CRIMINAL LAWYERS ASSOCIATION OF THE NORTHERN TERRITORY

Habeas Corpus and Detention under the Migration Act 1958 and the Crimes Act 1914

by

The Honourable Justice Dean Mildren RFD, Northern Territory

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HABEAS CORPUS AND DETENTION UNDER THE MIGRATION ACT 1958 (CTH) AND THE CRIMES ACT 1914 (CTH)

The Honourable Justice Dean Mildren RFD[1]

Introduction

As part of our legal heritage, we enjoy a number of basic rights and freedoms which are usually regarded as essential: freedom of religion; freedom of communication; the right to equality before the law; the right to freedom of association; and the right to personal liberty. In recent times we have discovered that some of these rights and freedoms have begun to be recognised as implied freedoms under the Constitution[2].

One of our most important rights is the right to personal liberty and in particular, the right not to be imprisoned except by a Court in the exercise of its criminal jurisdiction. To what extent

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[1] A Judge of the Supreme Court of the Northern Territory of Australia.

[2] For example, the implied freedom of political discussion recognised in such cases as the *Langer v The Commonwealth* (1996) 186 CLR 302; *Australian Capital Television P/L & Ors v The Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Cunliffe v The Commonwealth* (1994) 182 CLR 272; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; the implied right to a unanimous verdict of a jury where an accused is charged with an indictable office against a law of the Commonwealth recognised in *Cheatle and Anor v The Queen* (1993) 177 CLR 541. The right to freedom of religion is expressly provided for by s 116 of the Constitution; see *Kruger v The Commonwealth* (1996-1997) 190 CLR 1; but the Court was divided as to whether the freedom applied to the Territories. There is, as yet, no implied constitutional right to equality before the law nor of freedom of association: *Kruger v The Commonwealth* (1996-1997) 190 CLR 1, other than that derived from Chapter III which precludes the conferring on courts of discretionary powers which are such that they are incompatible with the integrity, independence and impartiality of the Courts: see *Kable v Director of Public Prosecutions* (1996) 189 CLR 51.

has that right been eroded by the passage of legislation by the Commonwealth Parliament? To what extent is that right protected by the Constitution? Can an individual denied his or her liberty by unlawful imprisonment obtain release through habeas corpus? To what extent can the individual challenge the facts asserted as justification for his or her incarceration?

Lim's Case

The starting point is the decision of the High Court in *Chu Kheng Lim v Minister for Immigration*[3]. In that case Lim and 35 other Cambodian boat people brought proceedings in the High Court in order to challenge the validity of certain provisions of the Migration Act. At the time of the passage of those provisions there was pending in the Federal Court an action brought by Lim and the others for orders to be released from custody due to be heard in two days' time. The new provisions purported to authorise the holding of boat people in custody until removed from Australia or granted an entry permit and were plainly directed at the applicants. Section 54R specifically precluded a court from ordering the release of such a person. The Cambodians had been held in custody for a period in excess of two years when the amendments came into force. The High Court held that their detention during this period had been illegal, but that their continued detention under the new provisions was lawful. In so deciding the Court held that the provisions (except s 54R) were valid laws under s 51(xxix) of the Constitution (the 'aliens' power). The Court also held by a bare majority that s 54R was invalid because (inter alia) it purported to derogate from the jurisdiction vested in the High Court under the Constitution and was an impermissible intrusion into the judicial power because it purported to prevent the courts from ordering the release of persons unlawfully

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[3] (1992) 176 CLR 1.

detained. The minority view was that s 54R should be construed narrowly so that it applied only in circumstances where the detainee was lawfully held in custody. The Court also held that the provisions did not amount to a Bill of Attainder because it did not single out individuals or identifiable persons but operated upon a class of persons in a non-punitive fashion.

In the course of their judgment, Brennan, Deane and Dawson JJ said:

> "...the citizens of this country enjoy, at least in times of peace, a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth." [4]

However, this right is subject to a number of exceptions recognised by the authorities. The first is that referred to by their Honours – "at least in times of peace". During both World wars Australia interned foreign nationals as well as naturalised Australians thought to be a threat to national security pursuant to regulations made under the Defence Act. During World War II, the relevant regulation permitted the detention of any person whom the Minister was satisfied should be detained in order to prevent that person acting in a manner prejudicial to public safety, or the Defence of the Commonwealth[5]. Under that regulation members of the Australia First Movement, who were not of foreign birth, were detained and one of the leaders

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[4] *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28-29.

[5] National Security (General) Regulations 1939 (Cth), Reg 26.

of that movement was detained for almost three and a half years[6]. The High Court upheld the validity of these regulations under the defence power[7].

Secondly, the High Court has recognised amongst the exceptions a number of other well-known examples, summarised by McHugh J in *Re Woolley and Another; Ex parte Applicant M276/2003 (by their next friend GS)*[8]. These include (1) custody without bail pending the determination of a criminal charge; (2) detention because of infectious disease or mental illness; (3) imprisonment for contempt of parliament; (4) imprisonment by military tribunals; (5) detention pending the investigation and determination of an application for a visa; (6) committal to an institution upon being found not guilty on the grounds of insanity; (7) imprisonment for failure to pay a fine or for debt. McHugh J concluded that the dictum of Brennan, Deane and Dawson JJ in *Lim* ought not to be followed[9], but none of the other members of the present High Court have gone as far as this.

What has emerged from recent decisions of the High Court is that whilst the Court was divided on the question of whether or not the relevant provisions of the Migration Act, which allowed the Minister to place an "unlawful non-citizen" in mandatory detention, ought to be construed as enabling a non-citizen to be held indefinitely, there was general agreement that such a law was not invalid on constitutional grounds. What is less clear is the principle upon which laws which enable a person to be imprisoned by executive authority might be held to

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[6] See *Al-Kateb v Godwin and others* (2004) 208 ALR 124 at par [55] per McHugh J.

[7] *Lloyd v Wallach* (1915) 20 CLR 299; *Ex parte Walsh* [1942] ALR 359.

[8] (2004) 210 ALR 369 at 384.

[9] (2004) 210 ALR 369 at 385.

be unconstitutional. Some Judges favour a principle that a law of the Commonwealth which provides for extra-judicial punishment contravenes Chapter III of the Constitution.

The question is whether that principle has now become accepted, and if so, what are the circumstances under which it will operate.

The Development of the Extra-Judicial Punishment Principle

The starting point is the decision of the High Court in *Al-Kateb v Godwin and others*[10]. In that case the appellant, a stateless person, having arrived in Australia without a visa, was held in immigration detention. His application for a visa having been refused, he requested the Minister to remove him from Australia pursuant to s 198 of the Migration Act. Attempts by Australia to obtain international cooperation for his removal were unsuccessful. The appellant sought an "order in the nature of habeas corpus" and a declaration from a Judge of the Federal Court that his continued detention was unlawful. The primary judge found that there was no real likelihood of the removal of the appellant in the reasonably foreseeable future, but nevertheless refused relief. The appellant appealed to the Full Federal Court but the matter was removed into the High Court pursuant to s 40 of the Judiciary Act. The Court held, by a majority of four to three that the appeal should be dismissed. Gleeson CJ in his dissenting judgment held that the power to detain was not punitive in nature and "did not involve an invalid attempt to confer on the Executive a power to punish people who, being in Australia, are subject to, and entitled to, the protection of the law"[11]. McHugh J (one of the majority) said that "as long as the purpose of the detention is to make the alien available for deportation

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[10] (2004) 208 ALR 124.

[11] (2004) 208 ALR 124 at [4].

or to prevent the alien from entering Australia or the Australian community, the detention is non-punitive"[12]. In the case of *Re Woolley*[13], McHugh J made it clear that a Commonwealth law which has a punitive purpose, even as one of its purposes, would be invalid as it would go beyond what was necessary to achieve its non-punitive object.

Gummow J, in dissent, rejected the punitive/non-punitive dichotomy:

> "Once it is accepted that many forms of detention involve some non-punitive purpose, it follows that a punitive/non-punitive distinction cannot be the basis upon which the Ch III limitations respecting administrative detention are enlivened.
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> "Accordingly, the focusing of attention on whether detention is "penal or punitive in character" is apt to mislead. As Blackstone noted, in a passage quoted by Brennan, Deane and Dawson JJ in *Lim*, "[t]he confinement of the person, in any wise, is an imprisonment" and one which, subject to certain exceptions, is usually only permissible if consequent upon some form of judicial process." [14]

It would appear that Kirby J, also in dissent, favoured the extra-judicial punishment principle, although his Honour's decision in that case was based upon a construction of the relevant sections of the Act[15]. Hayne J, with whom Heydon J concurred (both in the majority) decided that on the proper construction of the provisions of the Act, the Act permitted indefinite

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[12] (2004) 208 ALR 124 at [44].

[13] (2004) 210 ALR 369 at [77]-[78].

[14] (2004) 208 ALR 124 at [136]-[137].

[15] See especially at 208 ALR 124, para [153].

detention and was not invalid for contravening Chapter III because the laws in question were not in fact punitive[16]. A close reading of his Honour's judgment leaves it very much an open question as to whether or not he entirely accepted the reasoning in *Lim*[17]. Nevertheless his Honour said:

> "At least in many cases it will be right to say that a law authorising detention divorced from any breach of the law is not a law with respect to a head of power and for that reason is invalid."[18]

So far as Callinan J is concerned, there are passages in his Honour's judgment which suggest that a law, even one which is punitive, is a valid law if the purpose of the law falls within the relevant head of power[19]. His Honour said:

> "Detention of aliens, certainly for the purpose of deportation, clearly falls within the exception traditionally and rightly recognised as being detention otherwise than of a punitive kind. It would only be if the respondents formally and unequivocally abandoned that purpose that the detention could be regarded as being no longer for that purpose. It may be that detention for some other purpose under the aliens or indeed the immigration power would be constitutionally possible, but no question of that arises here. It may be that legislation for detention to deter entry by persons without any valid claims to entry either as a punishment or a deterrent would be permissible, bearing in mind that a penalty imposed as a deterrent or as a disciplinary measure is not

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[16] 208 ALR 124 at [263].

[17] See especially at [258].

[18] At [259].

[19] At [294].

> always to be regarded as punishment imposable only by a court. Deterrence may be an end in itself unrelated to a criminal sanction or a punishment."[20]

The High Court decision in *Re Woolley* held that even children, who may have no capacity to request deportation may be unlawful non-citizens and held in detention, if necessary, indefinitely. Apart from the comments of McHugh J referred to previously, nothing new is elicited.

Detention of Australian Citizens in Peace Time

Nevertheless, there are clearly questions which arise as to the power of the Commonwealth in peace time to provide for the detention of persons who are Australian citizens without charge merely because it may be thought by ASIO or the Australian Federal Police that the individuals concerned might pose a threat to national security. The raft of legislation passed by the Parliament since 2001 as part of the "war against Terrorism" invites constitutional challenge on a number of grounds[21]. It is interesting to observe the extent to which the Commonwealth felt it necessary to go in order to promote the legality of Part 5.3 of the Criminal Code Act 1995 (Cth) relating to terrorism in that s 100.3 purports to base the power on the whole of s 51 except paragraph 51(xxxvii) of the Constitution (which deals with matters referred to the Commonwealth by the States). So far as the Northern Territory is concerned, s 100.3(3)(a) specifically relies on the Territories power (s 122). The provisions of Part 5.3 have even been entrenched by s 100.8 which purports to prevent an amendment to that part unless the amendment is approved by at least four States and a majority of the States,

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[20] 208 ALR 124 at [291].

[21] See, for instance, the discussion by Michael Head, *Counter-Terrorism Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights* [2002] 26 Melbourne University Law Review 666.

the Northern Territory and the Australian Capital Territory. So far as the investigation of terrorism offences by the Federal police are concerned, the power to detain a person for the purposes of investigation of a Commonwealth offence applies only to a person who has been arrested for a Commonwealth offence: see s 23 of the Crimes Act 1918 (Cth), and the power to detain before bringing the person arrested before a court is limited in time by s 23CA(4) to four hours[22] unless the time is extended by a Magistrate or other judicial officer[23].

Of more concern is the power to detain given to ASIO as the result of amendments to the Australian Security Intelligence Organisation Act 1979 which enable ASIO to request a warrant to compulsorily question and/or detain persons aged 16 or above who are suspected of having information relating to terrorism offences. The Act provides that at first, the request must receive the assent of the Attorney-General. It is then able to be issued by an "issuing authority" who must be a person who is either a federal judge or a member of a group declared by regulation to be an issuing authority. Once the warrant is executed, it is supervised by a "prescribed authority" who under the Act must be a retired superior court judge, or if there is an insufficient number of such persons, a serving State judge of certain courts who has served for at least five years; or if this pool is insufficient, the Attorney-General may appoint persons who are either the President or a Deputy President of the Administrative Appeals Tribunal. The Act permits detention for up to seven days unless further material justifies a second or subsequent warrant which could potentially extend the

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[22] Note that s 23CA(8) of the Crimes Act provides that time spent when, for example, questioning is suspended, does not count.

[23] Vide s 23CB(2) or s 23DA(1). There are limits to s 23DA(1) but not to s 23CB(2).

period by rolling periods of seven days[24]. A person detained for questioning under the Act is required to provide any information or document requested by ASIO; the failure to do so is an offence punishable by imprisonment for five years[25]. This erosion of the right of silence is not confined to terrorism offences. However, all information or documentation so provided is inadmissible as evidence against a person in criminal proceedings[26].

A person so detained has the right to an interpreter and a right to legal representation, but the lawyer's role during questioning is limited to a request that an ambiguous question be clarified[27]. There is also a range of secrecy provisions which prohibits the disclosure of information which, in effect, encompasses information relating to ASIO's knowledge and most of its activities. An exception enables the disclosure of information for the purposes of conducting legal proceedings or for obtaining legal advice and representation in relation to a warrant or its execution. One commentator has observed:

> "...these offences directly impede legal challenges to some of ASIO's investigatory activities. While it is true that the *ASIO Amendment Act* allows disclosure for the purpose of initiating legal proceedings in relation to a detention or questioning warrant, this exception is quite limited. In particular, the 'permitted disclosure' exceptions do not extend to disclosure of information for the purpose of legal proceedings relating to ASIO's investigatory activities which are connected to the warrant. As a result, disclosure of such information would be an 'operational information' offence,

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[24] For an account of the legislation see Joo-Cheong Tham, *Casualties of the Domestic 'War on Terror': A Review of Recent Counter-Terrorism Laws* (2004) 28(2) Melbourne University Law Review 512.

[25] See Australian Security Intelligence Organisation Act, s 34G.

[26] See Australian Security Intelligence Organisation Act, s 34G(9).

[27] See Australian Security Intelligence Organisation Act, s 34U(4).

> with the effect that individuals cannot challenge the legality of such investigatory activities. For example, if ASIO, after compulsorily questioning one of Willie Brigitte's acquaintances, taps the phone of this person in breach of the *ASIO Act*, it seems that this illegality cannot be tested in the courts as it is an 'operational knowledge' offence to disclose the fact that the phone has been illegally tapped." [28]

Further, these provisions may make it difficult to mount a constitutional challenge to detention if the purpose of the detention is punitive[29]. Section 34X specifically provides that State and Territory Courts have no jurisdiction to entertain proceedings for a remedy whilst a warrant is in force. However, proceedings can be taken in the Federal Court of Australia.

Detention under the Fisheries Management Act

In *R v Zainudin & Ho*[30] the defendants were the masters of Indonesian ice-boats charged with illegal fishing in the Australian Fishing Zone contrary to s 100A(1) and (2)(a) of the Fisheries Management Act and other offences. In each case the defendants were held in detention pursuant to s 84(1)(ia) of that Act. That provision enables an "officer" to detain a person for the purpose of determining during the period of detention, whether or not to charge the defendant with an offence against the Act. Under s 84A(1) a person detained under s 84(1)(ia) must be released from detention at the end of 168 hours unless there has been a decision to charge and the defendant has been brought before a magistrate.

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[28] Tham, supra, f.n. 24 at 527.

[29] Tham, supra f.n. 24 at 527-528.

[30] Unreported [2005] NTSC 14.

In that case the defendant Zainudin was not charged until 10 weeks and three days after his arrest. The defendant Ho was not charged until nine weeks after his arrest. Both defendants had been held, after the initial period of 168 hours, in immigration detention pursuant to s 250 of the Migration Act.

Section 250 enables a person to be held in immigration detention for:

> "(a) such period as is required for:
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> (i) the making of a decision whether to prosecute the suspect in connection with the offence concerned; or
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> (ii) instituting such a prosecution; and
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> (b) if such a prosecution is instituted within that period--such further period as is required for the purposes of the prosecution."

Section 250 applies only to a "non-citizen" who is a "suspect" who "travelled, or was brought, to the migration zone" and "is believed by an authorised officer on reasonable grounds to have been on board a vessel (not being an aircraft) when it was used in connection with the commission of an offence against a law in force in the whole or any part of Australia". Section 250(1) provides that a "suspect" includes someone who was brought to the migration zone against his or her will. It is not necessary for the authorised officer to believe that the *suspect* has committed an offence; it is the *vessel* which must be suspected of being used in connection with the commission an offence against any law in force in Australia – in other words it is not confined to offences against the Fisheries Management Act but would include, for instance, offences against the Migration Act which are committed by the master

or crew. Also, the power to detain under s 250 is unlimited in time. It lasts so long as there are proceedings, including appeal proceedings, on foot and until any custodial sentence is imposed.

It is arguable that any detention authorised by s 84(1)(ia) of the Fisheries Management Act must be strictly complied with, so that, once the 168 hours has passed, the defendants were required to be released unless they were remanded into custody by a Court. Section 84A(1) provides:

> (1) A person (the *detainee*) detained under paragraph 84(1)(ia) must be released from detention:
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> (a) as soon as an officer knows or reasonably believes that the detainee is an Australian citizen or an Australian resident; or
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> (b) at the time the detainee is brought before a magistrate following a decision to charge the detainee with an offence referred to in paragraph 84(1)(ia); or
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> (c) at the time a decision is made not to charge the detainee with an offence referred to in that paragraph; or
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> (d) at the end of 168 hours after the detention began;
>
> whichever occurs first."

It might be further argued that, as s 84A specifically provides for the very situation of someone arrested for and detained in respect of suspected illegal fishing, s 250 of the Migration Act, which is of general application, cannot be used to overcome the express

provisions of s 84A: generalia specialibus non derogant. The enforcement visa regime introduced into the Act in 1999 gives added credence to this theory. Under those provisions, every non-citizen detained in fisheries detention for the purpose of determining whether or not to charge the non-citizen with an offence against sections 99, 100, 100A, 101, 101A or 101B of the Fisheries Management Act is by force of Division 4A of Part 2 of the Act granted an "enforcement visa" which enables them to be brought into the country lawfully. The enforcement visa ceases to have effect at the time the non-citizen is released from fisheries detention: see s 164C of the Migration Act. The problem for the detainee will be to get access to legal representation in the period after the 168 hours has expired, and before he is brought before a Magistrate following a formal charge. I discuss this problem later. In *R v Zainudin and Ho* no submissions were made that the defendants had been held illegally, and the issue only arose incidentally when I was considering whether or not I could back-date their sentences to the time of their arrest.

However I did say this in respect of s 250 of the Migration Act:

> "The potential for abuse is obvious. The Parliament has used a very heavy hand in enacting legislation which enables the potential for this abuse to occur. The opportunity for abuse is all the more evident in that by virtue of s 84A(2), the defendant is required to be held in circumstances where Div 2 of Pt IC of the Crimes Act does not apply, so that there is no obligation to bring such a person detained before a justice. Not even a person arrested for a terrorism offence can be held indefinitely as this defendant could be." [31]

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[31] Supra, f.n. 30, para [27].

There is presently a Bill before the Commonwealth Parliament to amend the Fisheries Management Act – The Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, introduced into the House of Representatives on 17 February 2005 and passed on 17 March 2005. The Bill was referred to the Select Bills Committee to consider, inter alia, "the appropriateness of the detention regime, including possible length of imprisonment". One of the objects of the Bill is to provide for "a fisheries detention regime that is broadly consistent with current immigration detention arrangements", and to "facilitate a seamless transfer of detainees from fisheries to immigration detention". According to the report of the Senate Rural and Regional Affairs and Transport Legislation Committee[32], the General Manager AFMA informed the Committee that:

> "...people are only in fisheries detention for a maximum of seven days, and often it is a lot less than that."

The Committee observed:

> "The Committee contrasts this statement with the figures provided in the 1998 Ombudsman's Report that indicates that the 1997 figures for the average number of days in detention were 26.58 for Broome and 26.86 for Darwin. It acknowledges that, in addition to the maximum of seven days described by AFMA, there are further days in detention pending repatriation." [33]

It is impossible to know the extent to which s 84A(1) is observed.

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[32] May 2005, para 2.57.

[33] Supra, f.n. 32 para 2.58. In addition, some detainees were charged with offences against the Criminal Code, s 149.1 (resisting a public official in the performance of his functions) which place them outside of the fisheries detention regime.

The Remedy of Habeas Corpus

It has been said that the prerogative writ of habeas corpus is one of the most ancient rights in our legal system[34]. It was not used originally to release people from custody; nor was it used to arrest and imprison them. Its function was to ensure the defendant's physical presence in court on a certain day. This applied to both civil and criminal proceedings[35]. It was not until the 15th and 16th centuries that the writ began to change to a demand for the reason for the applicant's detention so that the courts could adjudge the legality of the detention. Sharpe observes that the Act of 1679 "marks the point at which the writ took its modern form"[36]. The Habeas Corpus Act 1816 abolished the rule which once precluded the applicant from controverting the return, although, as Sharpe points out, review of factual questions in habeas corpus is now common-place, especially where the facts can be characterised as "jurisdictional facts"[37].

That the remedy of habeas corpus is part of Australian law is incontrovertible. Unlike the other prerogative writs, the remedy is not discretionary, and if the applicant has established his grounds, he is entitled to his remedy ex debito justiciae. Sharpe[38], in the note to the 2nd edition of his work described habeas corpus as:

> "...a versatile and flexible remedy, properly seen as a fundamental constitutional guarantee and a cornerstone of the rule of law."

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[34] Andrew Field, *Produce the Body – The Heritage of Habeas Corpus*, Law Institute Journal (Victoria) (2005), Vol 79 (5) 54 at 55.

[35] See generally, R.J. Sharpe, *The Law of Habeas Corpus*, 2nd ed, Clarendon Press (1989), p 2.

[36] Supra, f.n. 35, p 20.

[37] Supra, f.n. 35 at pp 70-76.

[38] Supra, f.n. 35.

Gleeson CJ in *Al-Kateb v Godwin*[39] said:

> "The remedy of habeas corpus... is a basic protection of liberty, and its scope is broad and flexible. ' This, the greatest and oldest of all the prerogative writs, is quite capable of adapting itself to the circumstances of the times."[40]

The remedy is required to be speedy, and under the Habeas Corpus Act 1640 (which abolished the Court of the Star Chamber) s 6 required the judges to pronounce upon the legality of detention within 3 days and discharge, bail or remand the prisoner accordingly. Failure by a Judge to comply with the Act was subject to heavy penalties and the Judge was liable to be sued for damages by an aggrieved party. The Habeas Corpus Act of 1679, s 9 made a judge personally liable for punitive damages in the event of wrongly refusing the writ in vacation.

In the United States the remedy is enshrined in the Constitution and may not be suspended "unless when in cases of rebellion or invasion the public safety warrants it"[41]. During the Civil War habeas corpus was suspended by President Lincoln without the support of Congress, and later by Congress in 1863, although both suspensions were later held to be unconstitutional[42]. In Australia there has never been an attempt to abolish or restrict its operation, except by s 196 of the Migration Act, which seems to be directed at curbing the power of the Courts to grant bail as an incident to habeas corpus pending a decision on the

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[39] (2004) 208 ALR 124 at [25].

[40] Quoting Lord Donaldson MR in *R v Secretary of State for the Home Department; ex parte Muboyayi* [1992] QB 244 at 258; [1991] 4 All E.R. 72 at 81-82.

[41] Article 1, s 9.

[42] See the discussion by Andrew Field, supra, f.n. 34 at 56.

return of the writ, or ordering the release of a non-citizen who has not been granted a visa: see s 196(3). However s 196(2) makes it plain that the Act does not prevent a Court from ordering the release of a "citizen or lawful non-citizen". As the High Court has held by the narrowest majority that the aliens power is not subject to Chapter III of the Constitution it would appear that, for the time being at least, the Commonwealth could lawfully restrict the operation of habeas corpus in relation to "unlawful non-citizens". However, in *Minister for Immigration and Multicultural and Indigenous Affairs v SLGB* (2004) 207 ALR 12, the High Court held that s 474 of the Migration Act (a privative clause purportively preventing certiorari) was required to be construed conformably with Chapter III of the Constitution, applying its own decision in *Plaintiff s157/2002 v The Commonwealth* (2003) 211 CLR 476, and accordingly that a decision involving jurisdictional error was not caught by the section. It might be arguable that a statutory provision which seeks to restrict habeas corpus is subject to the same kind of constraints: see also the fate of s 54R in *Lim's* case discussed above. In any event it has been held that habeas corpus will not lie in order to test the lawfulness of the arrest or detention of an unlawful non-citizen on the high seas or who is not in Australia[43].

On the other hand, efforts to isolate persons held in detention unlawfully from seeking the remedy will not prevent the Courts from granting the remedy. In *Cox v The Minister for Immigration and Multicultural and Indigenous Affairs*[44] I said:

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[43] See *Ruddock v Vadarlis* (2001) 110 FCR 491 at 519-521; 548; *Cox v Minister for Immigration and Multicultural and Indigenous Affairs and others* (2004) 143 NTR 10 at 17-18.

[44] (2004) 143 NTR 10 at [11]. See also *Waters v The Commonwealth* (1951) 82 CLR 188 at 190; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 600, 627, 652-653; *Ruddock v Vadarlis* (2001) 110 FCR 491 at 509 per Black CJ.

> "There is no doubt that an application for a writ of habeas corpus may be made by a person other than the person or persons allegedly imprisoned unlawfully where the captive or captives are closely confined and cannot bring their own application… In *Ex parte John Doe* (1974) 46 DLR (3d) 547, an application was brought by counsel who was not even able to determine the name of the detainee. That is this case."

It is well established that the remedy is available to secure release from the unlawful detention of any person, whether that person is detained on a ship or in a prison or detention facility; and it is available in cases of migration or fisheries detention if the detention is unlawful. However, cases where an order has been made for release are relatively rare. One successful case worth mentioning is a decision of the Supreme Court of the Northern Territory, *The King v Wall*[45]. In that case the applicant, King Won, was born in Darwin in 1893. In 1901 or 1902 he left Australia with his parents who went to China. About a year later, King Won's father returned to Darwin where he resumed residence with another woman of Chinese race. In 1924, King Won returned to Darwin. On 25 May 1926 the Sub-Collector of Customs, Mr Wall, applied a "dictation test" to the applicant who failed the test and was thereupon arrested. He was charged with being a prohibited immigrant. Roberts J found that King Won was not an immigrant and was therefore not subject to the Migration Act, and granted the Writ. On appeal to the High Court[46] a majority of the justices (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ) held that an appeal did not lie:

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[45] (1926) NTJ 68 per Roberts J.

[46] At that time an appeal lay from a judgment of the Supreme Court to the High Court of Australia consisting of not less than 3 justices by leave only vide s 21 of the Supreme Court Ordinance 1911-1922. There was no other intermediate court of appeal.

> "...no appeal lies from an order of a competent Court for the issue of a writ of habeas corpus discharging a prisoner from custody unless an appeal is specifically given by the Legislature, and that the Courts should not hold that such an appeal is given merely because of general words in their natural meaning sufficient for such a purpose."[47]

On the basis of that decision which has never been overruled, it might well be agreed that the Supreme Court Act (NT) s 51(1) does not confer on the Court of Appeal jurisdiction to hear an appeal from an order discharging a prisoner from custody, although an appeal would lie if the judge wrongly refused the remedy.

Conclusions

There have in recent times been a number of reports of Australian citizens wrongly held in immigration detention[48]. The Palmer Inquiry into some of these cases appears to have run into difficulties because it has no powers to compel the attendance of witnesses and some witnesses have refused to give evidence[49]. As the powers given to immigration and fisheries officials to detain persons are not subject to judicial control or warrant, those powers are capable of being abused or wrongly used. In such circumstances, as well as other cases of wrongful imprisonment, the ancient remedy of habeas corpus is the ultimate remedy.

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[47] (1927) 39 CLR 245 at 250.

[48] *The Australian* 13/05/2005, refers to the case of a woman, Vivian Young, held in detention and deported to the Philippines in 2001 (p 1); the case of Cornelia Rau held in immigration detention for 10 months and the enquiry headed by Mick Palmer (p 2); the case of a mentally ill Iranian man with an Australian visa wrongly held in a detention facility for 2 weeks in April 2005 (p 2). The ABC web site, *ABC Online* for 18 May 2005 reports a case pending in the Supreme Court of New South Wales where a Chinese born man was held in immigration detention when the detainee, an Australian citizen with an Australian passport, was held at Villawood Detention Centre for 3 days in 2002, notwithstanding that he showed officials his Medicare card, driver's licence and employment papers and told them he held an Australian passport. Since then some 200 further cases have been referred to the Palmer Inquiry.

[49] *The Australian* 13/05/2005, p 2.

Immigration issues, in particular, have become important politically in recent times, following the *Tampa* incident and the "children overboard" affair, as well as other cases. The Immigration Department in its various departmental forms has long suffered from a perception of racism and xenophobia dating from the time of the "dictation test", because officialdom was and is seen by its critics as being hard-nosed and capable of using every dirty trick in the book to enforce government policy irrespective of the lawfulness or otherwise of their actions. This perception may not be entirely justified. Part of the difficulty arises because of conventions to which Australia is a party, which entitle unlawful non-citizens arriving in Australia to seek a protection visa as a refugee and which prevent Australia from charging refugees with criminal proceedings[50]; so far as fisheries detention is concerned, the relevant convention seeks to preclude the imposition of gaol terms for certain fisheries offences[51]. Australia generally abides by its international obligations in the legislation it enacts, but administrative measures are also taken, including detention, which at times may appear to be not strictly harmonious with the spirit of these conventions.

One possible resolution is to confer on the Courts a general supervisory jurisdiction of detainees. The law could require that persons who are taken into detention be brought before a Court forthwith, such as a Court of Summary Jurisdiction or a local court. I suggest the use of State or Territory Courts rather than Federal Courts because the former are equipped to handle prisoners and legal aid agencies have duty solicitors regularly in attendance. The purposes of such a requirement would be (1) to ensure that the power to detain was exercised lawfully;

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[50] Refugees Convention, 28 July 1951, Article 31.1.

[51] See Convention on The Law of the Sea, Article 73 discussed on *Aruli v Mitchell and others* [1999] WASCA 1042.

(2) to enable the detainee access to a lawyer; (3) to remand the detainee into custody or grant bail (if appropriate) where a charge has been laid; (4) to order the release of a detainee where the detention was no longer lawful. It may be that even under such a system mistakes will be made and persons will be wrongfully detained from time to time, but at least the system of detention will be subject to automatic independent judicial review and will promote the rule of law.