

## **CLANT CONFERENCE PAPER REGARDING DARWIN ASYLUM SEEKER DETAINEES who were the subject of criminal offences that had been committed in detention in Darwin in July-Dec 2012**

### ***Introduction***

1. In July 2012 at the invitation of DASSAN (Darwin Asylum Seekers Support Network) Rohan Thwaites (of DASSAN) and I commenced to see numerous asylum seekers in detention in Darwin. All were bewildered as to why they were in detention for in most cases lengthy periods.
2. We then sought to make enquires to determine what was going on. This process in many cases took months to determine, usually through persistent contact with the AFP to firstly work out that a particular person was the subject of an enquiry; and secondly, if that was so, when would the brief of evidence be completed? Once completed, it was then to be forwarded to the Cth DPP for that office to consider the brief and determine if charges should be laid. I should say at the start that I make no criticism of the Cth DPP for their role in these matters. The advocates who appeared on their behalf behaved fairly and were of real assistance to me in representing my clients.

### **RELEVANT LEGAL PRINCIPLES**

#### ***A protection visa***

3. This is the most important type of visa for a refugee in Australia for it entitles the holder to stay permanently in Australia. In order for an asylum seeker to get a protection visa into Australia three hurdles have to be jumped over:
  - (i) The person must gain refugee status. In nearly all cases of the clients that I saw, this had occurred.
  - (ii) The person must have obtained security clearance from ASIO. In nearly all cases, this was satisfied.
  - (iii) The person must be assessed as being of good character. It was this hurdle that proved to be the major stumbling block with most of the people that I was seeing. Section 501 of the Migration Act is the key section here.

#### ***4. Section 501 of the Migration Act***

***Ss 1. The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.***

***Sub section 6 defines the character test. Relevantly, it says that a person does not pass the character test if the person has been convicted of an offence that was committed while the person was in immigration detention.***

5. In nearly all cases, it turned out that the AFP was either in the process of compiling a brief or considering it. In nearly all cases, many months had gone by since the commission of the offence. In most cases the offence was straightforward as was proof of it. Usually the offence was captured on multiple CCTV cameras, the offender was apprehended immediately afterwards or in the process of carrying out the offence. Mostly, a complete video taped confession followed. Sherlock Holmes was not required to solve these crimes. Yet despite the simplicity of the offences the matters invariably were plagued by delay, which often became a mitigatory matter on sentence. I could never understand why it would take a year to compile a brief on breaking a piece of glass where there was an overwhelming case. Furthermore, I was very unused to this as in the general criminal justice system the prosecution could never get away with this as strict time limits are in place for the prosecution to serve its brief.

***Section 19B of the Cth Crimes Act***

6. What this means is that the provisions of the relevant section of the Cth law that governs non conviction orders are rather critical. This is section 19B of the Cth Crimes Act, which relevantly states that a non conviction can be delivered if:
- i. The character, antecedents, age, health or mental condition of the person, or
  - ii. The trivial nature of the offence, or
  - iii. The extent to which the offence was committed under extenuating circumstances
- That it is  
Inexpedient to inflict any punishment.
7. Therefore it is a two stage test. One of the first three matters must be established by the defence and then, secondly, it must be inexpedient to inflict any punishment. A conviction is punishment.
8. Now in respect to a number of persons such as Mr H I was able to obtain a non-conviction order. However, in respect to Mr A this did not occur. His co-accused had all been sentenced. The total damage bill was \$25,000. I sought to distinguish Mr A from the others but was unable to do so. All were convicted and given a recog and ordered to pay a portion of the damages bill.

***Court not to take into account potential for s 501 refusal of visa on conviction***

9. A further matter is this: there is a principle that is the law in the NT that is this: for the purposes of seeking a non conviction order pursuant to s 19B of the Cth Crimes Act, a court is not to take into account that the deft may be refused a visa as a consequence of a conviction being imposed for that offence (pursuant to s 501 of the Cth Migration Act). The applicable law was recently stated in the case of *Habib v Semrad* a decision at first instance of Justice Southwood [2012] NTSC 95. This followed *R v MAH* a decision of Mildren J in 2005.<sup>1</sup> This would appear to be the law in Qld, WA and NSW but not Victoria. What this means is that is that a non-conviction order is vital in this area. However, bizarrely, I can't refer to s501 of the Migration Act in making the submission that he not be convicted.

***Time in detention.***

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<sup>1</sup> (2005) 16NTR 150 at [41]

10. The general principle is that time in immigration detention will not be taken into account in consideration of an application pursuant to s 19B of the Crimes Act for a non-conviction other than subsequent to the point that a deft is granted ASIO clearance. If from that point the person is only in detention as a result of criminal charges that are pending that may affect the character test, then that detention from that point is analogous to a period in custody. See Southwood at para 54 of his judgement in *Habib v Semrad* [2012] NTSC 95.

### **CASE STUDIES**

#### ***Mr H***

11. I will say something of Mr H's personality as this so rarely finds its way into media. He was a joker. I remember one time seeing him in first from behind the electrified wire at NIDC laughing and joking with even the SERCO guards , and at one point he had his arm around the shoulders of a guard.
12. His life had gone into free fall due to what initially appeared to be a strange case of bad luck. He lived in Basra, which at the time of a place of extreme violence, run partly by war lords, which included the remains of an organisation called the Mahdi Army that had morphed into the Promised Day brigade- and so violent that the British Army and the Danish Army pulled out of it. Mr H's brother was running a Tae Kwon Do class. A boy in the class accidentally lost his eye during some incident that occurred in class. Mr H's brother was falsely blamed. The boy was a member of a powerful tribe. Tribes are a predicate of life in Iraq. \$150,000 was demanded from the brother. He could not pay up as his family were poor. Meetings occurred between Mr H's family and the other family. Mr H and his brother were told that if they could not pay they must smuggle items between Iran and Iraq. These appeared to include arms and money. Mr H knew that if he and his brother engaged in this they would eventually be killed. So he and his family fled after very nearly been shot. For a while they were stuck in a house fed secretly at night. He still has a wife and three children, stateless and destitute in Iran. He is desperate to get them to Australia.
13. For example, in the case of Mr H, 11 months had passed since the commission of his alleged offence, which was breaking windows of a building that was in the process of being built at a detention centre in Darwin. He had confessed to the matter on video tape. There was an overwhelming case against him. The offence was committed one year to the day after Mr H first went into detention. He was frustrated that unless he did something he may never be released. The damage bill was a little over \$8,000 which seemed high given that the building was in the process of being built. I had to actually put pressure on the AFP to complete the brief. When that occurred, and it took at least six weeks, the Cth DPP then made a decision to charge. When that occurred, my client pleaded guilty and appeared before the Magistrate's court in Darwin. The plea in his case went for the best part of a day and included evidence being given by Rohan Thwaites, which was to the effect that Mr H had on numerous occasions assisted persons in detention in various ways. It was also put and accepted by the Cth DPP that Mr H had actively assisted persons in detention who had attempted suicide. He had also helped Serco officials by defusing tense situations. Ultimately he was dealt with by Mr Carey SM

without conviction, which was an excellent result. Mr Carey accepted that 99 %of the time he was a man of fine character. Yet he remained in detention. Months went by. During this period Mr Thwaites and I entered the next phase of advocacy on his behalf which was begging various officials to let him out. Eventually, this occurred after about three months. He had spent more than two years in detention. His life story was an extraordinary situation of survival from violence that was delivered on to his family in Iraq through no fault of his own.

### **Mr A**

14. The case of Mr A was referred to me by Vicki Riley who was killed two weeks later riding her bicycle to DAL 3. Mr A was an Hazara man from Afghanistan. It is important to know something of the history of the Hazara. Prior to 1890 they were the majority ethnic group in Afghanistan. In fact prior to the 19<sup>th</sup> century they constituted nearly two thirds of the population of the area that is now known as Afghanistan. However, as a consequence of a series of massacres that occurred in the 1890s at the hands of the Pashtun the Hazara were reduced from a majority to the minority of the country. It is alleged that more than half of the Hazara population were put to death in these massacres. Today they constitute only 9% -15% of the population. I should add that the country's borders had only recently been formed in 1893 as a consequence of a British public servant named Sir Mortimer Durand establishing what became known as the Durand Line which marked the border between British India as it was then known and Afghanistan. It should also be noted that after the massacres in the 1890s many Hazara ended up as slaves in slave markets were then in existence in both Kabul and Kandahar. The consequences of this violence endure today in that the Taliban are primarily comprised of persons of Pashtun ancestry. Anybody who has visited either Afghanistan or Pakistan will see the sharp difference in the facial features and build of these two ethnic groups.
  
15. Mr A's father and brother were murdered by the Taliban. He himself escaped death by the skin of his teeth in one encounter with the Taliban. It became so dangerous for him and his family that he left Afghanistan and went to Quetta, Pakistan. His five children and wife remain there as well as three children of his murdered brother. He and they cannot return to Afghanistan. In Quetta the family are regularly subject to threats from the Pakistan Taliban and its agents. There have been a series of massacres of Hazara in Quetta that have been carried out in the last three years that have killed in the region of 600 people. In addition to that in mid 2013 a massacre took place whereby a bus containing girls was the subject of an attack. The unusual thing is that the violence continued on to a hospital in Quetta which was the subject of a siege. These matters weighed heavily on the mind of Mr A.
  
16. Mr A's personality is calm and kind. He is a very polite man. When I got a psychiatrist to see him he said to the psychiatrist that he would like to thank the Australian government for all the assistance that it has provided to him. He had a series of mental health difficulties in detention both before and after the offence that he committed which was breaking property (computers, desks and chairs) in one minute in detention in company with 7 other Hazara fellows. He arrived in Australia by boat March of 2011. The offence was committed in November 2011. His refugee status was approved in December 2011. When I saw him first in August 2012 he was in

a state of utter confusion as to what was happening to him. He was not sure that charges were pending or if police were involved with him. I found out the AFP was involved and ultimately got them to get the brief to the Cth DPP who decided that he be charged. After some further delay he pleaded guilty to the offence and was dealt with in Jan of this year. He was convicted by the court and placed upon a recognisance. All his co-accused had been convicted. I tried to distinguish my client but it was difficult and the Magistrate refused to do so.

### ***Non-refoulement***

17. There is one crucial principle of international law that I have never heard mentioned on a single occasion by any journalist or politician in any debate concerning refugees. It is called non-refoulement. It forbids the rendering of a true victim of persecution to their persecutor; "persecutor" generally refers to a state actor ie a country or govt. It arose out of the failure to give victims of the Nazis, sanctuary. It is now enshrined in the Refugee convention of 1951, the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Australia is a party to these conventions. Mr A therefore as a matter of law cannot go, as I have said to either Afghanistan or Pakistan. Nor can he go anywhere else bar here.
  
18. After Mr A was dealt with in court I then, in company with Mr Thwaites, reverted to beggar mode. This reflects the reality that I have no power whatsoever. I looked into the question of psychiatrists. I had him assessed. That went nowhere. I was in touch with private law firms regarding the question of suing the govt. That went nowhere. I had a complaint with the Australian Human Rights commission regarding arbitrary detention. Ultimately, their powers are very limited. We wrote to the Minister. I contacted head honchos at DIAC and other places. Still nothing. All this year. Waiting. I was wondering if Mr A would go crazy. Would he do the same thing? Then in early Sept just prior to the election the govt let him out of detention. Yippee. Not on a protection visa..but he was out. However, something further was to happen to him that illustrates the Kafkaesque nature of this business. I will deal with it now.

### ***Twist in the tale.***

19. In the case of Mr A two weeks ago on 5 Sept 2013 he was released from detention. Yesterday, 19 Sept his migration agent stated that he had received a notice from the Cth govt stating an intent to not grant Mr A a visa on the basis that he had failed the character test, pursuant to s 501 of the Migration Act. Mr A is permitted to respond to this. I discovered that 5 of his 7 co-accused have already had their application for visas refused on this basis and, consequently, they are appealing to the High Court of Australia and raising, inter alia a number of grounds of appeal. So after been in detention for two and a half years Mr A's position and family are completely uncertain. It is relevant to reflect that the war against the Taliban continues in Afghanistan. Australia is a party to it. Mr A is a victim of the Taliban, yet as a victim of the Taliban it appears that he gets nothing except perhaps a closed door and a dose of madness. In terms of his good character he said this of the Australia govt: I repeat what he has said: "I would just like to say to the Australian govt to thank them for all the help that they have given me". He later apologised for his misconduct. He has as much good character as me.

**Mr O**

20. Mr O's tale is instructive. A gay man, he fled Iran after being caught in flagrante delicto by his boyfriend's father who threatened him with death. Mr O was to be killed. He fled and came to Australia by boat. Mr O, an intelligent man was inclined to kill himself. I saw him for months in detention here. He was entirely unclear as to what the problem was before we eventually found out that the AFP were looking into him as a people smuggler and assembling a brief. This went on for months. The brief was said to be complicated. He went to Sydney- to Villawood. I kept in touch with Mr O. Many months went by before one day I spoke to the AFP and they casually said that the AFP investigation had concluded and that he was not to be the subject of any charges. It did not seem likely that they were going to notify Mr O anytime soon. Mr O was stunned. This happened in March of this year. In May he was let out of detention on a community visa. His future is uncertain.

**Summary**

21. In the limited time available these three people are three case studies of what has happened to many asylum seekers in detention who have been alleged to have committed offences in detention in the second half of 2012. The circumstances of confusion, delay in investigation, and the vital importance of seeking that the matter be dealt with without conviction were common factors in each case. Each had utterly poignant subjective circumstances. The pleas in court often went for much of the day. At the end of the court proceedings, irrespective of the result the matter went back into darkness, and I became a professional beggar on my client's behalf in an island of opacity. In some cases the emotion was so high as to be palpable. For example in one plea on behalf of a man whose girlfriend was killed by her family after their relationship was discovered he could not bear for me to tell the Magistrate in court the worse aspects of this matter for he would become distraught. I had to write it down and show it to the Magistrate (after showing the DPP lawyer the note).

Mark Thomas,

John Toohey Chambers,

20 Sept 2013