

**Due Process and Rule of Law as Human Rights: The High Court and the ‘Offshore’
Processing of Asylum Seekers
Mary Crock and Daniel Ghezbash***

1 Introduction

Long story short. Australia does not have a federal Bill of Rights. While the country could arguably benefit from the introduction of an instrument of this nature,¹ Australia does have a Constitution and a Common Law tradition. Together, these features of the legal system can deliver some of the same outcomes as a Bill of Rights, most particularly if one considers that the central function of any ‘rights’ instrument is to safeguard the individual against the arbitrary use of power. It will be our argument that this is a central message delivered by the High Court in *Plaintiff M61/2010E v Commonwealth* and *Plaintiff M69 of 2010 v Commonwealth*.²

The case is the latest in a series of matters in which the Australian courts have faced down attempts to restrict judicial oversight of immigration decision making. As we explore in Part 2 of this article, all have been designed with the objective of making an exception of this area of administrative law and policy. The latest and most sophisticated of the restrictionist schemes is embodied in what we describe in Part 3 as the regime for processing asylum claims on the ‘excised offshore place’ of Christmas Island. The remainder of this article is devoted to dissecting arguments made by government and by the two Tamil refugee claimants who sought to challenge the refusal of their asylum requests under this regime. In a unanimous judgment, the High Court ruled that the claimants had a right to have their determinations made in accordance with the rules of procedural fairness and general principles of law. In concluding, we examine the implications of the ruling both on the current Christmas Island caseload and plans for the establishment of a regional processing centre in East Timor.

2 Creating the Exception

A perennial problem faces individuals seeking to invoke or enforce human rights, whether these be the right to liberty of the person; the right to freedom from inhuman or degrading treatment; or the right to family life. Claimants are often, if not always, unpopular; their invocation of rights dissonant with the views, aspirations and feelings of ‘mainstream’ society. In this respect, the very notion of human rights can sit uneasily with simple, majoritarian views of democracy. In contemporary Australia there is one group that embodies this conflict perhaps more than any

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¹ See National Human Rights Consultation *Report* (Canberra, 2009) (the *Brennan Inquiry and Report*).

² [2010] HCA 41 (11 November 2010) (*‘Plaintiffs M61/ M69’*).

other: asylum seekers and, in particular, asylum seekers arriving without authorisation by boat. These are people who enter, or attempt to enter Australia without visas and without following 'regular' procedures. Asylum seekers nevertheless invoke rights to protection founded in laws to which Australia is party but which modern Australian politicians have had no hand in the making. The unpopularity of the proactive refugee is reflected in the electoral force of the mantra adopted by Prime Minister John Howard in launching the Conservative Coalition's campaign in 2001: 'We will determine who comes to this country and the circumstances in which they come.'³

The recent history of refugee law and immigration control in Australia features successive measures taken by parliament and policy makers to contain and deter irregular migrants. On the one hand are direct initiatives manifest in a visa system and pre-travel checking measures that are the envy of many countries around the world.⁴ On the other are deterrent measures such as the interdiction of asylum seeker boats and mandatory detention, often in remote and difficult locations. Although the discourse on control is typically focused on the subjects of control – the migrant and the refugee – there is a reason why immigration has enduring fascination for public law scholars. Whether manifest as constitutional or administrative law, public law is the tool or vehicle that has been used by asylum seekers through the judicial system to assert both their rights to protection and other human rights. This reality explains why successive governments have viewed the struggle to contain irregular migration as much more than a struggle with the (often pitiful) migrant and refugee. Immigration has become the locus for a battle royal between the government, in the form of the Executive and the Legislature on one side, and the Courts on the other.⁵ When Prime Minister Howard used the collective noun 'we' to reference who should control entry into Australia in 2001, his subtext was pointedly to exclude *lawyers* and *judges* from the process.

The establishment of detention centres in remote parts of Australia followed a storm of litigation around first Cambodian and later Chinese boat people who made their way to Australia in and after 1989.⁶ Designed to place physical distance between the asylum seekers and their lawyers and advocates, the move was accompanied by the first overt attempts to restrict the role of the courts in the review of migration decisions. The objective was to ensure that the politicians – in particular the Minister for Immigration – should have the last word on that eponymous question of entitlement of entry into Australia. So, the *Migration Act* 1958 (Cth) was amended first to

³ John Howard, speech delivered at the Federal Liberal Party Campaign Launch, Sydney, 28 October 2001.

⁴ Dating from 1979; See Mary Crock, *Immigration, Refugees and Forced Migration - Law, Policy and Practice in Australia* (Sydney: Federation Press, 2011), chapter 5.

⁵ See Dennis Pearce, 'Executive Versus Judiciary (1991) 2 *PLR* 179; Mary Crock, *Administrative Law and Immigration Control in Australia: Actions and Reactions* (Unpublished PhD Thesis, Melbourne University, 1994) and Stephen Gaegler, 'Impact of migration law on the development of Australian administrative law' (2010) 17 *Australian Journal of Administrative Law* 92. The phenomenon is not one that has been unique to Australia. See Stephen Legomsky, *Immigration and the Judiciary* (Oxford: OUP, 1987).

⁶ See Crock and Berg, above n4 at Chapter 16.

provide that no court could order the release of specified immigration detainees.⁷ Changes that came into force on 1 September 1994 then took the judicial review of migration decisions out of the mainstream.⁸ A special regime was created that gave the Federal Court of Australia a truncated role, leaving the High Court as the only federal court with full power to examine all aspects of the legality of migration decisions.⁹ This ‘first’ Part 8 of the *Migration Act* 1958 only narrowly survived a constitutional challenge.¹⁰ The practical failure of the measure to discourage asylum seekers from seeking redress through the courts lead to the introduction of a more ambitious court stripping regime in the form of a comprehensive ‘privative clause’ in 2001.¹¹ That initiative was only part of a more ambitious scheme that saw a reprise of attempts to match the physical isolation of asylum seekers with their metaphysical isolation from the Rule of Law in Australia. It is a scheme that has come to be known variously as ‘offshore processing’, the ‘Pacific Solution’ and the ‘Pacific Strategy’. Surviving the change of government in 2007, the objective of creating a processing regime that is beyond the reach of the Australian courts remains central to plans to process asylum seekers on East Timor.¹²

Attempts to isolate administrative decision making and practice from judicial oversight are neither novel nor particularly Australian in their provenance.¹³ When Charles II was restored as King of England in the 1660s, he instituted his own ‘excision’ regime. The monarchists moved to incarcerate dissident republicans on the islands of Jersey and the Isle of Man. Judicial oversight of the detention was blocked by the issue of a decree that the royal writ of *habeas corpus* should not run in these places.¹⁴ The measure was justified as necessary for the security of the nation at a time of emergency.

The more immediate model for Australia’s early offshore processing regime, however, was American. Although known most recently as a site for holding ‘enemy combatants’ captured in the course of the wars in Iraq and Afghanistan, Guantanamo Bay began as an offshore detention and processing centre for asylum seekers from Haiti and Cuba. The centre was established on the

⁷ See former s 54R of the *Migration Act* 1958 (Cth); *Chu Kheng Lim v MIEA* (1992) 176 CLR 1; Crock, above n4, chapter 5.

⁸ See Part 8 of the *Migration Act* 1958 (Cth), introduced by the *Migration Amendment Act* 1992 (Cth) which removed the applicability of the *Administrative Decisions (Judicial Review) Act* 1997 (Cth) and 39B of the *Judiciary Act* 1902 (Cth) to certain migration determinations.

⁹ See Mary Crock, ‘Judicial Review and Part 8 of the *Migration Act*: Necessary Reform or Overkill?’ (1996) 18 *Sydney Law Review* 267, 274–80.

¹⁰ *Abebe v The Commonwealth* (1999) 197 CLR 510. Note that this case placed tremendous strain on the High Court as it led to thousands of cases being commenced in the High Court.

¹¹ Section s 474 of the *Migration Act* 1958 (Cth), introduced by the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth).

¹² See Mary Crock & Daniel Ghezelbash, ‘Do Loose Lips Bring Ships?: The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals’ (2010) 19 *Griffith Law Review* 239 at 255-257.

¹³ See David Dyzenhaus, *The Constitution of Law – Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006)

¹⁴ See Geoffrey Robertson *The Tyrannicide Brief* (London: Vintage, 2006) at 349; and Geoffrey Robertson, ‘Freedom, Soldier’, *New Statesmen*, 21 May 2007, at 55.

US protectorate for the dual purpose of denying asylum seekers access to US territory and to the protections of US law.¹⁵

It is a measure of the centrality of judicial oversight to the notion of the Rule of Law in both Britain and the United States that the exclusionary initiatives both old and new were eventually defeated either by Parliamentary initiatives or by the assertiveness of superior courts of both countries.¹⁶ The controversy surrounding the detention regimes on Jersey and the Isle of Man was such that the British Parliament outlawed the practice in 1679.¹⁷ The measures at Guantanamo initially proved effective in quarantining detention and refugee status determination processes from the protections of international law as far as these might have been enforceable through US law.¹⁸ In the longer term, however, the rulings of the US Supreme court in *Hamdi v Rumsfeld*¹⁹ and *Rasul v Bush*²⁰ affirmed the capacity of Guantanamo Bay detainees to invoke the jurisdiction of US federal courts. The point to be taken from these historical precedents, is that government attempts to exclude the rule of law have always been deliberate and well-reasoned, if not well-intentioned. They have frequently involved attempts to avoid scrutiny of measures that are abusive of human rights. Most have involved restrictions on the liberty of the individual and physical and mental abuse that would not normally be regarded as acceptable.²¹ In the

¹⁵ See Gerald Neuman, 'Anomalous Zones' (1996) 48 *Stanford Law Review* 1197, at 1128–1233. Following is a selection of the many articles written on the interdiction program that has been run in the United States since the early 1980s: Margaret A Coon, 'The Law of Interdiction: Time for Change' (1980) 27 *Louisiana Bar Journal* 223; Stanley Mailman, 'Reagan's Policy on Haitian Refugees' (1981) 186 *New York Law Journal*, col 1; Louis B Sohn 'Interdiction of Vessels on the High Seas' (1984) 18 *International Lawyer* 411; and Bill Frelick, 'Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection' (in Symposium: Refusing Refugees: Political and Legal Barriers to Asylum) (1993) 26(3) *Cornell International Law Journal* 675.

¹⁶ See Fleur Johns, 'Guantanamo Bay and the Annihilation of the Exception' (2005) 16 *European Journal of International Law* 613.

¹⁷ See *Habeas Corpus Act 1679 (Imp): An Act for the better securing the Liberty of the Subject, and for Prevention of Imprisonment beyond the Seas*, available at <<http://www.british-history.ac.uk/report.asp?compid=47484>> (accessed 16 November 2010).

¹⁸ In the United States, various challenges were made to the Haitian interdiction program by the Haitian Centers Council, culminating in the Supreme Court case of *Sale v Haitian Centers Council Inc* 113 S Ct 2549 (1993). See James R Zink, 'Race and Foreign Policy in Refugee Law: A Historical Perspective of the Haitian Refugee Crises' (1998) 48 *De Paul Law Review* 559; Bill Frelick, 'Haitian boat interdiction: First asylum and first principles of refugee protection' (1993) 26 *Geo Imm LR* 675-695; Bill Frelick, 'US Policy in the Carribean: No Bridge Over Troubled Waters' (1996) 20(2) *The Fletcher Forum of World Affairs* 67; Hiroshi Motomura, 'Haitian Asylum Seekers: Interdiction and Immigrants' Rights' (1993) 26 *Geo Imm LR* 695; Thomas David Jones, 'A Human Rights Tragedy: The Cuban and Haitian Refugee Crises Revisited' (1995) 9(3) *Georgetown Immigration Law Journal* 479 (see also this author's piece in (1996) 90 *American Journal of International Law* 477); and the various articles in (1993) 7 *Georgetown Immigration Law Journal*. Most recently, see Stephen Legomsky, 'The USA and the Carribean Interdiction Program' (2006) 18 *International Journal of Refugee Law* 677.

¹⁹ 124 S Ct 2633 (2004).

²⁰ 123 S Ct 2686 (2004).

²¹ In the American context, see Karen J. Greenberg and Joshua L. Dratel (ed), *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005). On abuses relating to the 'Pacific Strategy', see Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in*

absence of a Bill of Rights, the question for the High Court is what protections and guarantees are afforded by the Australia Constitution and by the Common Law in this country?

3 Of offshore processing and ‘excised’ territories

The offshore processing regime in dispute before the High Court had its genesis in the Conservative Coalition Government’s response to a surge in unauthorised boat arrivals in the late 1990s. The turning point was the stand taken in 2001 to prevent the Norwegian registered container ship MV Tampa from delivering onto Australian soil 433 asylum seekers rescued at sea from a sinking Indonesian ferry. The federal government prevented the MV Tampa from entering Australia territorial waters by boarding the ship with SAS troops and hastily concluding agreements with Australia’s Pacific neighbours to host the asylum seekers.²²

In the aftermath of the *Tampa* affair, six Acts²³ were pushed through the federal Parliament on 26 September 2001 to validate the actions taken against the asylum seekers aboard Tampa and to limit the access of future unauthorised boat arrivals to mainland refugee status determination procedures. Four strategies were adopted to achieve this objective. First, the Minister for Immigration was empowered to declare certain Australian territories to be ‘excised offshore places’²⁴ and so not part of Australia’s ‘migration zone’. Initially, Christmas Island, Ashmore Reef, Cartier Island and the Cocos Islands were excised. Later regulations extended the excision to include almost all but mainland Australia and Tasmania.²⁵ Second, a new category of ‘offshore entry person’ was created to catch all asylum seekers landing on an excised territory without a valid visa or other authority.²⁶ Third, the Migration Act was amended to enable the transfer of ‘offshore entry persons’ to a ‘declared country’.²⁷ The two countries so declared at the height of the ‘Pacific strategy’ were Nauru and Papua New Guinea. The effect of these arrangements was to prevent ‘offshore entry persons’ from making visa applications. Section 46A(1) was introduced to explicitly bar ‘offshore entry persons’ from making an application for

Australia (Sydney: Federation Press, 2006) 137-43, ch 7; and Michael Gordon, *Freeing Ali: The Human Face of the Pacific Solution* (Sydney: UNSW Press, 2005).

²² Mary Crock, ‘In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows’ (2003) 12 *Pacific Rim Law and Policy Journal* 49; Ernst Willheim, ‘MV Tampa: The Australian Response’ (2003) 15 *International Journal of Refugee Law* 159; Jessica Tauman ‘Rescued at Sea, but Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis’ (2002) 11 *Pacific Rim Law and Policy Journal* 461; Chantal Marie-Jeanne Bostock ‘The International Legal Obligations Owed to the Asylum Seekers on the MV Tampa’ (2002) 14 *International Journal of Refugee Law* 279.

²³ *Border Protection (Validation and Enforcement Powers) Act 2001*; *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone (Consequential Provisions) Act 2001* (Cth); *Migration Legislation Amendment Act (No 1) 2001* (Cth); *Migration Legislation Amendment Act (No 5) 2001* (Cth); *Migration Legislation Amendment Act (No 6) 2001* (Cth)

²⁴ *Migration Act 1958* (Cth) s 5(1).

²⁵ See *Migration Legislation Amendment (Further Border Protection Measures) Bill 2002* (Cth) & *Migration Legislation Amendment (Further Border Protection Measures) Bill (No 2) 2002* (Cth).

²⁶ *Migration Act 1958* (Cth) s 5(1).

²⁷ *Migration Act 1958* (Cth) s 198A.

a visa to enter Australia, unless the minister exercises the public interest discretion under s46A(2) to lift the bar. Section 46A(7) makes it clear that this discretion is non-compellable, with the Minister having no duty to exercise the discretion in any circumstances. The Minister's power to grant a visa to offshore entry persons under s 195A is also expressed as non-compellable and non-reviewable.

At time of writing, the Rudd and Gillard Labor Governments had not altered the legislative framework underpinning the 'Pacific Strategy'. However, after the February 2008 resettlement in Australia of the final group of refugees detained on Nauru, Labor adopted a policy of not exercising the s198A power to transfer 'offshore entry persons' to third countries. Instead, asylum seekers interdicted at sea are held on Christmas Island pending a decision by the Minister to exercise the non-delegable, non-compellable discretion under s46(A)(2) to allow an application for a protection visa. The other change made by Labor was to abolish the special temporary protection visas for offshore entry persons, opting instead to grant permanent resident visas with the same terms and conditions as those granted to persons recognised as refugees on mainland Australia.²⁸

The way the scheme on Christmas Island operates is as follows. Contrary to the facial operation of the legislation, asylum seekers taken to the Island are permitted immediately to lodge refugee claims. Procedures have been established outside of the *Migration Act* 1958 to allow for 'Refugee Status Assessment' (RSA) and indeed for the 'Independent Merits Review' (IMR) of negative rulings. The RSA process allows an offshore entry person, on request, to be assessed to determine whether he or she is a person with respect to whom Australia has protection obligations under the *Convention relating to the Status of Refugees*²⁹ or its related Protocol.³⁰ In the first instance, the RSA is carried out by an officer of the Department of Immigration and Citizenship (DIAC), while the IMR is conducted by reviewers employed by the private company, 'Wizard People Pty Ltd'.

Where a non-citizen is assessed by the officer or by the independent reviewer to be a refugee, a submission is made to the Minister recommending that the Minister *consider exercising* the power conferred by s 46A(2) of the Act. This allows the Minister to either determine that s 46A(1) of the Act should not apply to an application for a protection visa or exercise the related non-compellable discretion under s 195A to grant a protection visa to an offshore entry person held in detention. In practice, a recommendation to 'lift the s 46A bar' has always been followed by a decision to both exercise the discretion contained in s 46A(2) and to grant a protection visa in accordance with s 195A.

²⁸ See *Migration Regulations* 1994 (Cth), Schedule 2, subclass 866.

²⁹ (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

³⁰ *Protocol relating to the Status of Refugees* (adopted 31 January 1967, entered into force 13 December 1973) 606 UNTS 267.

One other aspect of the legislative scheme introduced in the wake of the Tampa affair is worthy of mention at this juncture. In the litigation brought in August 2001 an attempt to force the government to ‘land’ and process the refugee claims of the Tampa ‘rescuees’,³¹ the assertion was made that the exclusion (and detention) of these people was a legitimate exercise of the government’s executive power. The claim was made that the vesting of the executive power on the government under s 61 of the Constitution was a sufficient basis for all the actions taken by the government: special enabling legislation was not required. Although not central to his reasoning, then Federal Court judge, French J accepted this proposition in the lead judgment for the majority in the case.³² In response, s 7A was added to the *Migration Act* 1958 so as to provide:

The existence of a statutory power under this Act does not prevent the exercise of any executive power of the Commonwealth to protect Australia’s borders, including, where necessary, by ejecting persons who have crossed those borders.

By relying on the broad and ill-defined notion of the executive power and by engaging non-government actors with only advisory functions to undertake RSA and review processes, the government’s intention was clear. The ‘offshore’ status determination process was to be carried out free from both the exigencies of domestic administrative and refugee law and free from oversight by the Australia courts.

4 The Challenge

The reach of the executive power vested in government by s 61 of the Constitution and implicitly the very justiciability of actions taken in the exercise of the power were central to the challenges made by two Tamil asylum seekers whose refugee claims were processed on Christmas Island under the regime described here.³³ Given the code names M61 and M69, the Plaintiffs arrived by boat in 2009 and claimed refugee protection on the basis that they faced persecution from the Sri Lankan Army and paramilitary groups and because of their alleged support for the Tamil Tigers (the LTTE). Their protection claims were rejected by both the (departmental) RSA officer and the IMR person. Each Plaintiff instituted proceedings in the original jurisdiction of the High Court, naming the Commonwealth, the Minister and others as Defendants.³⁴ Each alleged that they were not afforded procedural fairness during either the original RSA assessment or the subsequent IMR review. Each claimed further that the persons who undertook the assessment and the relevant review made errors of law by not treating themselves as bound to apply relevant provisions of the *Migration Act* 1958 and case law determining the way in which the criteria of

³¹ *Ruddock v Vadarlis* (2001) 110 FCR 491; *Ruddock v Vardarlis (No 2)* 115 FCR 229; *Victorian Council for Civil Liberties v Minister for Immigration and Multicultural Affairs* 110 FCR 452.

³² *Ruddock v Vadarlis* (2001) 110 FCR at 543-4.

³³ *Plaintiffs M61/M69* [2010] HCA 41 (11 November 2010).

³⁴ M61 named the Commonwealth, the Minister and the person who conducted the review, as defendants. M69 jointed the Secretary of the Department as a fourth defendant.

being a person to whom Australia owes protection obligations must be understood and applied. Plaintiff M69 alleged further that s 46A of the *Migration Act* 1958 is invalid if the provision has the effect of precluding judicial oversight of the RSA at the centre of the Plaintiff's claim.³⁵

In fact, the justiciability of the Plaintiffs' actions in the High Court was not contested. The Commonwealth conceded that the High Court had 'undoubted' jurisdiction under s 75(iii) of the Constitution: the action was a matter in which the Commonwealth, and persons being sued on behalf of the Commonwealth, were parties.³⁶ Moreover, orders of mandamus and injunction were sought against 'officers of the Commonwealth', namely the Minister (and the Secretary of the Department of Immigration in proceeding M69), which enlivened s 75(v) of the Constitution.³⁷ The Court agreed,³⁸ adding that jurisdiction could also be found in s 75(i) as the matters could be said to be arising under a treaty, in the form of the Refugee Convention and Protocol.³⁹ The plaintiffs argued that primary decision makers and the independent reviewers were also 'officers of the Commonwealth' for the purposes of s 75(v) of the Constitution. Having already found jurisdiction for the matters arising in each proceeding, the Court neatly avoided the need to consider the contentious issue of the reviewability of decisions made by private non-government actors.⁴⁰ As explained in the following section, it did this through skilful use of principles of statutory interpretation, tying the entirety of the process back to the *Migration Act* 1958. The reluctance of the court to engage in any detailed examination of the meaning of 'officer of the Commonwealth' may reflect a desire not to trench on the future consideration of the privatised management of facilities previously controlled by government - domestic migration detention centres being an example in point. The Court also left for another day the whole issue of foreign authorities processing relevant immigration applications.⁴¹

³⁵ See Part 4.2 below.

³⁶ Submissions of the First and Second Defendant in the matter of Plaintiff M61 v Commonwealth of Australia & Ors; Plaintiff M69 v Commonwealth of Australia & Ors, at [6].

³⁷ Ibid.

³⁸ *Plaintiffs M61/M69* at [51]; At [99] the court points out that mandamus would not be issued because of the absence of a compellable duty, but at [8] they seem to suggest that an injunction might have been ordered if there was a threat to remove the Plaintiffs before the lawful completion of the refugee determination process. Section 75(v) jurisdiction therefore seems to be best based on the injunction and ancillary declaration powers. This point is important for future cases, as the undoubted existence of s 75(v) jurisdiction is essential to the Federal Magistrates Court having 'the same original jurisdiction' under s 476(1) over s 46A processing activities: see further note 81 below.

³⁹ *Plaintiffs M61/M69* at [51].

⁴⁰ See *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277; *General Newspapers Pty v Telstra Corporation* (1993) 45 FCR 164; and *Griffith University v Tang* (2005) 221 CLR 99. See also, Margaret Allars, 'Public administration in private hands' (2005) 12 *Australian Journal of Administrative Law* 126, in which the author explores the possibility of the privatisation of decision making in the migration area as a way to remove the area from administrative review.

⁴¹ Although not cited in the written submissions to the Court, the Commonwealth's submission on this point makes at least tacit reference to the second leg of the test adopted in *Griffith University v Tang* (2005) 221 CLR 99.

The decision of the High Court turned on three matters. First was the question of whether the Plaintiffs were entitled to procedural fairness at the hands of the various actors in the status determination and visa process. The second concerned an examination of various aspects of the *ultra vires* doctrine in the context of the decision makers obligations to act in accordance with the *Migration Act* 1958 and associated case law. Finally there was the issue of what remedies might be available to the Plaintiffs. It is to each of these matters that we now turn.

4.1 The offshore RSA and IMR regimes are qualified by an obligation to observe the rules of procedural fairness.

The source of power

The essence of the defence mounted by the Minister and his Department was that the offshore RSA and IMR regimes were undertaken in exercise of a non-statutory executive power under s 61 of the Constitution. This power, it was submitted, was a non-prerogative executive power to inquire. While capable of informing the government and shaping the course of executive decisions, the exercise of the power did not in itself directly determine rights.⁴² The fact that the inquiry neither affected legal rights or interests, nor formed a legal precondition to the determination of legal rights or interests, meant that there was no obligation to afford procedural fairness in conducting the RSA and IMR processes. Nor did it matter if those who undertook the inquiry had misunderstood or misapplied the law.

The High Court rejected this characterisation of the power exercised by the RSA and IMR decision makers. Instead, the Court accepted the submission made by Plaintiff M61 (and adopted as an alternative argument by Plaintiff M69) that the power being exercised was *statutory*, being tied to the Minister's consideration of whether to exercise his power under s 46A(2) or s 195A(2) of the Act. The Court found that the Minister's practice and the published policies governing the RSA and IMR processes indicate that the Minister had made a decision to tie the non-reviewable, non-compellable discretions conferred by ss 46A and 195A to the assessment and review outcomes.

The court characterised the exercise of the powers given by ss 46A and 196 as being constituted by two distinct steps: '[F]irst, the decision to *consider* exercising the power to lift the bar or grant a visa and second, the decision whether to lift the bar or grant the visa'.⁴³ The court accepted that the Minister is not obliged to take either step. However, the court reasoned that as a result of the announcement in February 2008 that Minister would no longer remove offshore entry persons from Australia to declared countries under s 198A for processing of their claims, consideration

⁴² *R v Collins; Ex parte ACTU-Solo Enterprises Pty Ltd*, (1976) 8 ALR 691 at 695. See Submissions of the First and Second Defendant, at [33].

⁴³ *Plaintiffs M61/M69*, at [70].

would automatically have to be given to exercising the powers given by ss 46A and 195A in every case. These were the only statutory powers available to give effect to Australia's protection obligations under the Refugee Convention and Protocol. In this context, the decision to establish and implement the RSA and IMR procedures is understood not just as a direction to provide the Minister with advice about whether power under s 46A or s 195A can or should be exercised, but also as a decision by the Minister to consider whether to exercise either of those powers in respect of an offshore entry person invoking Australia's protection obligations.

A key factor in the Court's reasoning was the fact that the *Migration Act* requires the detention of an offshore entry person for the duration of RSA and IMR processes.⁴⁴ Without referencing the contentious High Court rulings on immigration detention,⁴⁵ the Court nevertheless pointedly expressed its reluctance to accept that a statutory power to detain a person could permit the continuation of that detention at the unconstrained discretion of the executive.⁴⁶ Such detention, the Court found, could only be lawful if the relevant assessment and review had some sort of statutory footing. The Plaintiffs' detention – prolonged by the RSA and IMR processes – was critical to the Court's ultimate finding that the pair did enjoy a legal entitlement to be accorded procedural fairness.

Rights, interests and legitimate expectations

Where a statute confers power to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, principles of natural justice generally regulate the exercise of that power.⁴⁷ In their submissions, the Minister and his Department argued that if any power was being exercised under s 46A(2), there was no implied obligation to afford procedural fairness because the power is not a power to destroy, defeat or prejudice a right. It is a *discretionary* power to *confer* a right. The Court rejected this argument, stating that the Minister's decision to consider whether power should be exercised under either s 46A or s 195A directly affected the rights and interests of the Plaintiffs. The decision had the consequence of depriving the Plaintiffs of their liberty for longer than would otherwise have been the case. It affected their rights and interest directly because the decision to consider the exercise of those powers, with the consequential need to make inquiries, prolonged their detention for as long as the assessment and any necessary review took to complete.⁴⁸ In the absence of exclusion by words of necessary intent, it followed that the Plaintiffs were entitled to an assessment and review that was procedurally fair and that addressed the relevant legal question or questions.⁴⁹

⁴⁴ *Migration Act* 1958 (Cth), s 189.

⁴⁵ See *Al Kateb v Godwin* (2004) 219 CLR 562; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664; Juliet Curtin, 'Never Say Never: Al-Kateb v Godwin' (2005) 27 *Sydney Law Review* 355.

⁴⁶ *Plaintiffs M61/M69*, at [63]-[64].

⁴⁷ *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ.

⁴⁸ *Plaintiffs M61/M69*, at [76].

⁴⁹ *Plaintiffs M61/M69*, at [77].

Three things are interesting about the High Court's rather sparse treatment of the procedural fairness issue. The first is that the Court did not buy into the debate that has raged over the phrase 'legitimate expectation' in the context of determining implication of the hearing rules. As offshore entry persons, the Plaintiffs are prime examples of persons bereft of rights. They are in reality the most disempowered of applicants. The Court returned simply to the case upon which the modern law of procedural fairness is founded: *Kioa v West*,⁵⁰ another matter in which applicants who could invoke no rights to speak of were found nonetheless to be entitled to a fair hearing. As in this and other early decisions,⁵¹ the focus of the Court was on the impact of the decisional process on the Plaintiffs' *interests* – expressed in human rights terms.

The second matter that was raised but not considered by the Court was whether the RSA and IMR decision makers might have been acting as the Minister's agent, if not as his delegate. Again, the Court's skilful interpretation of the statutory scheme allowed it to avoid any determination of whether the so-called *Carltona* principle should apply to the offshore processing regime. The fact that the assessments and review were done in consequence of a Ministerial decision was determined to be sufficient to link the assessment and review procedures to the Minister's power under s 46(A)/195A.⁵² As Matthew Groves notes, the *Carltona* principle is one that can and should cut both ways for governments. Governments frequently rely on the *Carltona* principle to suggest that the use of agents and departmental officers is an essential feature of administrative decision making in modern government which does not involve an improper delegation or similar transfer of authority. It is difficult then to complain when courts view governmental use of agents in an holistic way, rejecting an artificial separation of functions between Ministers and their delegates.⁵³

The third interesting aspect was that in linking the right to procedural fairness with the Plaintiffs' detention, the court was implicitly referencing prohibitions on arbitrary detention under human rights law. The right to the judicial review of incarceration is a fundamental human right that is reflected in numerous international human rights instruments. For example, article 9.4 of the ICCPR states '[a]nyone who is deprived of his liberty by arrests or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'⁵⁴ Although no

⁵⁰ (1985) 159 CLR 550.

⁵¹ See *Annetts v McCann* (1990) 170 CLR 596, another case in which the applicants could invoke no rights but whose broad personal interests were affected by the process in dispute.

⁵² *Plaintiffs M61/M69*, at [69].

⁵³ See Matthew Groves, 'Treaties and Legitimate Expectations – The Rise and Fall of *Teoh* in Australia' (2010) 15(4) *Judicial Review*, at [12].

⁵⁴ *International Covenant on Civil and Political Rights* (adopted 16 Dec 1966, entered into force 23 March 1976) 999 UNTS 171, art 9.4. Similar provisions exist in other human rights instruments including the *Universal Declaration of Human Rights*, GA Res 217A, UN Doc A/810, art 8, 10; *European Convention for the Protection of Human Rights* (adopted 4 November 1950, entered into force 3 September 1953) 213

reference was made to international human right instruments in the judgement, the effect of the judgement was to enforce the prohibition against arbitrary detention through the application of administrative law principles.

The content of the hearing rules

Having decided that the RSA and IMR processes are conditioned by the rules of procedural fairness, the Court had little difficulty in finding that serious breaches of the rules had in fact occurred. The Court focussed on the decision making process of the reviewer, as it was treated as overtaking the primary decision made by the department officer.

The court determined that the reviewer of both M61 and M69's claims had breached the rules of procedural fairness by failing to give the claimants an opportunity to respond to adverse country information. Procedural fairness required the reviewer to put before the Plaintiffs the substance of matters that the reviewer knew of and considered pertinent to the Plaintiffs' claims.⁵⁵ Both Plaintiffs had claimed refugee status on the basis that they faced persecution from the Sri Lankan army for their alleged support for the Tamil Tigers. In both instances, the Department had provided country information that contradicted claims made by the Plaintiffs that were not put to them. In the case of M61, the country information included claims that the groups whom the Plaintiff said he feared were now joining and integrating into mainstream Sri Lankan politics. He was also denied access to other general information about the improving conditions for Tamils in Sri Lanka. In M62's case, the country information contradicted the Plaintiff's claims about the treatment of failed asylum seekers returned to Sri Lanka. By applying the Common Law principles of procedural fairness in relation to the provision of country information, the Court echoed its earlier ruling in *Re Minister for Immigration and Multicultural Affairs; Ex p Miah*.⁵⁶ In so finding the Court has effectively declared that offshore applicants have a greater entitlement to due process than their onshore counterparts. This is because the Common Law rules of procedural fairness are expressly precluded for the second group.⁵⁷

The Court identified an additional breach of the rules of procedural fairness in the conduct of the review M61's claims, namely a failure to address one of the claimed bases for the Plaintiff's fear of persecution. M61 had made a separate claim that he risked harm on account of 'his profile as a shop owner' and on account of his membership of particular social groups: 'Tamil business owners' or 'Tamils who are perceived to be wealthy'.⁵⁸ The reviewer did not make any reference

UNTS 222, art 5(3)-(4); See also, Jordan Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial* (2003) 44 *Harvard International Law Journal* 503.

⁵⁵ Plaintiffs M61/M69, at [69].

⁵⁶ (2001) 206 CLR 57.

⁵⁷ See Plaintiffs M61/M69, at [91] and *Migration Act* 1958, s 424A(3)(a).

⁵⁸ Plaintiffs M61/M69, at [83].

to this claim in his written reasons. The Court held that the failure to deal with this claim resulted in a breach of the rules of procedural fairness. The breach was serious because it meant that the Minister was not informed about a matter that bore upon the question that the Minister had asked to be considered: whether Australia owed the Plaintiff protection obligations.⁵⁹ On this occasion, it is arguable that such a finding would have been made also in respect of onshore applicants, given the constraints of the *Migration Act* 1958.⁶⁰

4.2 Other grounds of review

Error of Law

Putting the procedural fairness issues to one side, the Court turned its attention more broadly to the relevant limits on the conduct of RSA and IMR inquiries. The Court determined that RSA and IMR inquiries were required to be carried out according to law. The RSA and IMR inquiries were made pursuant to the power to lift the bar under s 46A and permit a claimant to make a valid claim for a protection visa. The court determined that:

...the exercise of that power on the footing that Australia owed protection obligations to the plaintiff would be pointless unless the determinations was made according to the criteria and principles identified in the Migration Act, as construed by the courts of Australia.⁶¹

As such, it followed that the reviewer had made an error of law by treating the *Migration Act* and decided cases as no more than guides to decision making. It is interesting to note that the Court ruled at [89] against the need to consider whether the refugee principles for these refugee determinations would differ from those applied by decision makers who are required to look at the Convention definition of refugee as it is qualified by ss 36 and 91R of the *Migration Act* 1958. This may be another consequence of *Plaintiff M61/M69* where the High Court has placed offshore entry persons in a better position than s 36 protection visa applicants.

The constitutionality of s 46A

Plaintiff M69 made additional submissions challenging the constitutional validity of s 46A of the *Migration Act* on the basis that it confers an arbitrary and unreviewable power on the Minister. Section 46A(7) makes it clear that the Minister has no duty to consider whether to exercise the power conferred on him by s 46A(2) of the Act. Plaintiff M69 contended that this renders s 46A invalid because its effect is to confer on the Minister a power ‘free from any judicially

⁵⁹ *Plaintiffs M61/M69*, at [90].

⁶⁰ See, *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No.2)* (2004) 144 FCR 1 at [63].

⁶¹ *Plaintiffs M61/M69*, at [88].

enforceable limitation'.⁶² This meant that s 46A(2) was either not a 'law' at all⁶³ or that it amounted to an invalid conferral of judicial power to the Minister.⁶⁴ Both these arguments were based on the proposition that Chapter III of the constitution and s 75(v) in particular render invalid a grant of power without limits that are capable of being enforced by the courts.⁶⁵

Support for this proposition was sought by reference to three further considerations:

First, reference was made to the notion of the rule of law and the well known dictum of Dixon J in *Australia Communist Party v The Commonwealth*⁶⁶ that the Constitution is framed in accordance with many traditional conceptions of which some, including the rule of law, are simply assumed. Second, reference was made to what was said in *Kirk v Industrial Court (NSW)*⁶⁷: that to deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than the Court "would create islands of power immune from supervision and restraint". Third, reference was made to the uncontroversial proposition that 'a non-judicial body cannot determine the limits of its own power'

The Court rejected these submissions, ruling that there is nothing inherently unconstitutional about conferring a discretion on a Minister that the Minister is under no legal obligation to consider exercising. Such a power precluded the enforcement of *consideration* of the power, but did not mean the power had no enforceable limits. This is because where the Minister makes a decision to exercise the power, s 75(v) can be engaged to enforce limits on the power - as was done in the Plaintiffs' cases. In the words of the court:

Maintenance of the capacity to enforce limits on power does not entail that consideration of the exercise of a power must always be amenable to enforcement, whether by mandamus or otherwise. Nor does it entail that every discretion to exercise a power must be read as if satisfaction of identified criteria would require its exercise.⁶⁸

It is one thing for the High Court to affirm its jurisdiction over the existence and extent of powers once they are exercised. It is quite another to declare that it is beyond the power of the Commonwealth to enact a power that contains a discretion as to whether the power should be exercised. It is understandable that the High Court would wish to avoid such a far reaching proposition.

⁶² Submissions of Plaintiff M69 in the matter of Plaintiff M61 v Commonwealth of Australia & Ors; Plaintiff M69 v Commonwealth of Australia & Ors at [18].

⁶³ Ibid, at [19]-[29].

⁶⁴ Ibid, at [30]-[31].

⁶⁵ *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at [45]; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 363 per Dixon J.

⁶⁶ (1951) 83 CLR 1 at 193.

⁶⁷ (2010) 239 CLR 531 at [99].

⁶⁸ *Plaintiffs M61/M69*, at [57].

4.3 The remedies available

The High Court's careful analysis of the statutory scheme underpinning the offshore processing regime lead inevitably to a finding that the writ of mandamus could not issue against the Minister. The Court said:

Sections 46A(7) and 195A(4) expressly provide that the Minister does not have a duty to consider whether to exercise the relevant power. And ss 46A(2) and (3) and 195A(2) and (5) make plain that it is for the Minister personally to decide whether to exercise the relevant power.⁶⁹

...

That the Minister decided to consider exercising the powers and, for that purpose, directed the making of Refugee Status Assessment and Independent Merits Review does not entail that, if the process of inquiry miscarried, the Minister can be compelled again to consider exercising the power.⁷⁰

In the absence of any duty in the Minister to make a decision, *certiorari* 'would have no practical utility'.⁷¹ Instead, a declaration was made in each case that the person who conducted the Independent Merits Review made the error of law that has been identified and that the plaintiff was not afforded procedural fairness in the conduct of that review.

5 The implications of the ruling in *Plaintiffs M61 and M69*.

5.1 The existing Christmas Island cases

There is no escaping the fact that the ramifications of the High Court's ruling in *Plaintiffs M61 and M69* are serious for the government's management of its offshore asylum processing regime, particularly as the number of persons being refused refugee protection continue to grow. At time of writing, there were at least 150 cases where the applicants had been refused at both first instance and on appeal.⁷² If the statements of reasons produced for Plaintiffs M61 and M69 are indicative of a trend, the likelihood that most if not all of the IMR rulings are affected by fundamental legal errors is high.

The sting in the High Court's ruling is that the Court did not just declare the processes in the two cases to have been flawed by reason of a failure to observe the rules of procedural fairness. The Court also made it clear that the decision makers were bound by other aspects of Australian law.

⁶⁹ *Plaintiffs M61/M69*, at [70].

⁷⁰ *Plaintiffs M61/M69*, at [99].

⁷¹ *Plaintiffs M61/M69*, at [100]. See *Re MIMIA ; Ex parte Applicants S134/2002* (2003) 211 CLR 441.

⁷² See Michael Gordon and Yuko Narushima, 'Rejected refugees given new hearings', *The Age*, 20 November 2010, available at < <http://www.theage.com.au/national/rejected-refugees-given-new-hearings-20101119-18111.html>>.

This includes both the rules that have grown up around the making of administrative decisions and the substantial body of jurisprudence that has developed around the international legal definition of refugee and other aspects of the Refugee Convention and Protocol. As we have seen, the whole concept of offshore processing was developed so as avoid the intricacies of this body of law.

The desire of successive governments to reduce the complexity and perceived generosity (for want of a better term) of domestic administrative law in Australia has lead over the years to the introduction of a series of special measures in the migration area. The privative clause regime in s 474 of the *Migration Act* 1958 is a prime example in point. The exclusion of all decisions involving the grant of visas from the remit of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) is another,⁷³ as are provisions basing refugee determinations on the ‘satisfaction’ of the Minister rather than on an objective standard.⁷⁴ The effect of these measures is arguably to make it more difficult than might otherwise be the case to obtain judicial review of an onshore migration decision.

The great irony following the High Court ruling is that none of these constraints and qualifications apply to offshore RSA or IMR decision making. For a court reviewing the decisions made by these bodies, it is the objective standard of the Refugee Convention and Protocol that applies.⁷⁵ Any departure from either the jurisprudence on the definition of refugee or the dictates of lawful administrative decision making will constitute an error of law. As noted earlier, it may be that offshore entry persons now have broader rights of procedural fairness than onshore applicants in relation to the requirement that adverse country information be put to them for comment.⁷⁶ In other words, the lowly offshore entry persons could find it easier in the scheme of things to have a Court declare unlawful the ruling made on their case. This outcome once again illustrates the counterproductive nature of legislative attempts by successive governments to undermine various elements of the rule of law. Legislation that seeks to do this inevitably provides a judicial opportunity to affirm the rights of people against whom the legislation is directed.⁷⁷

⁷³ *Administrative Decisions (Judicial Review) Act* 1977 (Cth), Schedule 1.

⁷⁴ *Migration Act* 1958 (Cth), s 36; See *Wu Shan Liang v MIEA* (1996) 185 CLR 259; Crock, above n4, Chapter 19.

⁷⁵ This was the situation that applied at the time of the High Court’s ruling in *Chan Yee Kin v MIEA* (1989) 169 CLR 379. Note that the definition of refugee is qualified in the migration legislation. The High Court’s ruling suggests that this qualification would apply also to offshore RSA and IMR inquiries.

⁷⁶ *Plaintiffs M61/M69*, at [91]. Section 424A of the *Migration Act* 1958 reduces common law rules of procedural fairness for onshore applicants by stating that they have no right to be informed of information ‘that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is just a member’. The High Court’s decision makes it clear that this restriction does not apply to offshore applicants.

⁷⁷ See for example, the High Court’s recent ruling in *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23 (23 June 2010).

The government has announced that it will respond to the *Plaintiffs M61 and M69* case by drawing a line under the current refusals and referring them all back to the IMR bodies for re-consideration.⁷⁸ There is a possibility that this approach could lead to future legal challenges. Although there is High Court authority to the effect that rulings affected by fundamental legal error are no decisions and all and so can be re-made by decision makers,⁷⁹ the better view is that only a court can declare definitively that a decision is affected by legal error.⁸⁰ It could take only one case to undo such a strategy. A nightmare scenario for the High Court would be for all the unsuccessful claimants to issue in its jurisdiction.⁸¹ Here again, however, the Court's ruling contains a clever escape clause. By tying the case to s 46A of the *Migration Act 1958*, the Court left open the possibility that applicants could seek judicial review in the Federal Magistrates Court.⁸²

5.2 The Pacific Strategy reprised in East Timor or Nauru? Can Australia create an offshore processing system that is not subject to of judicial oversight?

In the immediate aftermath of the High Court's ruling in *Plaintiffs M61 and M69*, the Minister and indeed the government have maintained the plan to create an offshore processing centre on East Timor.⁸³ For its part the Opposition has repeated its assertion that Australia should resurrect arrangements with Nauru that saw 'offshore entry persons' processed in that tiny country.⁸⁴ Leaving to one side the political difficulties of securing an appropriate agreement with Nauru, both proposals bear reconsideration in light of the High Court's ruling.

⁷⁸ See Gordon and Narushima, above n71.

⁷⁹ *MIMA v Bhardwaj* (2002) 209 CLR 597.

⁸⁰ See Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Law Book Co: Sydney, 2009, 4th ed) at 717- 727.

⁸¹ For complaints by individual judges about the increased workload arising from a flood of refugee cases commenced in the High Court's original jurisdiction after the introduction of the first Part 8 of the *Migration Act 1958* (Cth) see *Ex Parte Durairajasingham* (2000) 168 ALR 407 at [13] (McHugh J) and *Re Refugee Review Tribunal, ex p Aala* (2000) 204 CLR 82 at [134] (Kirby J).

⁸² Section 476(1) of the *Migration Act 1958* gives the Federal Magistrates Court jurisdiction over nearly all privative clause decisions, purported privative clause decisions and non-privative clause decisions as defined in s 5 and elsewhere (see the definition of 'migration decision' in s 5). Hence, all non-compellable powers would be reviewable by the Federal Magistrates Court as in the High Court under s 75(v) (albeit with the same limitations because of their non-compellable nature). While most of these powers are expressly excluded by s 476(2)(d) read with s474(7), s 46A is not so excluded. See the comments of Smith FM in *SZLJM v Minister for Immigration and Citizenship* (2007) 215 FLR 115, upheld by Flick J [2008] FCA 300.

⁸³ See Chris Bowen MP, Interview with Kerry O'Brien, 7:30 Report, ABC TV, 11 November 2010, transcript available at <http://mia.org.au/media/File/Bowen_HCA_730_report.pdf>; Interview with Samantha Hawley, ABC AM, 12 November 2010, transcript available at <http://mia.org.au/media/File/Bowen_HCA.pdf>; Interview with Marius Benson, ABC Newsradio, 12 November 2010, transcript available at <http://mia.org.au/media/File/Bowen_ABC_newsradio.pdf>.

⁸⁴ Scott Morrison MP, 'High Court sinks Labor's asylum policy credibility', *Media Release* (11 November 2010), available at <<http://www.scottmorrison.com.au/info/pressrelease.aspx?id=535>>.

Driven by the compromises needed to secure a unanimous judgment, the ruling in *Plaintiffs M61 and M69* is very spare in its treatment of the many and varied issues raised by offshore processing. In the result, the scope for the government to move forward with confidence that it may be possible to create a processing regime free of judicial oversight is somewhat reduced. The central problem is the link made by the Court between status determinations and the grant of a visa to enter Australia. As long as the status determination process is tied to the visa grant in some way, the judgment suggests that the process may be reviewable. It would not be enough, for example, that the decision makers had no connection with the Australian government. The central issue is the connection between the status determination and the grant of the visa. Another factor that will influence whether offshore entry persons processed in East Timor can have their determinations reviewed by Australian courts is whether such persons are held in detention on Australian territory or by Australian officers before or after being taken to Timor.

On this point it is worth noting that the regime (such as it was) underpinning the referral of asylum seekers to Nauru was never comprehensively challenged in the Australian courts. Only two challenges (both unsuccessful) were made. The first related to the legality of the detention in Nauru⁸⁵ and the second, to whether the decision of the Minister to remove a person from Australia under s198B was reviewable by the courts.⁸⁶ The question of whether asylum seekers processed on Nauru were entitled to procedural fairness and whether they could have access to judicial review in Australia if they did not receive it was never considered by an Australian court. Why the Pacific strategy enjoyed such a honeymoon from Australia's otherwise quite litigious refugee advocates is something of a mystery.⁸⁷ For present purposes, however, it suffices to note that there can be no certainty that a return to this regime would see the High Court demur from the review of relevant decisions.

The schema that the current government appears to be seeking to replicate is that which operates within the major refugee camps managed by UNHCR around the world. In these cases, UNHCR determines claims made by asylum seekers. Sometimes this is done for the purpose of identifying worthy candidates for resettlement in third countries. The primary purpose, however, is to identify persons whose claims not to be returned to the country from which they have fled should be respected. The problem with establishing a regime of this kind on East Timor, or for that matter on Nauru, is that the system would depend on breaking the nexus between the relevant asylum seekers and Australia's obligation not to *refoule* or send back a genuine refugee

⁸⁵ *Sadiqi v Commonwealth of Australia (No 2)* [2009] FCA 1117.

⁸⁶ See *Plaintiff P1/2003 v MIMIA* [2003] HCATrans 787 (18 June 2003) (remittal of the case to the Federal Court); and *P1/2003 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1029 (26 September 2003).

⁸⁷ The refusal of Nauru and/or the then Australian government to allow anyone near the detainees may offer a partial explanation. The contemporary jurisprudence coming from the High Court between 2001 and 2004 may also have discouraged litigation. See, for example, *Al-Kateb v Godwin* (2004) 219 CLR 562; *Behrooz v Secretary, DIMIA* (2004) 219 CLR 486; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1.

to a place of persecution.⁸⁸ This obligation extends to indirect as well as direct return.⁸⁹ Unlike the asylum seekers processed by UNHCR in its many field operations, the boat people interdicted by Australia are first and foremost Australia's responsibility. If Australia is the only country involved in the creation of the offshore centre, this responsibility – and the connection with Australia – will be hard to shake. Whichever country is chosen to house such a centre, it is difficult to imagine that the arrangements would not involve a guarantee of some kind that Australia will bear the ultimate responsibility of ensuring that recognised refugees are resettled in a third country.

The cleverness of the High Court's ruling in *Plaintiffs M61 and M69* is that the judgment leaves unanswered a great many questions. Among these is the important issue considered by the Brennan Inquiry concerning the applicability of any proposed human rights legislation to persons outside of mainland Australia. In fact, the Committee recommended that appropriate standards should apply to persons who were overseas but subject to Australian jurisdiction.⁹⁰ Given the sensitivity of the matters at stake the sparseness of the Court's judgment should not be a surprise. The one thing that is clear is that the High Court continues to guard jealously its ability to review decisions associated with government in Australia. In spite of the gaps and silences in the Constitution, this seems to be particularly the case in matters involving the potential abuse of human rights.

⁸⁸ Articles 32 and 33 of Refugee Convention create basic obligations that refugees should neither be *refouled* nor returned to 'the frontiers of territories where his [or her] life or freedom would be threatened'.

⁸⁹ See James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, Cambridge, 2005) at 326.

⁹⁰ See the *Brennan Report*, above n 1 at Recommendation 21.