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**No Way Out:  
The High Court,  
Asylum Seekers  
and Human Rights**

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## No Way Out: The High Court, Asylum Seekers and Human Rights

When reading the Human Rights and Equal Opportunity Commission's report on children in detention, *A Last Resort*, late last year, I came close to tears as I took in the following series of entries made by staff in relation to one particular 12 year old child.<sup>1</sup> This case study was not isolated but was one of more than a hundred considered by the Commission:<sup>2</sup>

- 11 April 2002: Child attempts to hang himself with a bed sheet on playground equipment.
- 12 April: Child's mother becomes very upset and is taken to hospital for observations and assessment by psychologist. Says that she is on hunger strike. Child recorded as saying:  
  
'he wanted to kill himself because his mother doesn't eat and she cries all the time...Very tired of camp, getting up in the morning and seeing the fences and dirt. We came for support and it seems we're being tortured. It doesn't matter where you keep me, I'm going to hang myself.'
- 19 April: Child attempts to hang himself from playground equipment. Child taken to hospital with his father.
- 17 May: Child attempts to hang himself from playground equipment. Taken to Woomera and then returns.
- 30 May: Psychiatrist reports that 'for this child the matter is simple. If he remains in custody he wishes to die. He can no longer bear razor wire and dirt. He worries about his mother's wellbeing and also about his father who he says is constantly worrying and angry...'
- 7 June: Child found in the razor wire. He says 'he can't go on anymore.'
- 8 June: Child found in razor wire again.
- 14 June: Child climbs fence into the razor wire a third time. After about 8 minutes climbs down again.

1. Human Rights and Equal Opportunity Commission (2004), *A Last Resort? National Inquiry into Children in Immigration Detention*, April 2004.

2. *Ibid*, pp.442-444.

- 24 June: Child on hunger strike.
- 13 July: Child found in razor wire.
- 26 July: Child attempts to hang himself.
- 29 July: Child smashes lights in dining area, slashes arm with fluorescent tube.
- January 2003: Child transferred to Woomera RHP.

It is said frequently of Australia's constitutional and legal system that 'if it ain't broke, don't fix it'. If there is no way out for a child such as this then, in my view, it's broke. In this article, I will explore this theme further by reference to recent High Court decisions which concern the legal position of those seeking asylum in Australia and explore the enactment human rights legislation as one possible solution to the problems raised by them.

### Children in Detention

In two important cases late in 2004, the High Court had to rule on the legal validity of the mandatory detention of the children of asylum seekers. In both it concluded that the Commonwealth Government has the constitutional and statutory authority to detain children mandatorily – even for years. The conclusions of the Court were unanimous and, in my view, clearly right. This is not for a moment, however, to endorse the policy of the compulsory incarceration of minors embodied in the legislation that the Court was required to consider. I return to this dissonance presently.

The first case was one of several involving the Bakhtiyari family.<sup>3</sup> It came to the High Court as an appeal from the Family Court. The Family Court had decided that it could order the release of the Bakhtiyari children from detention in pursuit of a general, statutory responsibility for the welfare of children. This was a most adventurous interpretation of the Court's jurisdiction. No matter how well intentioned, it was plainly, legally incorrect. The High Court determined properly that the Family Court's jurisdiction was confined by its statute to the pursuit of the best interests of the child only in the context of marital disputes or in the determination of the proper exercise of parental responsibility. Consequently, the Court could not make orders with respect to the welfare of the Bakhtiyari children just because they were children in need. It could not order their release, therefore, particularly in the face of the comprehensive scheme of mandatory detention of those seeking asylum contained in the Commonwealth's Immigration Act. This scheme, the Court ruled, was one which appeared to contain no relevant exception in relation to children.

3. *Minister for Immigration and Multicultural Affairs v B* (2004) 78 ALJR 737.

The proposition that there was no exception for children was then challenged in the second case of *Re Woolley*.<sup>4</sup> Mr Woolley was the manager of the Baxter Detention Centre. The applicants were four Afghani children aged 15, 13, 11, and 7, who had arrived with their parents on Australian shores seeking refugee status on the ground that they would be in danger of persecution if they returned to their homeland. In *Woolley* the Court confirmed its initial view that the Immigration Act could not be read so as to provide children with a legal or constitutional immunity from mandatory detention. Children stood in no different position from their parents in this respect. The legal reasoning which led to this conclusion was straightforward.

The two central provisions of the *Migration Act* that provide for mandatory detention refer to the detention of ‘unlawful non-citizens’. The definition of an unlawful non-citizen contains no exception for children. An unlawful non-citizen is a person who is not a ‘lawful non-citizen’ i.e. a non-citizen possessing a visa. A child is a person. Therefore, a child may fall within the definition.

In addition, it had to be presumed that parliament would have known that adults and children would have been caught by the definitional provisions. As Justice Kirby observed, the plight of children in detention had been drawn to parliament’s attention in several, detailed parliamentary reports and reports from the Human Rights and Equal Opportunity Commission (HREOC). Despite this, no change to the legislation had been made. This reinforced the view that the mandatory detention of children had been, and continued to be, contemplated explicitly by the parliament.

The Constitution could not help either. It provides the Parliament with the power to make laws with respect to aliens (i.e. unlawful non-citizens). The statutory provisions with respect to mandatory detention are laws concerning aliens. They provide for the detention of aliens pending the scrutiny of their asylum claims, and if rejected, pending their deportation. The laws, therefore, were clearly within the Commonwealth’s constitutional power.

In short, the plain words of the *Migration Act* provided no room for an implication that the detention regime was inapplicable to children. Given the clarity of the words, and the intention behind them, it was not for the Court to undermine the legislature’s will. As Justice Kirby stated:<sup>5</sup>

Fundamental to the Australian constitution is respect for the rule of law. If the law is clear and constitutionally valid, it is the duty of the Australian courts to apply its terms. This is so whatever judges or others might think about the content and effect of the law.

4. *Re Woolley, Ex parte Applicants M276/2003* (2004) 210 ALR 369.

5. *Ibid* at 416.

The *Migration Act*, therefore, provided no way out for the Court and, consequently, no way out for the children.

This outcome, however well it might be justified legally, has presented the nation and legal system with a formidable dilemma. Australia's incarceration of children, often for long periods of time, has been well recognized internationally and nationally as a grave assault on their human rights. It constitutes a significant infringement of Australia's obligations under a number of international human rights conventions including, most notably, the *International Convention on the Rights of the Child*.

Yet, in the face of the plain intention of the parliament to the contrary, nothing other than the replacement of the government at election, or threats by liberal moderates to cross the floor, can be done to rectify or moderate the injury. That, in turn, draws one's attention sharply to certain critical matters that the High Court, as a matter of law, could not take into account when reaching its conclusions.

It could not consider whether the scheme of the legislation might be inconsistent with Australia's international human rights treaty obligations. This is because a treaty's provisions do not have direct effect in Australian law.

It could not consider the consistent opinion of United Nations treaty monitoring bodies and rapporteurs to the effect that Australia was in breach of its human rights treaty obligations: in this case, in breach of its obligation to ensure that no child should be deprived arbitrarily of their liberty and that detention of a child should be used only as a measure of last resort. The Court's task here was simply to interpret the statute and determine its constitutional validity.

It could not consider the comparative law of other similar countries. This is because Australia's detention regime, as set down by law, differs substantially from that in its closest counterparts.

It could not consider the powerful, indeed overwhelming, evidence of the systematic abuse of children's rights and the physical and emotional injury inflicted upon them in mandatory detention adduced by Australia's Human Rights Commission. In its 900 page report *A Last Resort?*, the Human Rights and Equal Opportunity Commission concluded that:<sup>6</sup>

Children in immigration detention suffered from anxiety, distress, bed-wetting, suicidal ideation, and self-destructive behaviour including attempted and actual self-harm. The methods used by children to self-harm included hunger strikes, attempted hanging, slashing, swallowing shampoo or detergents and lip-sewing. Some children were also diagnosed with specific psychiatric illnesses such as depression or post traumatic stress disorder.

6. *A Last Resort?* supra. p.13.

The only way in which evidence such as this might have made its way into the Court's legal deliberations would have been if Australia had a constitutionally entrenched or statutory Charter of Rights, enacting into law the provisions of the international human rights conventions that Australia has ratified. But Australia is now the last country in the Western world not to have adopted such a Charter. Neither Australians nor aliens have recourse to a law of this kind.

## Indefinite Detention

A very similar set of problems emerged from the High Court's very controversial decision with respect to stateless persons, *Al-Kateb v Godwin*.<sup>7</sup> Mr Ahmed Al-Kateb had been born in Kuwait of Palestinian parents. This was insufficient to accord him citizenship of Kuwait. In the absence of a Palestinian state, therefore, he was left as a 'stateless person'. After having spent considerable time wandering the Middle East in search of a home, Mr Al-Kateb arrived in Australia by boat in December 2000, without a passport or a visa. Upon landing he was detained pursuant to the *Migration Act 1958*.

The provision most relevant to his case was section 196. This states, in summary, that a person who is an 'unlawful non-citizen' must be kept in immigration detention until either the person is removed from the country, deported, or granted a visa. Mr Al-Kateb's problem, after three years in detention, was that he had been refused a visa but could not be removed or deported because no country had been found that was willing to receive him. He wished to leave Australia – but had absolutely nowhere to go.

The decision in the case, then, concerned two principal questions. First, how should s.196 of the Act be interpreted? And, secondly, did the Constitution provide any foundation upon which Mr Al-Kateb's continuing detention might be challenged?

The majority in the case, Justices McHugh, Hayne, Callinan and Heydon, decided that s.196 was unambiguous. The provision states that a person must continue to be detained until a visa is issued or removal is effected. If that meant, in the absence of a capacity to remove him, that Mr Al-Kateb's detention would be for life then that was the consequence that must follow as a matter of law. The words, as Justice Hayne put it, were 'intractable'.

The minority, Justices Gleeson, Gummow and Kirby, disagreed fundamentally. S.196, they believed, rested upon an underlying assumption that the purpose of the provision, i.e. a person's removal, was capable of fulfilment. However, if Mr Al-Kateb could not be removed, because no other country would

7. (2004) 219 CLR 562 and see further J. Allan, 'Do the Rights Thing Judging?: The High Court of Australia in *Al-Kateb*' *University of Queensland Law Journal* 24 (2005): 1.

admit him, the provision's purpose lapsed. Where the purpose was spent, therefore, detention must be suspended. This result followed from the great statutory and common law presumption in favour of the liberty of the subject.

The Court was equally divided on the principal constitutional question. Speaking generally the Constitution forbids a person's detention for any punitive purpose unless that detention has been authorised by a court following a judgment of criminal guilt. Nevertheless, it is recognised that the Executive may detain a person for a non-punitive, administrative purpose in certain special circumstances. The detention of a person under immigration law for the purpose of determining whether they should be permitted to enter Australia is one such recognised exception.

On this question, the majority decided that the purpose of Mr Al-Kateb's detention was administrative and so, by definition, was non-punitive in nature. As Justice Hayne summarised the matter, the Constitution permitted the segregation of aliens from the Australian community. Such segregation was neither penal nor punitive.

The minority responded by asserting that no clear line could properly be drawn between punitive and non-punitive detention. The one might easily merge into the other. Consequently, it was primarily with the deprivation of a person's liberty that the Constitution and the Court had to be concerned. In the present case, therefore, as Justice Gummow encapsulated the matter:<sup>8</sup>

It is hardly to be supposed that in speaking of the denial to prohibited immigrants of membership of the Australian community... [this Court] was giving support to the notion that legislative power with respect to such persons would support a system of segregation by incarceration without trial for any offence and with no limit of time...

Yet it is this, precisely, that has been the outcome of the case. The majority's very literal approach to constitutional and statutory interpretation left no room for a consideration of the presumption of liberty. It shut the gate on numerous prior judicial decisions to the effect that, in case of doubt, laws should not be interpreted in a way that is prejudicial to individual liberty. In the most influential of these statements, a prior Court stated that:<sup>9</sup>

the rationale of the presumption is to be found in the assumption that it is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law without expressing its intention with irresistible clarity.

8. *Ibid*, p.614.

9. *Bropho v Western Australia* (1990) 171 CLR 1, 18.

The choice not to infringe Mr Al-Kateb's fundamental rights was open. The majority chose not to exercise it. The Court adopted a formal, semantically founded interpretation of both statute and Constitution. This method embodies a degree of deference to the will of the Executive that is likely to narrow significantly its role as a guardian of individual rights and liberties and expand governmental power correspondingly.

## A Human Rights Act

Immediately following his retirement from the High Court late in 2005, Justice Michael McHugh, a member of the majority in *Al-Kateb*, gave a speech to students at the University of Sydney's Law School.<sup>10</sup> In that speech he indicated his strong support for the enactment in Australia of a Bill of Rights. The existence of a Human Rights Act of this kind, he said, was the only way in which a legal difference could have been made to the High Court's decision in that case. As he said then:<sup>11</sup>

There is no doubt that the protection provided [for human rights] under ordinary legislation is no substitute for the protection that could be provided by a national Bill of Rights...Unlike ordinary legislation, a Bill of Rights is expressly designed to place fundamental human rights beyond the reach of day to day politics...A Bill of Rights forces governments to consider the human rights consequences of the legislation they are introducing, allows the judiciary to view legislation through the prism of human rights and provides the public with a clearer overview of the rights they are being asked to give up in the name of national security.

How then might a *Human Rights Act* such as that Justice McHugh advocates have made a difference in the cases discussed above? The short answer is that human rights legislation would set down in Australian domestic law, the rights and freedoms common to and exercisable by all Australians. These, in turn, would be derived from the terms of the international human rights treaties to which Australia is a party. Having done so, the legislation's effect would be to establish clear legal standards against which all other laws would have to be assessed. Consequently, where it is determined by a Court that a law of the Commonwealth is incompatible with a right or freedom set down in the *Human Rights Act*, that law would be returned to the Parliament for reconsideration, amendment or revocation.

By way of example, let me reconsider the cases previously referred to with reference to the draft Commonwealth human rights legislation presently being proposed in a campaign by the online political magazine, *New Matilda*.<sup>12</sup>

10. The Hon Justice Michael McHugh, *The Need for Agitators – The Risk of Stagnation*, Sydney University Law Society Public Forum, 12 October 2005.

11. *Ibid*, pp.12-13.

12. **The full text of the *New Matilda Human Rights Act*** may be found at [www.humanrightsact.com.au](http://www.humanrightsact.com.au).

It was an important feature of the decision in *Al-Kateb* that the legislation underpinning Mr Al-Kateb's indefinite detention was made under the Commonwealth's constitutional power to make laws with respect to aliens. All members of the Court accepted that had Mr Al-Kateb been an Australian citizen, the executive government would have had no similar power to detain him. This is because, under Australia's constitution, a citizen may be detained only consequent upon a finding of criminal guilt and the imposition of a sentence by a properly constituted Federal Court. Had the *Human Rights Act* been in place, however, the situation would have been different. This is because the Act applies to 'all people within Australia's jurisdiction'.<sup>13</sup> No relevant distinction could be drawn, then, between citizens and aliens. Its guarantee of a 'right to liberty', then, would apply equally to both.

That being the case, Mr Al-Kateb's indefinite detention by the executive would certainly be found to be inconsistent with the *Human Rights Act* which provides that 'every person has the right to liberty and security of the person' and, more particularly, that 'no one may be arbitrarily arrested or detained'.<sup>14</sup> This is derived from a similar guarantee contained in the *International Covenant on Civil and Political Rights*. The key issue here relates to the meaning of the term 'arbitrarily'. It may be quite reasonable for legislation to provide that a person arriving without authorisation on Australian shores should be detained for a period of time that is sufficient to permit appropriate health and identity checks to be carried out and also, perhaps, pending the outcome of their formal application for asylum. However, as the United Nations Human Rights Committee has determined, in its criticism of Australia's mandatory detention regime, where detention is either substantively unreasonable or is perpetuated for a quite unreasonable period of time, the injunction that a person should not be detained arbitrarily is transgressed.<sup>15</sup> The idea that Mr Al-Kateb could be detained indefinitely and perhaps for life, would constitute the clearest infringement of both national and international guarantees with respect to the 'liberty of the subject'.

The *Human Rights Act* also provides for a right to asylum.<sup>16</sup> This right incorporates into Australian domestic law, the provisions of the *International Convention on Status of Refugees*. In doing so it provides an entitlement to asylum to any person who is in genuine fear of political persecution in their home country. Further, the Convention contains a minimum guarantee of humane treatment for applicants for asylum. The *Human Rights Act* gives this guarantee domestic legal effect. While families are in the process of having their asylum claims heard and determined, these basic conditions of humane treatment would not permit the extended and psychologically damaging detention of adults. The prohibition would be even more forceful in relation to children.

13. *New Matilda Human Rights Act*, s.4.

14. *Ibid* s.15.

15. **Concluding Observations of the Human Rights Committee: Australia**. 28/07/2000, A/55/40.

16. *New Matilda Human Rights Act*, s. 34.

The Act provides in addition for the rights of the child. In this respect it incorporates the terms of the *International Covenant on the Rights of the Child*. More specifically it states that:<sup>17</sup>

1. Every child has the right –
  - a. to a name and a nationality from birth;
  - b. to family care, parental care, or adequate and appropriate alternative care if removed in accordance with law from the family environment;
  - c. to be protected from maltreatment, neglect, abuse or degradation;
  - ...
  - e. not to be detained except as a matter of last resort and then only for the shortest appropriate period of time;
  - ...
  
2. A child's best interests are of paramount importance in every matter concerning the child.

Taken in combination these provisions would be likely to rule out the mandatory detention of children. This is first because of the requirement that the child's best interests must be paramount in determining his or her placement. So, except in very special circumstances, it is highly unlikely that a court would find that a child's best interests would be served by their continuing incarceration in an immigration detention centre. Further, as the Human Rights and Equal Opportunity Commission found in its comprehensive report on children in detention, it cannot properly be said that in practice the detention of children has been either a last resort or that it has been instituted for the shortest appropriate time. Finally, it is highly unlikely that a Court would endorse the mandatory detention of children given the overwhelming evidence to the Commission that children have been subject to severe mental trauma and damage consequent upon their incarceration. Such treatment flies in the face of the requirement that children must be protected from maltreatment and abuse at the hands of governmental authorities.

## Conclusion

In a lecture, now some time ago, Chief Justice Gleeson pointed out correctly in my view that:

Those for whose rights we need to be zealous are the unpopular, those against whom campaigns of public vilification may be waged, those whose activities, even though lawful, are sought to be made the object of public disapproval.<sup>18</sup>

<sup>17</sup>. Ibid, s.27.

<sup>18</sup>. The Hon. Justice Murray Gleeson, 'The Rule of Law and the Independence of the Judiciary', *Judicial Officers' Bulletin* 1, no.10 (1989), p.2.

And yet it seems that the Government is not willing, and the High Court perhaps is not able, to act to give effect to this principle.

The enactment of a strong and effective *Human Rights Act* at federal level, as Justice Michael McHugh observed, provides one avenue through which the rights of the dispossessed and disadvantaged, of whom asylum seekers are one category, may more actively be pursued and, where appropriate, be vindicated. It is time to consider such legislation seriously.