For quite a while, the Members had only one year renewable appointments. Their decisions during that period were closely monitored to make sure that they had the requisite number of refusals and if they had too many approvals they were not reappointed. There have been some members of the Tribunal who have said that there is actual political interference on the decision making of the RRT. Whether that is true or not I cannot confirm. Most decisions of the Tribunal are not all published – only about 20% of Tribunal decisions are published so there is no way of independently vetting what is actually going on in the RRT. Accountability, transparency and independence are not concepts one can safely say apply to our RRT.

There are some members of our Tribunal who have an almost 100% refusal rate of applications. Now that would seem an impossibility, but it's a fact. The statistics are that 97% of Iraqis and 95% of Afghans have been found in recent years to be refugees. On average 15% to 20% of decisions of the RRT are favourable to applicants, yet a few Members have almost never found a refugee amongst all their cases. It is just extraordinary.

JUDICIAL REVIEW OF REFUGEE DECISIONS

The next thing which I come to is the very serious issue of judicial review. The Government has not been satisfied with all the attempts made to prevent refugees from entering Australia and making claims. So as part of the *Tampa* package, legislation was surreptitiously introduced to exclude all judicial review of migration decision by the introduction of a “private clause”. A privative clause in general terms is one which validates what might otherwise be an invalid decision. Fundamentally, the effect of the privative clause is that unless one could establish that the decision that was taken by the Tribunal or primary decision maker was a non bona fide attempt by the decision maker to exercise his/her power, or that it didn't relate to the subject matter of the legislation, or was not reasonably capable of reference to the power given to the decision maker, (all very technical and exceptionally narrow grounds for review) no appeal could be made. There was no right to review the decision on the grounds of inter alia a denial of natural justice, jurisdictional error or procedural fairness. The privative clause applied to all migration decisions, not only in the refugee area. Even if, as was admitted by the Government in argument at the hearing in the case, I am going to refer to, it was established that the decision maker refused the decision because he/she had solicited a bribe which the applicant refused to pay. That was the particular scenario which was put by one High Court Judge in the case of *Plaintiff S157/2002 v Commonwealth* (2003) 77 ALJR 454 through the Minister's Counsel. He asked, “Does that mean you say that your privative clause would validate that decision?” and received the reply “Yes, it would.” My firm decided that we would challenge this legislation. In a landmark decision, one of the most important High Court decisions dealing in the administrative law area in the last ten years, the High Court sidetracked the constitutional arguments we had raised by declaring that the private clause only applied to valid decisions, and those infected by jurisdictional error were outside the scope of the clause. A neat formula! The definition of jurisdictional error is broad and applies for example where the decision maker fails to identify a wrong issue, to ask itself the main question, to ignore relevant material, to rely on irrelevant material or at least in some circumstances to make an erroneous finding or to reach a mistaken conclusion. The problem remains that the law in Australia is still not settled by S157 because Parliament subsequently passed another law amending the Migration Act to exclude judicial review for the denial of procedural fairness! The law in this area remains very unclear in Australia.

CONCLUDING REMARKS

I conclude by referring to a few other significant issues in Australia.

To quote former Minister Ruddock in a speech which he gave to the Foreign Policy Institute in London in December 2001, there are four essential core values underlying Australia's immigration policies. Firstly, we have a non-discriminatory policy. I reject this absolutely. I wrote a paper on that topic some years ago, expressing the view that we have a policy, which discriminates under every generally accepted indicator. Secondly, the policy applies to ensure that Australia's national economic interest is protected. That is certainly correct. The third core value is that Australians will be enabled to be reunited with their non-Australian partners or dependent children. This is basically true, although there are some significant exceptions, which it is outside the scope of this paper to address. The fourth core value is that Australia will contribute to its share of re-settlement of refugees. Certainly Australia does this. Nothing however about protection for onshore asylum seekers as required under the Refugee Convention. The Minister then goes on to stress that we must have the capacity to manage the movement of people across our borders in an orderly, efficient and just manner. This is the kernel of the policy. Minister Ruddock is now Australia's Attorney General, responsible for the implementation of the legislative response to the terrorism threat.

It is my view we really have not progressed very far since the time of the "hulks" on Sydney Harbour. Remember, in 1788, New South Wales, as we then were, was established by the UK as a prison colony. The Migration Act provides that everybody in Australia must have a valid visa. Persons who do not have a visa must be detained and then must be removed from the country. There is the power to release a person on a "bridging visa" pending removal or to enable them to lodge an application but subject to that they must be detained.

We have not progressed far in public policy terms since our colonisation.

**BIO-DATA
DAVID BITEL**

David Bitel is a partner of the long-established Sydney law firm Parish Patience Immigration, specialising in immigration law and administrative law. He is a registered migration agent and an accredited immigration law specialist by the NSW Law Society.

Since 1989 he has been a Judicial Member of the Equal Opportunity Tribunal of NSW, now the NSW Administrative Decisions Tribunal, Equal Opportunity Division.

He has been Secretary-General of the Australian Section of the International Commission of Jurists since 1983.

He has particular interest in the problems of refugees and has been President of the Refugee Council of Australia since 1995 and chairman of the Australian Refugee Foundation since 1998. He was founding chairman of the Refugee Advice and Casework Service. David received Austcare's Paul Cullen Humanitarian Award in 2002.

He helped to found - and subsequently was Chairman of - the Immigration Advice and Rights Centre (IARC), the Gay and Lesbian Immigration Task Force (GLITF), and the Australian Forum of Human Rights Organisations (AFHRO).

David has authored many publications, presented papers at legal conferences and has made many submissions to Parliamentary enquiries on issues relating to human rights, the rule of law and immigration and refugees. He is a consultant author of Butterworth's Australian Immigration Law Service.

He is and has been a member of various committees of the Law Society of NSW, the Law Council of Australia and the International Bar Association, the world body of lawyers. In 2000 he was appointed Vice Chair of Committee 14 (Migration and Nationality) of the Section on Legal Practice of the International Bar Association, and since 2002 he has served as Senior Vice Chair of that Committee. David is also a member of the executive of the I.B.A.