Reforming judicial review since Tampa

Attitudes, policy and implications

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In the flurry of legal and political activity surrounding the Tampa crisis, the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) was pushed through Parliament — one of a series of amendments to the *Migration Act 1958* (Cth) ('*Migration Act*') passed in direct response to the crisis.[1] It formed a major attempt to reduce the scope of judicial review available for migrants, refugees and asylum seekers. This article will survey the attempts to eliminate and curtail judicial review in the wake of the Tampa crisis. It will also examine the rhetoric on border security and national sovereignty precipitating legislative attacks on judicial review, which was perceived as obstructing government policy, overburdening the courts, and at too great an expense for taxpayers. Its consequences and implications for offshore detention will also be discussed, particularly the introduction of offshore processing — outside domestic Australian jurisdiction — as a means to avoid judicial review.

I The importance of judicial review

The reach and scope of judicial review in relation to migration decisions has faced dramatic reductions as a result of various legislative amendments. Judicial review is only a way of vetting administrative errors, and is not a process for reconsidering a migration decision. It is an important mechanism in the context of migration, primarily in addressing decisions made by ministers or officers which fall short of constitutional or legislative boundaries.[2]

Judicial review also plays a role in Australia's detention policy for refugees arriving by boat. Its restriction, according to Brian Opeskin, has prevented detained refugees from seeking recourse, breaching art 9(4) of the *ICCPR*,[3] which guarantees detained persons 'an entitlement to bring proceedings before a court to allow it to decide on the lawfulness of the detention and to order release'.[4] Despite attempts to curtail it, judicial review is still entrenched in s 75 of the *Constitution*.

II Attitudes and reform

Since 1998, parliamentary debates over how to deal with the perceived financial and administrative burden of migrant litigation led to the Migration Legislation Amendment (Judicial Review) Bill 1998,[5] which remained

Australian Aarmy patrols near the MV Tampa. Christmas Island, 3 September 2001 (Dita Alangkara/AAP Image)

dormant until the Tampa crisis. Interest in the Bill revitalised, and it received royal assent in September 2001.[6] The intent, outlined by Minister for Immigration Philip Ruddock, was based on

> giv[ing] legislative effect to the government's longstanding commitment to introduce legislation that in migration matters will restrict access to judicial review in all but exceptional circumstances. This commitment was made in light of the extensive merits review rights in the migration legislation and concerns about the growing cost and incidence of migration litigation and the associated delays in removal of non-citizens with no right to remain in Australia.[7]

The government claimed that this would not restrict access to courts, but only expand the conditions for the legality of a migration decision. The amendment introduced 'privative decision clauses' into the *Migration Act*.[8] Almost all migration decisions under the Act were turned into a privative clause decision.[9] A decision made under the auspices of the Act (either directly or through regulations) — with the narrow exceptions provided by ss 474(4)–(5) — would be 'final and conclusive' and cannot be subject to any sort of judicial review or challenge.[10]

One of the debates leading up to the November 2001 election was built upon concerns of border security,[11] fomenting tensions between the courts and the government. The attitude that courts were unjustifiably interfering with tribunal decisions formed a key justification for the attacks on judicial review.[12] However, the actual outcomes of those reviews did not bear that interpretation.[13] The High Court had, in reality, cautioned against 'overzealous' judicial scrutiny; of 32 applications in the 11 months before 31 May 2000, 26 were refused, three discontinued and only three resulted in orders.[14]

Concerns about 'abuses' of the Australian migration system featured in the rhetoric of the government discourse surrounding migrants. A prevailing view was that administrative and legal institutions were being abused by migrants seeking unmeritorious judicial review. Philip Ruddock stated

> it is hard not to conclude that there is a substantial number who are using the legal process primarily in order to extend their stay in Australia, especially given that one-third to one-half of all applicants withdraw from legal proceedings before hearing.[15]

The discussion over the abuse of courts reflected a fear of unauthorised migrants being able to stay in Australia. According to Alan Freckelton, it represented a fixation on border security as 'a necessary element of a government's sovereignty.'[16] The result has been an anxiety over 'absolute control'[17] over borders and migration:

> Images which convey this run from the Statue of Liberty to crack SAS troops boarding the MV Tampa. In the law, the strong links between migration provisions and the notion of sovereignty have lead to courts showing remarkable deference to executives in areas of immigration rule making …[18]

Moreover, Sharon Pickering has highlighted the 'criminalisation' of refugees as a product of these discussions. Media representation of refugees throughout this period heightened many of the issues generally in terms of a 'problem'.[19] Using coverage from the *Sydney Morning Herald* and other publications throughout the late-1990s, Pickering argues that portrayals of refugees during this period were underpinned by perceptions of 'deviancy'.[20] To that end, judicial review was seen as 'aiding and abetting' the deviant behaviour of refugees, through undermining government policy and creating a threat to national sovereignty.[21] Courts were unfavourably characterised as obstructionist, with the costs and resources associated with judicial and administrative review perceived as a burdensome expense to tax payers.[22]

III Aftermath

In 2003, the new privative clause provisions were considered by the High Court in *Plaintiff S157/2002*.[23] The plaintiff was refused a Protection Visa by the Refugee Review Tribunal. He argued that the tribunal's decision was a breach of natural justice and that the restriction under s 474 of the *Migration Act* was inconsistent with s 75(v) of the *Constitution*, where the High Court retains original jurisdiction over matters where review 'is sought against an officer of the Commonwealth'.[24] Instead, the Court found a 'jurisdictional error' in the decision, meaning that it

was not a decision 'made under [the *Migration Act*].'[25] Privative clauses did not apply to decisions made '*purporting* to be under the Act', that is, a decision involving a jurisdictional error.[26] This reading would make judicial review possible only if the decision was erroneous and outside the decision-maker's jurisdiction, where it could not be defined as a privative clause decision. Parliament could not completely extricate itself from judicial review. While the High Court did not find s 474 inconsistent with the *Constitution*, they nevertheless retained judicial review, reserving it for cases of 'jurisdictional error'.[27]

Further reforms to judicial review appeared in the following years. With the *Migration Litigation Reform Act 2005* (Cth), the Federal Circuit Court (then the Federal Magistrates Court) was given the power to exercise judicial review on the bulk of migration cases.[28] The Federal Circuit Court's jurisdiction over these matters is the same as the jurisdiction conferred upon the High Court under s 75(v) of the *Constitution*, but with exceptions laid out in s 476A of the *Migration Act*.[29] Throughout these reforms, Parliament attempted to reframe s 486A of the *Migration Act* to include absolute time limits for judicial review applications.[30] This was later found constitutionally invalid by the High Court in *Bodruddaza*.[31] In response, the *Migration Legislation Amendment Act [No. 1] 2009* (Cth) enacted a 35-day time limit with discretion to seek an order from the High Court to extend the time limit.[32]

More recently, the *Migration Amendment (Clarification of Jurisdiction) Bill 2018* (Cth) has attempted to clarify the grounds for judicial review, after claims that the terms under pt 8 were unduly ambiguous.[33] The Bill provides that purported non-privative clause decisions (ie decisions affected by jurisdictional error) are 'reviewable by the Federal Circuit Court'.[34] It has been said this will 'ensure that applicants seeking judicial review of migration decisions would have substantially the same rights as applicants seeking judicial review of most other Commonwealth administrative decisions'.[35] However, as of April 2019, the Bill has lapsed in the Parliament.

IV Implications for offshore detention

Far from eliminating judicial review, the addition of privative clauses and the results of subsequent cases have instead raised questions of what exactly constitutes a 'jurisdictional error'. Denis O'Brien argues that 'the privative clause… has not achieved its intended effect' but 'merely had the effect of returning judicial review in the area to the complexity associated with the prerogative writs and the language of jurisdictional error'.[36] Numerous cases have considered this issue, attempting to define what is and is not a 'jurisdictional error'.[37]

However, there remains a significant concern that judicial review may be unavailable for refugees placed in offshore detention. Although privative clauses and other restrictions to judicial review have been resisted, the High Court's original jurisdiction to hear these matters is confined to a function by 'an officer of the Commonwealth'.[38] Throughout the Tampa crisis, the government ensured that the asylum seekers' vessel could not have contact with a migration official, but instead dispatched SAS troops to intercept them. The troops had no 'relevant statutory or common law duties under the *Migration Act* … [t]he supervisory jurisdiction of the High Court under s 75(v) of the *Constitution* was not relevant in their instance'.[39] This method of depriving judicial review would form a major rationale for the Pacific Solution and subsequent offshore processing policies — according to Duncan Kerr, 'the Howard government's strategy of avoiding judicial review by keeping officers of the Commonwealth away from possible legal engagement with refugee claimants was fundamental to the offshore process regime'.[40] To that effect, Nauru and Manus Island were established as offshore detention facilities. Christmas Island was removed from the Australian migration zone through the *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth),[41] meaning that a refugee who arrives at Australia via Christmas Island — or another offshore territory — is treated as an 'offshore entry person'.

In 2008, Christmas Island became the primary area for processing an 'offshore entry person'.[42] Such a person cannot receive a Protection Visa nor make a valid application for one unless the Minister decides it is in the public interest to allow it.[43] Hypothetically, the process of refugee determination for an onshore claimant can be reviewed by the Administrative Appeals Tribunal (before 2015, the Refugee Review

Tribunal),[44] the Federal Court and eventually the High Court, but this would be unavailable to an offshore refugee. However, the case *Plaintiff M61/2010E; Plaintiff M69/2010* found that offshore entry persons whose claims were considered by the Australian government can still challenge and have their claims reviewed under s 75 of the Constitution.[45] The government's attempt to restrict judicial review was once again resisted.

Nevertheless, by 2013 all unauthorised refugee arrivals were sent offshore to Nauru or Papua New Guinea for processing without any prospect of settling in Australia, fulfilling its original purpose as a 'shield against the possible intervention of Australian courts'.[46] While the government has settled into the current offshore regime at the cost of much human suffering, the legality of that regime has been challenged. Over 2016–2017, two cases were heard before the High Court concerning the lawfulness of the detention of refugees: *Plaintiff M68/2015* involved a detainee in Nauru,[47] and *Plaintiff S195/2016*, which began as a class action by refugees on Manus Island but was ultimately heard on a single plaintiff.[48]

While both decisions ruled against the applicants and upheld the legality of offshore processing, *Plaintiff M68/2015* highlighted the limitations of the Government's power to detain refugees in Nauru and Manus Island.[49] The majority emphasised that the government could not detain a person for purposes outside of s 198AHA of the *Migration Act*. Justice Gordon's dissent also highlighted that the government should not escape accountability in regards to their offshore detention regime: 'the fact that the place of detention is outside Australia does not mean that legislative power is relevantly unconstrained'.[50]

v Conclusion

Despite repeated attempts, judicial review relating to migrant decisions has resisted substantial erosion. The institution itself has been marked by a series of tensions between the courts and the government, becoming a target of legislative attack once the issue of refugees enters political debate. Throughout the Tampa crisis, judicial review found itself a feature of increasingly polarised political discourse, shored up by anxieties over national sovereignty, border security, and the purported abuse of courts by 'deviant' refugees. Amongst the Coalition's major amendments to the *Migration Act*, the introduction of privative clauses intended to effectively sidestep constitutional judicial review. When this strategy proved unsuccessful, offshore detention would eventually form a key mechanism for the continued deprivation of judicial review for refugees and migrants.

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References

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2 Brian Opeskin, 'Managing International Migration in Australia: Human Rights and the "Last Major Redoubt of Unfettered National Sovereignty"' (2012) 46(3) *International Migration Review* 551, 564.

3 *International Covenant on Civil and Political Rights*, opened for signature [16 December 1966], 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

4 Opeskin (n 2) 575.

5 *Migration Legislation Amendment (Judicial Review) Bill 1998* (Cth).

6 *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth).

7 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 September 2001, 31559 (Philip Ruddock).

8 *Migration Act 1958* (Cth) pt 8, as amended by *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) sch 1 item 7.

9 Migration Act 1958 (Cth) s 474(2).

10 Ibid s 474(1)(a).

11 For an examination of the role of border security in the Coalition's campaign and ultimate victory, see Ian McAllister, 'Border Protection, the 2001 Australian Election and the Coalition Victory' (2003) 38(3) *Australian Journal of Political Science* 445.

12 These attacks on judicial review were also bipartisan: according to Ronald Sackville QC, 'the current and proposed restrictions on judicial review reflect dissatisfaction by successive governments, from both sides of politics, with the workings of judicial review of migration decisions… there is a pattern of bipartisan governmental mistrust of the role performed by courts in reviewing migration decisions.': Ronald Sackville, 'Judicial Review of Migration Decisions: An Institution in Peril?' (2000) 23(3) *University of New South Wales Law Journal* 190, 196.

13 Ibid 200.

14 Ibid; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272.

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16 Alan Freckleton, *Administrative Decision-Making in Australian Migration Law* (ANU Press, 1st ed, 2015) 222.

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18 Catherine Dauvergne, 'Challenges to Sovereignty: Migration Laws for the 21st Century' (Working Paper No 92, 13th Commonwealth Law Conference, April 2003) 2 quoted

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21 Ibid 39-45.

22 Ibid.

23 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 ('Plaintiff S157/2002').

24 Ibid 482 [5] (Gleeson CJ).

25 Ibid 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

26 Ibid 505-507 [74]–[78] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

27 Ibid 508 [83].

28 *Migration Litigation Reform Act 2005* (Cth) sch 1 item 17.

29 *Migration Act 1958* (Cth) s 476A.

30 *Migration Litigation Reform Act 2005* (Cth) sch item 30.

31 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 672 [57]-[58] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ) ('Bodruddaza').

32 *Migration Legislation Amendment Act (No. 1) 2009* (Cth) sch 2 item 6.

33 *Minister for Immigration and Border Protection v ARJ17* (2017) 250 FCR 474.

34 Migration Amendment (Clarification of Jurisdiction) Bill 2018 (Cth); Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 8 of 2018-2019, 13 August 2018) 13.

35 Australian Human Rights Commission, Submission No 1 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Clarification of Jurisdiction) Bill 2018 (Cth)* (4 April 2018) 3.

36 Denis O'Brien, 'Controlling Migration Litigation' (Conference Paper, Australian Institute of Administrative Law National Administrative Law Forum, 7 August 2009) 37.

37 See, eg, *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34.

38 *Australian Constitution* s 75(v).

39 Duncan Kerr, 'The Red Queen's Law: Judicial Review and Offshore Processing after Plaintiff S157/2001' (2007) 9 *UTS Law Review* 57, 65.

40 Ibid.

41 *Migration Act 1958* (Cth) s 5(1), as amended by *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) sch 1 items 1–3.

42 Under the Rudd government, a large offshore detention facility began operating on Christmas Island in 2008 – it formally closed in 2018: Michael Koziol, 'After 10 years, the notorious Christmas Island detention centre has quietly closed', *The Sydney Morning Herald* (online, 4 October 2018) <https://www.smh.com.au/politics/federal/after-10-years-the-notorious-christmas-island-detention-centre-has-quietly-closed-20181004-p507r0.html>.

43 *Migration Act 1958* (Cth) ss 46A(1)-(2).

44 The Refugee Review Tribunal and Migration Review Tribunal were amalgamated into a division under the Administrative Appeals Tribunal in 2015.

45 *Plaintiff M61/2010E v Commonwealth of Australia*; *Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 243 CLR 319, 345-347 [51], [57]-[58] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel, Bell JJ). See also John McMillan, Regulating Migration Litigation After Plaintiff M61 (Report, 2011), 11-14.

46 Kerr (n 39) 66.

47 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 ('Plaintiff M68/2015').

48 *Plaintiff S195/2016 v Minister for Immigration and Border Protection* (2017) 261 CLR 622 ('Plaintiff S195/2016'). See Amy Maguire, 'High Court challenge to offshore immigration detention power fails', *The Conversation* (online, 17 August 2017) <https://theconversation.com/high-court-challenge-to-offshore-immigration-detention-power-fails-82424>.

49 See *Plaintiff M68/2015* (n 47) 71 [46] (French CJ, Kiefel and Nettle JJ). Amy Maguire argues that the High Court decisions in Plaintiff S195/2016 give a 'broader conception of executive government power in relation to mandatory offshore detention': Amy Maguire, 'Case Comment: *Plaintiff S195/2016 v Minister for Immigration and Border Protection* [2017] HCA 31' (2017) 4 *UNSW Law Journal* Forum 1–12.

50 *Plaintiff M68/2015* (n 47) 163 [390] (Gordon J).