Reaching behind iron bars: challenges to the detention of asylum seekers

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ABSTRACT

Recent legal challenges to the detention of asylum seekers in Australia have exposed some limits on the power of the executive government to detain asylum seekers. We set out the legal basis for the current mandatory detention regime in Australia, discuss recent legal challenges to the regime, and compare the Australian and British approaches to detention, focusing on the impact of international law. We suggest that although recent successes in Australian courts are significant, more comprehensive challenges to the constitutional validity of the regime may be possible in the future, particularly if greater emphasis is placed on Australia's international obligations.

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Introduction

In 1992, the Labor government introduced Australia's first mandatory detention regime. The regime was initially directed towards a specific group of Cambodian boat people who were seeking asylum in Australia, but over the past decade the regime has been extended to cover all unlawful non-citizens—that is, any non-citizen who is in Australia without a valid visa. The current mandatory detention regime provides that all unlawful non-citizens, including asylum seekers, must be detained until they are either granted a visa or removed from Australia.[1]

Department of Immigration & Multicultural & Indigenous Affairs (DIMIA) figures indicate that as at 28 May 2003, 1106 people are being detained in mainland detention centres.[2] However, only half of these are asylum seekers, the balance being overstayers (people who have stayed in Australia after their visas have expired) and illegal workers. In addition to the mainland detention centres, Australia detains unauthorised arrivals on the offshore territories of Christmas Island[3] and Cocos Island (when necessary), and there are 437 people still detained on Manus Island (Papua New Guinea) and Nauru under the 'Pacific Solution'.[4] Introduced by the Howard government following the Tampa affair in 2001, the Pacific Solution is the key element in the government's tough 'border protection' policy. Under this policy, asylum seekers who arrive by boat have restricted access to Australia's legal system.

Australia now has five operational detention (or immigration reception and processing) centres on the mainland—Port Hedland and Perth in Western Australia, Baxter in South Australia, Villawood in New South Wales, and Maribyrnong in Victoria. Both Curtin and Woomera detention centres closed recently, and detainees were transferred to the newly opened and custom-built Baxter facility. Fifteen people, including seven children, chose to remain in the Woomera Residential Housing Project.

Since its introduction, there has been widespread criticism of the mandatory detention regime, both domestically (see, for example, Ozdowski 2002; ChilOut 2002) and internationally (see, for example, Bhagwati 2002). Surprisingly, however, there have

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1 The information in this article is current at 9 July 2003.

2 Personal communication with DIMIA representative, 28 May 2003. This figure includes 89 people in 'other facilities' such as hospital, foster care and prison. These figures are significantly lower than in recent years, as there have been no new boat arrivals since December 2001.

3 Although there are currently no detainees held at the Christmas Island facility, it remains 'in a state of readiness' (Ruddock 2003).

4 As advised by DIMIA on 28 May 2003. There are 434 people held on Nauru and 3 people held on Manus Island, PNG.

been very few legal challenges to it.[5] In 1992 the High Court rejected the arguments of the Cambodian boat people that the regime was constitutionally invalid, and has not reconsidered the question of constitutionality, despite the many changes to the regime since that decision. However, in 2002 a number of decisions of the Federal Court suggested that the power of the government to detain non-citizens was subject to certain limitations derived from the Constitution and from the common law of Australia.[6] These limitations stem from the 'jealous' protection that the common law has always provided to the right to liberty, which has been described as the most fundamental of all the common law rights (see *Williams v The Queen* (1986) 161 CLR 278).

We outline here the history of the mandatory detention regime in Australia, and examine the recent legal challenges to its validity. As we discuss, challenges to detention in Australia are limited to arguments under domestic, or Australian, law, unlike the United Kingdom where international law has played an important role. Recent Australian decisions are significant because they impose some limits on executive power, although the courts have stopped short of declaring that the entire regime is invalid. We argue that because there are no safeguards against indefinite detention in the current regime, the regime is constitutionally invalid and should be struck down.

The legal basis of Australia's mandatory detention regime

The right to liberty

The idea that every person has a right to be free lies at the very heart of the Western liberal tradition. It has been said that the right to freedom is second only to a claim to life itself (Justice Isaacs in *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518, p. 538). One of the traditional functions of the judiciary in common law systems such as Australia's is to protect individuals against infringements of their liberty by the executive government. This is reflected in the common law principle that it is for courts, not governments, to decide whether or not a person should be deprived of their liberty. Similarly, the ancient writ of *habeas corpus* allows any person to apply to a court to challenge their detention.

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5 North and Decle (2002) discuss the history of judicial consideration of immigration detention. Crock (2002) discusses the legal issues surrounding the detention of asylum seekers, in particular in Australia.

6 Just before this article was published, the Full Court of the Family Court of Australia handed down its decision in the case *B and B v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FamCA 451 (19 June 2003), a case brought on behalf of a family of five children held at Baxter Detention Centre. Building on earlier Federal Court cases, the Family Court held that the mandatory detention of children was illegal and has subsequently ordered the release of the children: *Minister for Immigration & Multicultural & Indigenous Affairs v B and B* [2003] FamCA 591. The government is expected to appeal the decision to the High Court.

Habeas corpus, also known as an order for release, is a powerful tool. Sir William Deane once described it as a 'bulwark against tyranny' (Justice Deane in *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, p. 529), with the power to reach even behind iron bars to release a person who has been unlawfully detained (*Jones v Cunningham* 371 US 236 (1963), p. 243). But the remedy has so far been of limited assistance to asylum seekers in Australia, for two reasons. First, the Constitution grants the government very broad powers to deal with non-citizens or 'aliens'. Second, international legal norms are not directly enforceable in Australian law. As a result, the traditional common law presumption in favour of liberty is a privilege not generally afforded to asylum seekers arriving on our shores.[7]

Lim and the beginnings of the mandatory detention regime

The story of Australia's mandatory detention regime starts with *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1 (hereafter *Lim*), decided by the High Court in 1992. The applicants in that case were two groups of Cambodian boat people who arrived in Australia in 1989 and 1990 seeking asylum. Upon arriving in Australia, they were detained in the newly opened Port Hedland detention centre, in far northwest Western Australia. As well as applying for asylum (a protection visa), the Cambodian asylum seekers challenged the lawfulness of their detention.

At the time they were detained, the *Migration Act 1958* (Cth) did not authorise the detention of asylum seekers. However, two days before the Federal Court was to hear the challenge to their detention, the Australian Parliament passed legislation amending the Migration Act. This amendment stipulated that the Cambodians had to be kept in immigration detention until they were either granted a visa or removed from Australia. The amendment also provided that a court could not order their release from detention. This was the first mandatory detention regime in Australia, and it forms the basis of the present regime.

Mr Lim and the other Cambodians challenged this new regime in the High Court of Australia within a few weeks of its becoming law. They argued that the Commonwealth Government did not have the power to detain aliens, because it was only for courts, not governments, to deprive someone of their liberty. The High Court decided that while that *was* the case for citizens, non-citizens were in a different position. The Constitution gives the Federal Parliament a broad power to deal with aliens; one aspect of this is the power to administratively detain aliens. Administrative detention of this sort is only lawful, the Court said, if it is for a non-punitive purpose—in other words, if it is not designed to punish the detained people.

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7 Or any other 'unlawful non-citizen'; that is, any non-citizen who does not have a valid visa.

The Court was of the opinion that detaining people for the purpose of processing their visa applications or pending their removal from the country was, unlike imprisonment under the criminal law, administrative rather than punitive. The Court said that the regime under which Mr Lim and the other applicants were being detained was non-punitive for two main reasons. First, the detainees could end their detention at any time by choosing to leave Australia. According to the Court, it 'always lies within the power of a person to bring his or her detention in custody to an end by requesting to be removed from Australia' (*Lim* [34]). Detainees in punitive detention cannot exercise this choice. Second, the regime considered in the *Lim* case—unlike the current regime—imposed a time limit on detention. The time limit was 273 days, but this maximum period of imprisonment did not include periods of processing or delay that were not considered to be the Department of Immigration's responsibility; such as while a court considered any legal challenge to a refusal to grant a visa. The High Court found this important, because it meant that even if a detainee did not choose to bring their detention to an end, they could not be detained indefinitely. Thus, the Court held that the regime was lawful.[8]

Australia before the UN Human Rights Committee

Following the unsuccessful challenge in the High Court in *Lim*, one of the applicants, known as A, took the case to the United Nations Human Rights Committee in 1993 (*A v Australia*, UNHCHR Communication No. 560/93), arguing that Australia was in breach of the *International Covenant on Civil and Political Rights* (hereafter ICCPR); the ICCPR had been ratified by the Australian Government in 1980. Applicant A could appeal to the Human Rights Committee because Australia had acceded to the Optional Protocol to the ICCPR in September 1991. Under the Optional Protocol, individuals can bring cases to the Human Rights Committee where it is alleged that their rights under the ICCPR have been breached. Cases can only be brought once all domestic remedies have been exhausted; in this case, when an appeal to the High Court has been made but has been unsuccessful.

Articles 9(1) and 9(4) of the ICCPR provide, respectively, that:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such provisions as are established by law.

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8 The High Court did strike down one provision as breaching the separation of powers: the provision sought to prevent any court from releasing a detained person in any circumstances. The Court held this to be an 'impermissible intrusion into judicial power' and declared it invalid, but left the remainder of the regime intact.

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Applicant A argued that his continued detention was arbitrary and that Australia's mandatory detention policy breached both these provisions. The Human Rights Committee agreed that A's detention was arbitrary, because it was indefinite and prolonged, was not open to review, and was not proportionate to the end being sought.

However, rather than releasing A from detention in accordance with this finding, the Australian Government ignored the decision, retained the mandatory detention system, and expanded it to include all unauthorised arrivals. The government could do this because international law is not binding and is not directly enforceable in Australian courts unless legislation has incorporated it into the Australian legal system. No legislation incorporates the ICCPR into Australian law, so the government could ignore the Human Rights Committee's decision. However, the decision may well have placed some political pressure on the government, because Applicant A and many of the other Cambodians were eventually granted permission to stay in Australia, after four years of legal challenges to their detention.[9]

As the story of Mr Lim and Applicant A shows, the fact that Australia has ratified the ICCPR, thereby agreeing to be bound by it at international law, means little on the domestic front given the disjuncture between international and domestic law. For this reason international human rights norms are of minimal assistance to asylum seekers when they are challenging their continued detention by the Australian Government.

The current mandatory detention regime

The administrative detention of non-citizens—immigration detention—represents a significant exception to the rule that it is for courts, not governments, to deprive people of their liberty. As we have said, *Lim* provides a legal justification for the continued (and expanded) policy of mandatory detention in Australia. The policy is given legal force under two main provisions in the Migration Act: sections 189 and 196. Section 189 provides that an 'unlawful non-citizen' (a non-citizen without a valid visa) in the 'migration zone' (mainland Australia) must be detained. Section 196 stipulates that:

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[9] For a discussion of the circumstances surrounding the Cambodian asylum seekers' treatment by Australia see McMaster 2002, pp. 83–89.

> (1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
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> (a) removed from Australia under section 198 or 199; or
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> (b) deported under section 200; or
>
> (c) granted a visa.
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> …
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> (3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.

This law makes it clear that all unlawful non-citizens must be detained until they are granted a visa (such as a protection visa) or are removed from the country, either 'voluntarily' or by means of deportation in cases involving criminal offences.[10] We focus here on the detention of asylum seekers, and so do not consider the detention of non-citizens for the purposes of deportation. Failed asylum seekers are not deported under section 200; they are removed under sections 198 and 199.

Section 198 is the 'voluntary removal' provision considered so important in *Lim*. Section 198(1) provides that 'an officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed'. Thus a detained person may request at any time that the minister remove them from Australia. Once someone makes a 'voluntary removal' request, the minister must remove the person 'as soon as reasonably practicable'. This places an implied time limit on the detention of such people. A similar implication applies to deportation cases (under section 200). However, as we discuss in the next section, there is no express or implied time limit on the detention of people who are waiting for a visa. Thus there is a real question about the extent to which the absence of a time limit on the processing of applications for visas distinguishes the current regime from that considered lawful in *Lim*. This omission could affect the constitutionality (or lawfulness) of the regime, because it effectively permits indefinite detention.

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[10] See Migration Act, sections 200–205: these sections permit the deportation of non-citizens convicted of serious crimes. For a discussion of the application of these provisions, see *Luu v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 369.

Recent cases in the Federal Court

In the past year several challenges to the ongoing detention of individual asylum seekers have been brought in the Federal Court. Some have been successful, with the Court finding that the detention of these applicants is unlawful and ordering their release from detention. These cases are the first successful challenges to the comprehensive mandatory detention regime post-*Lim,* and highlight some limits on the government's power to detain.

Mr Al Masri

Mr Al Masri is a Palestinian from a part of the Gaza Strip currently under the control of the Palestinian Authority. Upon arriving in Australia in June 2001, he was detained at Woomera Detention Centre, in remote South Australia. He claimed to be a refugee and applied for a protection visa. His claim was unsuccessful. In December 2001 he asked to be returned to the Gaza Strip; six months later he was still in Woomera waiting to be removed. He commenced proceedings in the Federal Court seeking release from detention (*Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1009, hereafter *Al Masri*). Mr Al Masri contended that the power of the government to detain for the purpose of removing someone from Australia is impliedly limited to a reasonable time, and terminates when there is no reasonable likelihood of removal. Otherwise, the Migration Act would allow for indefinite detention, which is unlawful.

The Minister for Immigration argued that the government could lawfully detain someone as long as the detention was for the purpose of removal from Australia; that is, there is no time limit imposed on detention. Justice Merkel held that the detention provisions only authorise detention for as long as the minister is taking all reasonable steps to secure the person's removal from Australia 'as soon as reasonably practicable', and the removal is 'reasonably practicable' in the sense that there is a real likelihood or prospect of removal in the reasonably foreseeable future. Otherwise, the detention can no longer said to be for the purpose of removing the person from Australia, and becomes punitive.

In *Al Masri*, the minister had taken all reasonable steps to secure Mr Al Masri's removal from Australia by contacting all possible entry points—Israel, Jordan, Syria, and Egypt—without success. When the proceedings were heard in late July, there was still no evidence of any real likelihood of removal in the foreseeable future. Accordingly, Mr Al Masri's continued detention was held to be unlawful and Justice Merkel ordered his release from detention on 15 August. Two weeks later, the minister secured permission for the entry of Mr Al Masri and other Palestinians to Gaza. Mr Al Masri was placed in detention pending his deportation and is no longer in the country.

Justice Merkel's decision had the potential to affect the detention of all people waiting to be removed from Australia where there is no real likelihood of removal in the foreseeable future. Failed Iranian and Iraqi asylum seekers fell into this category. Indeed, a few weeks after the decision in *Al Masri*, Justice Mansfield ordered the release of a failed Iraqi asylum seeker—Mr Al Khafaji—on very similar grounds (*Al Khafaji v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1369). For this reason, the government appealed the decision in *Al Masri* to the Full Court of the Federal Court, even though Mr Al Masri was no longer in the country.

The Full Court unanimously held that Justice Merkel's decision was correct and that in the circumstances, Mr Al Masri's continued detention would have been unlawful (*Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* [2003] FCAFC 70). The court applied the decision in *Lim* and agreed that the Constitution limits the detention of non-citizens. The court said that the limitations or requirements Justice Merkel implied—that the detention is only lawful while reasonable steps are being taken to effect removal, and when there is a reasonable prospect of removal—are necessary to ensure that detention continues to be administrative and not punitive. The Full Court said (at 74) that:

> In the absence of any real likelihood or prospect of removal being effected in the reasonably foreseeable future, the connection between the purpose of removing aliens and their detention becomes so tenuous, if indeed it still exists, as to change the character of the detention so that it becomes essentially punitive in nature.

In addition, the limitations prevent the indefinite detention of those seeking removal from the country. The absence of these limitations, according to the Full Court, would 'have the potential to curtail to a very severe extent the fundamental common law right to liberty' (at 94). Despite these strongly worded statements, the judges on the Full Court agreed with Justice Merkel that the limitations he implied were a sufficient solution, and did not take the final step of declaring the entire regime invalid. The government has appealed the decision to the High Court.[11]

The Hazara Afghanis

The next series of unlawful detention cases appearing in the Federal Court involved Hazara Afghani asylum seekers whose applications were being processed around the

[11] The hearing of an appeal to the High Court is not automatic. At the time of publication, an application for special leave to appeal to the High Court had been filed by the government. The application will not be heard until the second half of 2003.

time that the war against the Taliban regime in Afghanistan started.[12] Unfortunately, we do not know the names of any of these applicants, because changes to the *Migration Act 1958* in 2001 prohibit the courts from disclosing the names of applicants for protection visas.[13] Codes are used instead—hence 'VFAD'. We will refer to these applicants as the Hazara Afghanis for now.

Each applicant was a Hazara Afghani male who had arrived in Australia in early 2001. Through documents obtained by their lawyers at the Refugee and Immigration Legal Centre under the *Freedom of Information Act 1982 (Cth)*, the applicants discovered what appeared to be decisions signed by Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) officials dating back to August 2001. The decisions appeared to grant the applicants protection visas. However, the department never communicated the decisions to the applicants, and the minister said that they were draft decisions only. After these 'decisions' appeared to have been made, the Minister for Immigration announced that given the changing situation in Afghanistan, there would be a department-wide 'freeze' on the processing of all Afghani asylum applications until the situation had stabilised. Afghani asylum seekers were notified of this policy decision in mid-January 2003; the notification led to protests at Woomera. Once the department began processing applications again after the fall of the Taliban in 2002, it denied all applicants a protection visa, based on the changed circumstances in Afghanistan.

The ultimate legal question in these cases is whether the 'decisions' were final decisions to grant protection visas to the applicants. If so, the processing freeze would have had no legal effect on them and the applicants should have been released from detention when the decisions were made. In each case, the Court found that the applicants had a strong case for saying that the decisions were final decisions, and that they had been granted protection visas. At issue in these cases, though, was whether or not the applicants should be detained until the final hearing. If the applicants succeeded in proving that the decision records did constitute the grant of a visa, they would have been unlawfully detained since the decisions were made. In reaching its decision in each case, the Court had to balance the strict requirements of

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[12] These cases include: *Applicant VFAD of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2002) 194 ALR 304 (Merkel J), confirmed on appeal to the Full Court in *Minister for Immigration & Multicultural & Indigenous Affairs v VFAD* [2002] FCAFC 390 (Black CJ, Sundberg and Weinberg JJ); *VHAF v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1243 (Gray J); and, *VJAB v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1253 (Marshall J).

[13] The amendments were aimed at preventing people from making protection claims based on their conduct in Australia (applying for a protection visa or engaging in demonstrations, for example) being known to authorities in the home countries. This is known as a '*sur place*' claim, a claim that the asylum seeker could not have made at the time they fled their home country.

the Migration Act with the law's presumption in favour of liberty. The judges in each of these cases came down on the side of liberty. As Justice Gray put it in *VHAD*: 'The protection of individual liberty is of such fundamental importance to the Australian legal system that the mere fact that the applicant is in detention must be given considerable weight.' Accordingly, all applicants were released into the care of a local charity, subject to a requirement to report to the department on a regular basis until their hearings, which were scheduled for early this year.[14] However, the cases were settled just before trial, and the terms of the settlement have not been made public.

The 'NAMU' family

In many of these cases, the applicants gave evidence about the detrimental effects of prolonged detention. About one of the Hazara Afghani applicants, Justice Gray said:

> He said he has been in detention for so long that he is now exhausted and depressed … He feels as if his soul is not healthy and he is no longer human … He feels like a fish that has just been caught, in its last moment before death.

In another recent Federal Court case it was argued that the effect of detention on children justified their release from detention. Applicant 'NAMU' (another pseudonym) was a husband and wife and their four children, three of whom were under eighteen years old. They are Iraqi nationals who fled in 1995 and arrived in Australia in 1999. They have been in detention since that time—about three years.

The family claimed that their detention, although originally lawful, had become unlawful because of the severe psychological disturbances their children were suffering as a result of detention. They claimed that by placing the children in a situation where they had become suicidal, the detention had stopped being administrative and had become punitive. Recall that according to the reasoning in *Lim*, punitive detention is unlawful.

Justice Hely disagreed with this view, arguing that the relevant question is the purpose of detention, not its impact on individuals. He said that the purpose of detention remained valid: because the family was still pursuing visa applications, they were being detained for the purpose of being granted a visa. The Full Court upheld

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[14] The minister appealed the first of these decisions, arguing that the Federal Court did not have the power to order the release of the applicants until the matter had been finally determined. This argument was rejected unanimously by the Full Court of the Federal Court and the applicants remain in the community: see *Minister for Immigration & Multicultural & Indigenous Affairs v VFAD* [2002] FCAFC 390 (Black CJ, Sundberg and Weinberg JJ).

this decision on appeal (*NAMU of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 401).

Comment on recent cases

These cases demonstrate limits to the government's power to detain non-citizens. In each case judges have held that the Migration Act does not prevent the release of people who can show that they are unlawfully detained—because they either have asked to be removed or appear to have been granted a visa. The Full Court decision in Mr Al Masri's case is particularly significant, because it considers in some depth the High Court's analysis in *Lim* and raises concerns about the constitutional validity of the mandatory detention regime. Despite these concerns, however, the court did not declare the regime invalid, agreeing with Justice Merkel that it is possible to imply limitations into the relevant laws instead. The government's response to the decision has been to increase pressure on countries such as Iran, which have previously refused to accept returning asylum seekers, and to come to confidential arrangements designed to prevent any further claims by detainees waiting to be removed.[15]

As the case of the 'NAMU' family shows, however, asylum seekers waiting for decisions on their visa applications appear to have no ability to challenge their detention, regardless of its nature, duration, or effect. The lack of any obligation on the minister to process applications within a fixed time compounds this injustice. Thus indefinite detention remains a very real possibility—an outcome which, as the Full Court pointed out in *Al Masri*, is 'rarely invoked in sentencing regimes and is seen as oppressive even in the context of punishment' (at 93).

It is precisely this absence of any obligation to process applications within a fixed time that has enabled DIMIA to freeze the processing of applications by the Hazara Afghanis. The 1600 East Timorese asylum seekers in the Australia community have also suffered. These people arrived in Australia and submitted their applications for protection visas some six to eight years ago. However, the department has only recently processed their applications. Most have now been refused protection visas due to the changed political landscape in East Timor, despite their strong claims to refugee status when they lodged their applications. This treatment has been hard on these people, who have had to try to establish new lives in a state of uncertainty.

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[15] In March 2003, Minister Ruddock announced that a 'deal' had been reached with the Islamic Republic of Iran. He claimed that Iran had agreed to accept the 'involuntary' return of failed Iranian asylum seekers in Australia. There is some doubt as to whether the Iranian Government has actually agreed to involuntary repatriation. In exchange, it appears that Australia will offer one-year working visas to selected young Iranians. The government has denied requests for the 'agreement' to be tabled in the Senate on the ground that it is not in the public interest to do so: see Mackin 2003.

However, they are lucky compared with the Hazara Afghanis, who have been detained in the middle of the desert for up to three years. In both cases it is difficult to escape the conclusion that the government gave priority to political outcomes, domestic and international, over the rights of the asylum seekers.

The United Kingdom's approach to detention

As we have seen, challengers to the detention of asylum seekers in Australia have rarely brought cases based on principles of international law, largely because of the limited role international law plays in the Australian legal system. A recent case in the United Kingdom provides a contrasting example of the use, and effect, of international law in legal challenges to the detention of asylum seekers.

The challenge in Saadi

Unlike Australia, the United Kingdom does not require that all unauthorised arrivals be detained. Prior to 1998, asylum seekers were granted temporary admission rather than detained. The Immigration Act 1971 (UK) did, however, give discretion to immigration officers to detain people for the purpose of establishing whether or not they should be entitled to enter. A 1998 governmental White Paper (United Kingdom Home Office 1998) stated that while a presumption in favour of granting temporary admission or release remained, there were three justifications for detaining people seeking to enter the United Kingdom:

1. where there is a reasonable belief that the individual will fail to keep the terms of temporary admission or temporary release;

2. initially, to clarify a person's identity and the basis of their claim; or

3. where removal is imminent.

The policy also specified that detention should be for the shortest possible time, and that detainees should receive written reasons for their detention at the time they are detained.

In March 2000, the UK government announced that it would open the Oakington Reception Centre, and detain asylum seekers there if it appeared that their application could be decided quickly. Decision times are estimated according to the applicant's country of origin and likelihood of success. The initial period of detention is seven days.

Mr Saadi and three other Iraqi Kurds who had all made applications for asylum in the United Kingdom challenged this regime in the High Court in 2000. Some of them arrived illegally (in the back of truck) and some legally (by plane). They were detained in the Oakington Reception Centre for a period of ten days in 2000. They claimed that they had been detained unlawfully.

Justice Collins held that the detention regime was lawful according to domestic law, because the detention accorded with the requirements of the Immigration Act, and the detention regime established under the Immigration Act was lawful under domestic law (*Saadi v Secretary of State for the Home Department* [2001] EWHC 670). But he held that the detention of Mr Saadi and the other applicants breached of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR), which protects liberty and prohibits detention except in certain specified situations, none of which applied to the applicants. Justice Collins's decision was, however, overturned on appeal and the regime was held to be lawful (*Saadi v Secretary of State for the Home Department* [2001] EWCA Civ 1512 (Court of Appeal)).[16] Importantly, though, the judges on appeal held that the length of detention should be proportional to its purpose, which in this case was to process asylum applications speedily. In this case, they held that detaining someone for ten days was proportionate. Whether the detention of people like the 'NAMU' family for a period of three years would be considered proportionate under the ECHR is another question.

Comparing Australia with the United Kingdom

Differences in approach between the British courts in *Saadi* and the High Court of Australia in *Lim* can be explained in large part by the different status of the relevant international conventions in the United Kingdom and Australia. As in Australia, international law is not directly enforceable in the United Kingdom; to be enforceable, it must be incorporated into United Kingdom law. Importantly, however, the ECHR is incorporated into United Kingdom law, by the *Human Rights Act 1998* (UK). There has been no such implementing legislation for the ICCPR in Australia. Because the ECHR forms part of UK law, Mr Saadi and the other Iraqis were able to rely on its provisions and were not confined to arguing about the legality of the regime under domestic law.

In another interesting development, in late 2002 the British Parliament passed a law (*Nationality, Immigration and Asylum Act 2002* (UK)) increasing the number of 'accommodation' (or detention) centres for the reception and processing of asylum seekers in the United Kingdom.[17] It seems that asylum seekers will be able to leave these centres, for example to engage in voluntary work in the community, but will be subject to security checks, reporting requirements, and residency requirements. Breach of these requirements may impact negatively on their asylum applications.

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16 The decision of the Court of Appeal was upheld by the House of Lords: *R v Secretary of State for the Home Department; Ex Parte Saadi* [2002] UKHL 41.

17 Trial centres are being established in various locations throughout the United Kingdom in an attempt to 'disperse' asylum seekers—particularly away from London and Kent: Accommodation Centres fact sheet. See also United Kingdom Home Office 2002. For an analysis of the White Paper see Human Rights Watch 2002.

While this represents a significant hardening of the British position on asylum seekers, the new law does also provide that asylum seekers will be able to leave the accommodation centres after an absolute maximum of nine months if their applications have not been processed. This highlights the glaring inadequacies in the Australian system—in particular, the absence of safeguards against prolonged and indefinite detention. Another important safeguard in the new UK regime is the creation of an independent monitor to oversee the operation of the 'accommodation' centres;[18] something that is sorely missing in Australia.[19]

The future of mandatory detention in Australia

Despite international and domestic criticism, there appears to be no end in sight to the mandatory detention regime in Australia. As the recent transfer of 53 Vietnamese asylum seekers to Christmas Island highlights, the deterrent value of the mandatory detention system, and more recently the 'Pacific Solution', is a key part of Australia's refugee policy ('PM's pledge to deter boat people' 2003).[20] Estimates put the cost of transferring the Vietnamese asylum seekers to the offshore Christmas Island processing facility at three times the cost of processing them at the Port Hedland centre, to which they were close when apprehended. The transfer serves no practical or legal purpose, as the government has acknowledged that the asylum seekers are entitled to be processed under Australia's mainland refugee system because they had technically reached the Australian mainland before they were apprehended. But according to the Minister for Immigration, Philip Ruddock, the transfer will send a message—that Australia is not 'open for business' for future asylum seekers (Karvelas & Terry 2003). The government clearly believes that conveying this message is worth considerable financial and administrative cost.

The deterrent value of the mandatory detention regime was epitomised by the Woomera Detention Centre, which was plagued by allegations of impropriety and abuse from the outset.[21] Despite—or perhaps because of—this, Woomera remained operational even after the opening of the custom-built Baxter Detention Centre just down the road. As Frank Brennan observed shortly before the decommissioning of Woomera,

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18 The independent monitor will report to the Home Secretary on the nature and enforcement of conditions of residence, the treatment of residents, and whether the location of any accommodation centre prevents a need of its residents from being met.

19 The Australian Labor Party has said that it would set up such a body if it were in government: see Crean and Gillard 2002.

20 See 'PM's pledge to deter boat people' 2003.

21 Even since its closure, allegations of abuse and of severe breaches of contractual arrangements between the government and the private contractor, Australian Correctional Management, have continued: 'About Woomera' 2003.

'[its] deterrent value to the government is enormous. It is the jewel in the crown of desert detention. There is no other policy reason for keeping it open' (Brennan 2003a).

The government justifies the use of desert detention as part of its general policy to deter people from travelling unauthorised to Australia. This justification is not expressed in the legislation implementing the mandatory detention policy. If it were, as was alluded to in *Lim*, it could undermine the argument that administrative detention is not punitive. The calculated placement of detainees in remote and harsh environments places a strain on the legal niceties justifying administrative detention.

Similarly, recent incidents highlight how blurred the line between administrative and punitive detention has become. After riots broke out in Woomera and Baxter in January 2003, several detainees were transferred to local prisons ('Australia jails 40 asylum seekers' 2003). On the face of it, the transfer to prison would suggest that the detainees were being punished for bad behaviour. Their detention in prison could therefore be open to challenge as punitive and therefore unlawful. However, the Migration Act specifies that people can be held in prison but still be in 'immigration detention', because the definition of immigration detention includes State and Commonwealth jails (section 5). At the time, the Acting Minister for Immigration, Daryl Williams, stated that the prisoners were transferred for the 'protection of other detainees and of staff at the detention centres' (Gray 2002). However, other comments suggest that they were transferred not for administrative convenience, but to enable punishment:

> Bear in mind that detention centres are not correctional facilities. They're not prisons, and they're generally not capable of being locked down. People within detention centres are generally able to move around within compounds within them ('Australia says it's right to remove asylum seekers' 2003).

Locking people down is punitive. When combined with reports of bans on telephone and mail access, strip searches, and handcuffing following the riots ('Scot charged over detention centre riots' 2003), it is difficult to accept that such treatment is not punishment for bad behaviour. Mr Williams reinforces this interpretation by commenting that 'anyone involved in riots in Australian detention centres could be placed in custody indefinitely'.

The reasons for the riots are, perhaps, obvious. According to DIMIA, more than 350 people in mainland detention centres are asylum seekers who have exhausted all their legal options and are 'available to be removed' (Ruddock 2003a). It is unclear how many of these people are in the same position as Mr Al Masri and Mr Al Khafaji, who had requested that they be returned to their country of origin, but could not be returned. Given that the majority of detained asylum seekers are from countries to which it is very difficult to return citizens—namely, Iraq, Iran, and Afghanistan—the

proportion of detainees with no prospect of either return or release has been steadily increasing since the original decisions in *Al Masri* and *Al Khafaji*.

Frank Brennan has claimed that the continued detention of these failed asylum seekers will see the transformation of the 'processing centres into punitive jails which labour under insuperable institutional defects' (2003a). He describes this change in use for Australia's migrant holding pens:

> Whereas previously our mainland detention centres were primarily processing centres for those with a real expectation of release on a visa, at the moment they are centres primarily for holding those denied a visa, waiting to go home voluntarily or by force (2003a).

Brennan's suggestion of forcible return has recently become reality, with the government's announcement that it has concluded a Memorandum of Understanding with the Republic of Iran about the return of failed asylum seekers. Under this agreement, Australia offered a voluntary return incentive of $2000 to Iranian asylum seekers in Australia and the Iranian government agreed to accept their return. It seems that the Australian Government has secured the Iranian government's agreement to *involuntary* or forcible returns as well (Shaw 2003; Mackin 2003). Forcible returns would create the potential for serious human rights problems, especially when the Australian Government has admitted that it has not secured any guarantees from the Iranian authorities for the safety of returnees (Mackin 2003). This could put Australia in breach of its international obligation of *non-réfoulement*: the requirement not to return an asylum seeker to a situation where their life might be threatened. Lawyers representing Iranian asylum seekers 'available' for removal have recently challenged the proposed forcible removal of Iranians in the Federal Court and the High Court (Shaw 2003; Mackin 2003). Many have obtained injunctions in the Federal Court stopping the government from removing any of the Iranians concerned until the cases are decided by the Court (Shaw 2003).

Conclusion

The cases we discuss here are the first successful challenges to the lawfulness of the detention of asylum seekers in Australia. For this reason they are extremely significant. However, the cases have been of limited scope. Unlike the arguments in *Lim* case, most do not strike at the heart of the detention regime, focusing instead on the circumstances of particular individuals. There is an assumption, it seems, that the current detention regime is lawful, despite the differences between its text—and its implementation—and the regime considered in *Lim*.

In our view, however, on the basis of the High Court's analysis in *Lim*, the current regime is not administrative but punitive. There are two reasons for our view. The first is that for many detainees, the option to end their detention at any time by

requesting that they be returned to their country of origin is illusory. Mr Al Masri, Mr Al Khafaji and the other Iraqis and Iranians in detention demonstrated this. The second is that, as with the Hazara Afghanis, a person could potentially be detained indefinitely while their visa application is processed, given that the sunset clause or time limit on visa processing that applied in *Lim* no longer exists. Given the weight the High Court placed on these features in *Lim*, their absence in the current regime raises serious questions about the lawfulness of the regime as a whole. Despite referring to it, neither Justice Merkel nor the Full Court in *Al Masri* adequately addressed this question.

Regardless of technical constitutional arguments, it seems reasonable to expect that Australia's treatment of asylum seekers should, at least, be in accordance with its international obligations, particularly its human rights obligations. No other country in the developed world treats asylum seekers with the same degree of contempt for their human rights. Many asylum seekers may arrive unlawfully, but they are still people, and 'an alien who is within this country, whether lawfully or unlawfully, is not an outlaw' (Justices Brennan, Deane & Dawson in *Lim*, at 8).

Recent challenges in the Federal Court have made this point—that asylum seekers, like 'us', are human beings with rights needing protection—most eloquently. It is heartening that despite the current climate of fear, the courts have not abandoned their function of protecting the vulnerable against excesses of power. The *Al Masri* appeal is yet to be heard by the High Court, and could provide that Court with its first real opportunity to comment on whether or not the current mandatory detention regime is constitutional. Meanwhile, the cases recently decided by the Federal Court are chipping away at the legal veneer of the mandatory detention policy. We hope that the next step will be a decision that strikes deep into its (il)legal heart.

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