## case notes with mark hunter

Cox v Minister for Immigration Multicultural & Indigenous Affairs & Ors

Supreme Court (NT) No. 172 of 2002

Judgment of Mildren J delivered 20 November 2003

ADMINISTRATIVE LAW - HABEAS CORPUS - REMOVAL OF NON-CITIZENS FROM AUSTRALIA

**At about midday (Darwin time) on Tuesday 4 November 2003 an Indonesian fishing boat, the *Minasa Bone* (MS), arrived at Snake Bay on Melville Island, north of Darwin. The fourteen passengers and four crew were all males, and the former asserted Turkish nationality upon arrival.**

Six of the men alighted from the MS after it struck the shore. The crew and passengers cheered when informed by a local fisherman that they had reached Australia. A short time later the MS, with the 18 men aboard, was towed about 400 metres offshore and anchored. Customs was notified, and at about 9pm a boarding party from *HMAS Geelong* served a detention notice on the Master of the MS, pursuant to s245F of the *Migration Act 1958* (Cth). During 5 November the 18 men aboard the MS were interviewed by Australian Federal Police and Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) officials.

The Commonwealth had since the afternoon of 4 November imposed a 3,000 metre exclusion zone over the island. The airport was also closed, as part of operations by the Commonwealth Government which Justice Mildren described as "clandestine".

At about 1am on 7 November, *HMAS Geelong* commenced towing the MS, with the 18 men aboard, away from Australia. On 6 November Justice Mildren commenced hearing the application, made by the plaintiff in her capacity as Director of the NT Legal Aid Commission, for a writ of habeas corpus against the defendants.

The remedy sought by the plaintiff was the relief of the crew and passengers' alleged unlawful detention, and their return to mainland Australia.

On 7 November the first and third defendants, being the Minister and the Commonwealth, called the only witness for the defence. Mr Eyers is the Assistant Secretary of the Legal Services and Litigation section of DIMIA. Mildren J described as "incredible" the fact that Mr Eyers was unable to inform the Court whether any of the passengers had requested either asylum or legal assistance. The Court was told that unless and until legal assistance is requested, DIMIA will normally deny lawyers access to boat people.

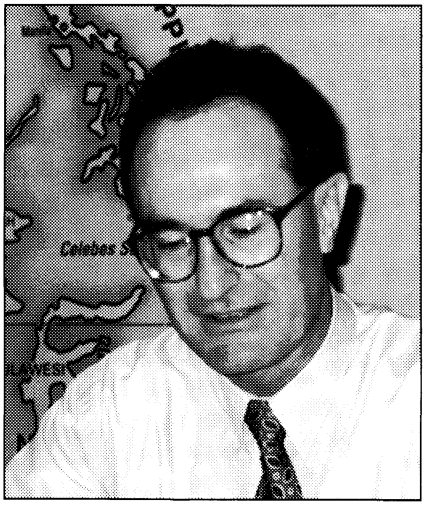
Public Interest Immunity was claimed by the Commonwealth in respect of the destination of *HMAS Geelong*. This claim was not fully argued before his Honour. Mr Eyers maintained in evidence that the crew and passengers were not being detained on the high seas and that the towline to the MS could be cut, so long as the captain of HMAS Geelong was satisfied that the MS would not return to Australia.

### HELD

1. Summons dismissed; question of costs reserved.
2. Habeas corpus does not lie to achieve by court order the entry to Australia of a person whose entry would otherwise be unlawful and without authority.

This conclusion had been reached by the majority of the Full Court of the Federal Court in *Ruddock v Vadarlis* (2001) 110 FCR 491. That case concerned an application for habeas corpus in respect of rescuees aboard the ship *MV Tampa* near Christmas Island, in late August 2001.

Justice Mildren found that the Government's action on 4 November, to retrospectively excise the Tiwi Islands from Australia's migration zone, was not relevant to the determination of the plaintiff's application for a writ of habeas corpus.



*Mark Hunter*

### APPEARANCES

Plaintiff: McDonald QC and Cvjeticanin / NTLAC.

Defendants: Bennett QC and O'Donnell / Cth A-G Department.

### COMMENTARY

An outline of all the legal arguments presented to the Court by the parties is beyond the scope of this casenote.

The clandestine nature of the Government's operations, and the strategy of the defendants before the Supreme Court, is of particular interest. Justice Mildren was kept in the dark by the model litigant, the Commonwealth.

It was not until after they had been towed back to Indonesia that the passengers of the MS gained the opportunity, on 11 November, to reveal to the media that they had indeed requested asylum before the MS was towed from Snake Bay.[1] The Immigration Minister, Amanda Vanstone maintained until 9 November that she had no advice on the issue of asylum claims. On that day she issued a media release stating: "The passengers on the *Minasa Bone* did not claim asylum in Australia".[2]

On 13 November the Government's People Smuggling Task Force released a letter that referred to asylum claims made by passengers in Snake Bay, including one passenger pointing to the word "refugee" in an English-Turkish dictionary.[3] The letter explained

*continued page 24*

**case notes with mark hunter**

# Cox v Minister for Immigration Multicultural & Indigenous Affairs & Ors cont...

that such actions "...usually lead to a more in-depth interview with each individual to determine the substance behind the words each has used".[4]

This policy was abandoned in Snake Bay. The Minister on 13 November described as "not relevant" the fact that "...some people did say things referring to human rights and mentioned refugee".[5]

Justice Mildren was the adjudicator of relevance for the purposes of the plaintiff's application, but the defendants did not make this information available to his Honour.

Had his Honour been informed that the HMAS Geelong's destination was Indonesia, the UN *Convention relating to the Status of Refugees* (1954) may have assumed significance before the Court.

Australia is a signatory to this convention; Indonesia is not. Article 33 prohibits "refoulement", which is the removal of a refugee to a territory where he/she would face persecution. Refoulement constitutes a violation of the principle of *non-refoulement*, and is therefore a breach of refugee law and of customary international law.

The excision of any part of Australia from the migration zone is relevant only for the operation of the *Migration Act*. Australia's obligations under international law are unaffected by any such excision. The UNHCR representative in Australia, Michael Gabaudan, declared on 11 November that Australia had:

> *...shirked its responsibility...by transferring responsibility for these asylum seekers to a country which has not signed the Refugee Convention; without having made adequate safeguards to ensure that they (Indonesia) would provide access to fair and effective asylum procedure and would not send them back to a place where they might be in danger.*[6]

Although the Convention does not deal with procedures for admission of asylum-seekers, the Executive Committee, which oversees the work of the UNHCR, has declared that non-refoulement includes rejection at the frontier.[7]

If Commonwealth public servants are prepared to falsely deny receiving claims for asylum, the denial of access by the media and lawyers to boat people may in future cases of this type permit such falsehoods to pass unchecked up the chain of command to the ministerial level.

As Mildren J observed, clandestine conduct of the kind adopted by the Government during this episode "...usually implies that there is something to hide."

**(Endnotes)**

1 Banham C and Riley M, "Refugee story torpedoed by PM's taskforce", Sydney Morning Herald (14 November 2003).
2 Gordon M, "Truth overboard ?", The Age (15 November 2003).
3 Banham, supra.
4 Gordon, supra.
5 Banham, supra.
6 ABC Radio, PM (11 November 2003) "Melville Island asylum seekers sent to Indonesia".
7 Willheim E, "A lack of respect for rule of law", Canberra Times (18 November 2003).

# The judicial system and its limits cont...

For whatever reason, twenty-first century Australia is an angst-ridden society. Politicians prey on it. They obtain votes from sometimes creating and certainly encouraging the angst which is out there, then giving the public what they believe they want. And invariably, with the law and order issue follows themes like: "throw the key away" and "hanging is too good for them".

Sentencing Judges often and inevitably become the subject matter of "the debate". They are butchered in the local newspaper letters column and politicians rubbish Judges for being too soft. "Totally corrupt" was the ex-Chief Minister and Attorney General's cry as regards the Territory's Judicial System at one point during the mandatory sentencing furore.

The tool of sentencing has very little impact, if any, on crime levels. This has been observed and known for generations. It was conceded in the mandatory sentencing debate. When mandatory sentencing was first introduced it was claimed that the reason for its introduction was to attack the increasing levels of property crime. In the three years of its life, it did no such thing. When that unequivocal state of affairs was pointed out to the responsible Minister, he accepted that and said that mandatory sentencing was there not to impact on crime levels but to ensure that offenders were effectively punished. That in itself is a legitimate sentencing principle, but Winston S Churchill once said that the most effective fitness test in regards to a society's level of civilisation is the manner in which it deals with its criminals.

The concept that long sentences will deter like-minded potential offenders is known as general deterrence. To put it mildly, this has limited effect. This point is perhaps no better illustrated than by the farewell remarks that retiring Chief Justice Martin made in October this year. As he exited stage left, the Chief Justice came clean: he bemoaned the futility of jailing people as a means of reducing crime levels.

Likewise, last year, a Magistrate with over twenty-five years experience retired and in his farewell address to the assembled throng he directly stated that general deterrence does not work. Jailing keeps dangerous and

*continued next page*