

A CLEVER GOVERNMENT – SUBVERTING THE RULE OF LAW

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I INTRODUCTION

In Australia the rule of law is secured in part by s 75(v) of the *Australian Constitution*.¹ This section confers upon the High Court an irremovable original jurisdiction to review the actions of officers of the Commonwealth. The effect of this jurisdiction is to ensure that ‘officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them.’²

Put simply, s 75(v) guarantees that the High Court has the jurisdiction to keep the executive under the rule of law.³ Given the constitutional importance of the section the following comment by Gaudron J in *Vadarlis v MIMA* is disturbing: ‘it just seems to be a little anomalous that you have a constitutional provision like 75(v) and it can be entirely subverted by a *clever government*...’.⁴

These words were uttered by Gaudron J during a special leave application in relation to the rights of asylum seekers to access Australian administrative and judicial arrangements under the

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¹ Section 75 of the *Australian Constitution* specifies the matters in which the High Court has original jurisdiction. Section 75(v) provides that such matters include ‘[all matters] in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth’.

² *Plaintiff S157/2002 v Commonwealth* (2003) 195 ALR 24, 52 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

³ ‘If the law imposes a duty, mandamus may issue to compel performance of that duty. If the law confers power or jurisdiction, prohibition may issue to prevent excess of power or jurisdiction. An injunction may issue to restrain unlawful behaviour.’: *Plaintiff S157/2002 v Commonwealth*, above n 2, 26 (Gleeson CJ).

⁴ Transcript of Proceedings, *Vadarlis v MIMA* M93/2001 (High Court of Australia, Gaudron, Gummow and Hayne JJ, 27 November 2001) 19 (Gaudron J) (emphasis added). The full quote reads: ‘It just seems to be a little anomalous that you have a constitutional provision like 75(v) and it can be entirely subverted by a clever government, if you like, because we have this notion of standing that it is tied to the remedy rather than the duty.’

Migration Act 1958 (Cth) (*Migration Act*). The comment provides the occasion to question how it is possible for a government to circumvent s 75(v) despite its status as a constitutional guarantee. Justice Gaudron is suggesting that an ‘irremovable jurisdiction’⁵ can be skilfully avoided. Furthermore, the tone of the comment suggests that there is little that can be done about it.

Justice Gaudron’s comment also provides an opportunity to reflect on the acute tension between a jurisdiction to review the actions of an officer of the Commonwealth under s 75(v) existing in a context in which the very person seeking review is completely controlled by that same executive. Asylum seekers, unlike other people in the Australian community, can be detained by the executive under statutory mandate and without judicial proceedings.⁶ The paradox is how to ensure that meaningful access to s 75(v) to review actions by the executive can occur when the executive is in control of asylum seekers’ detention.

This article is divided into three sections. The first section explores what Gaudron J meant by the subversion of s 75(v). Similar examples of subversion are also considered. The second section explains how ‘a clever government’ can succeed in this subversion, and why it is that the law is currently incapable of responding. Lastly, the article will briefly comment on what is lost by the community when this occurs.

⁵ ‘[Section] 75(v), introduces into the Constitution of the Commonwealth an entrenched minimum provision of judicial review. There was no precise equivalent to s 75(v) in either of the Constitutions of the United States of America or Canada. The provision of the constitutional writs and the conferral upon this Court of an *irremovable jurisdiction* to issue them to an officer of the Commonwealth constitutes a textual reinforcement for what Dixon J said about the significance of the rule of law.’: *Plaintiff S157/2002 v Commonwealth*, above n 2, 52 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (emphasis added).

⁶ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 19 (Brennan, Deane and Dawson JJ).

II SUBVERSION

‘Subversion’ is defined as ‘attempting to achieve by covert action the weakening or destruction’⁷ of a legal regime. The essence of subversion is in its method. Subversion is covert, undermining and secret. It is to be contrasted with a direct assault.

This section will consider what Gaudron J meant when she stated that s 75(v) was being ‘entirely subverted’. It will also consider three examples of avoidance of judicial review as guaranteed by s 75(v). Each example provides an insight into the type of activity that has the potential to weaken the practical operation of s 75(v).

The comment by Gaudron J was made during a special leave application to challenge a decision of the Full Court of the Federal Court.⁸ That court had upheld the lawfulness of the Commonwealth government’s expulsion of 433 asylum seekers who had sought to enter Australia’s territorial waters aboard a Norwegian ship, *MV Tampa*.⁹ By the time the special leave application was heard in the

⁷ *The New Oxford Shorter English Dictionary* (1993) 3127. The definition refers to the subversion of a political regime, country, or government. Clearly, Gaudron J was referring to the legal regime.

⁸ *Ruddock v Vadarlis* (2001) 110 FCR 491. See generally on the *Tampa* crisis: S Evans, ‘The Rule of Law, Constitutionalism and the *MV Tampa*’ (2002) 13 *Public Law Review* 94; G Lindell, ‘Reflections on the *Tampa* affair’ (2002) 4(2) *Constitutional Law and Policy Review* 21; J McMillan, ‘Comments: The justiciability of the Government’s *Tampa* action’ (2002) 13(2) *Public Law Review* 89; A M North and P Decle, ‘Courts and immigration detention: “Once a jolly swagman camped by a billabong...”’ (2002) 10(1) *Australian Journal of Administrative Law* 1; H Pringle and E Thompson, ‘*Tampa* as a metaphor: Majoritarianism and the separation of powers’ (2003) 10 *Australian Journal of Administrative Law* 107; H Pringle and E Thompson, ‘The *Tampa* Affair and the Role of the Australian Parliament’ (2002) 12 *Public Law Review* 128.

⁹ *Ruddock v Vadarlis*, above n 8; *Victorian Council for Civil Liberties Incorporated v Minister for Immigration & Multicultural Affairs* (2001) 110 FCR 452. Note the government was concerned not to allow the asylum seekers to enter Australian territorial waters, as this entry would trigger an obligation to allow the asylum seekers to apply for a protection visa under ss 36 and 256 of the *Migration Act 1958* (Cth). However, the government still had an obligation under international law, as contained in the *Convention Relating to the Status of Refugees*, 189 UNTS 150, entered into force April 22, 1954 (*Refugee Convention*), not to *refouler* (return) the *Tampa* asylum seekers to territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion: see *Refugee Convention* art 33(1). Traditionally, this obligation had been fulfilled by detaining asylum seekers who had entered territorial waters and allowing

High Court, the government had transferred the asylum seekers to offshore places.¹⁰ This fact was detrimental to the leave application:

In so far as the applicant now seeks to pursue a claim to or in the nature of habeas corpus, it is common ground that the essential claim made at trial and in the Full Court of the Federal Court, namely, the detention of the persons concerned aboard the *MV Tampa* can no longer be made... all have now gone either to Nauru or to New Zealand pursuant to arrangements made with the governments of those countries.¹¹

However, Gaudron J took the opportunity during oral submissions to explore some general issues. She put the following example to the Solicitor General, David Bennett:

Let us assume a slightly different set of facts. Let us assume these people were in detention centres and they were asking to make an application for protection visas and it was discovered that they were being told, 'You can't apply for protection visas', by the persons running the detention centres and yet there was a statutory provision that said they could.¹²

Justice Gaudron's example considers an individual in mandatory detention being denied the right to apply for a protection visa. The

them to apply for a protection visa under the *Migration Act 1958* (Cth). The *Tampa* incident introduced a new approach to this international obligation. The executive would impede the asylum seekers arrival by not allowing them to enter territorial waters and then, offshore under the 'Pacific Solution' or onshore but on 'excised off shore places', judge and administer the obligation not to *refouler*. See generally M Flynn and R LaForgia, 'Australia's Pacific Solution to Asylum Seekers' (2002) *LawAsia Journal* 31.

¹⁰ In the course of this litigation the applicants and the Commonwealth had entered into arrangements enabling the asylum seekers to transfer from *MV Tampa* to the Australian naval vessel, *HMAS Manoora*. There was an undertaking to maintain 'the legal status quo despite the rescuees having been transferred.': *Ruddock v Vadarlis*, above n 8, 522 (French J). The litigation was to be conducted as though the asylum seekers were still detained on the *MV Tampa*, and nothing was to turn upon their legal status onboard *HMAS Manoora*. This agreement was made, in part, on the humanitarian ground that it would be untenable for the asylum seekers to remain housed on *MV Tampa* for the course of the litigation.

¹¹ *Vadarlis v MIMA*, above n 4, 30.

¹² *Vadarlis v MIMA*, above n 4, 19.

normal remedy for such a denial would be to seek a writ of mandamus under s 75(v) of the *Constitution*, compelling the officer to perform her or his duties and allow the application for a protection visa. In other words, the executive would be ordered to comply with the law.

On the facts of this example, any possibility of a review of the officer of the Commonwealth's unlawful actions is illusory, because the asylum seeker is held in detention by the executive and has no access to independent legal advice. There is no *practical* way for the individual asylum seeker to secure a writ of mandamus under s 75(v). Furthermore, because of the rules relating to standing, another person cannot bring an action on the asylum seeker's behalf.¹³

The example put by Gaudron J was hypothetical. She was raising a personal concern that officers of the Commonwealth who are uncooperative and willing to misuse their power can effectively subvert s 75(v). This personal concern was confirmed in *Cox v Minister for Immigration Multicultural & Indigenous Affairs (Cox)*,¹⁴ a case heard by Mildren J in the Northern Territory Supreme Court in late 2003.

Cox was a case concerning the treatment of asylum seekers who had arrived on Melville Island on 4 November 2003. The Australian Navy Patrol subsequently removed the asylum seekers from the island to enable them to be processed 'offshore'. Before their removal, the Northern Territory Legal Aid Commission attempted to question the lawfulness of this action. Ms Cox, acting on behalf of the Northern Territory Legal Aid Commission, brought the action against the Minister. This article is not concerned with the arguments raised in the particular case, its concern is with the attitude and actions of the executive.

¹³ 'It just seems to be a little anomalous that you have a constitutional provision like 75(v) and it can be entirely subverted by a clever government, if you like, because we have *this notion of standing that it is tied to the remedy rather than the duty*.' : *Vadarlis v MIMA*, above n 4, 19 (emphasis added).

¹⁴ *Cox v Minister for Immigration Multicultural & Indigenous Affairs* [2003] NTSC 111 (Unreported, Mildren J, 20 November 2003) [10].

Justice Mildren commented on the general lack of cooperation in terms of the exchange of information:

It is plain from this and also from the evidence of Mr Eyers, as well as other matters of evidence to which I will come, that the policy of the government was to operate as clandestinely as possible... Behaviour of this kind usually implies that there is something to hide.¹⁵

Further, Mildren J commented on the question of access to legal advice:

Mr Eyers was asked specifically why Ms Cox's request to seek access to those on board the vessel was not acceded to. He replied that it was normal procedure that unless a person requested legal assistance it is not provided. He said that he did not know whether any of the persons concerned had asked for legal assistance or not and did not know whether any of them had asked for asylum. Even allowing for the urgency under which this affidavit was sworn I found it incredible that the 1st and 3rd defendants' principal witness could not answer these questions.¹⁶

The above comments replicate the concerns raised by Gaudron J in *Vadarlis v MIMA*. The Commonwealth government is using its power to frustrate the individual's right to access judicial review. This tactic has been described by Gaudron J as 'subversive', and by Mildren J as 'clandestine' and 'incredible'. It is the mode by which the rule of law is compromised that is so troubling. It is through stealth, secrecy and subversion that the executive is seeking to mask its actions, and render them inaccessible to judicial review.

The third example is taken from a parliamentary paper reviewing the policy and practice of excising areas from the Migration Zone.¹⁷

¹⁵ Ibid.

¹⁶ Ibid [24].

¹⁷ Research Note No 42 2003-04, *Excisions from the Migration Zone - Policy and Practice*, M Coombs, Law and Bills Digest Group (1 March 2004).

These excisions operate to complement the overall policy of the offshore processing of asylum seekers (the Pacific Solution).

The Commonwealth government introduced the Pacific Solution on 1 September 2001.¹⁸ Under this policy asylum seekers are sent by the government to the ‘declared countries’ of Nauru and/or Papua New Guinea. These countries, in return for monetary compensation, provide territory for the processing of the asylum seekers. However, the Commonwealth government remains in overall control of the asylum seekers’ welfare.¹⁹

The Pacific Solution works in two stages, by first defining an area of Australia as an ‘excised offshore place’. At present ‘excised offshore places’ include Christmas Island, Ashmore and Cartier Islands, Cocos (Keeling) Island, and Australian sea and resources installations. The government may also increase the area of excised offshore places if it prescribes by regulation any external territory or any island of a State or Territory as an excised offshore place.²⁰ To date the Senate has disallowed various attempts to prescribe offshore places by regulation,²¹ however, with the government in control of the Senate post-June 2005, it will be difficult to disallow any regulation authorised by the *Migration Act*.

The second stage of the Pacific Solution is the creation of a new identity for asylum seekers who arrive on these excised offshore

¹⁸ See Oxfam’s (Community Aid Abroad) Report, *Adrift in the Pacific: The Implications of Australia’s Pacific Refugee Solution* (February 2002), cited in G Thom, ‘Human Rights, Refugees and the *MV Tampa* Crisis’ (2002) 13 *Public Law Review* 110. See also *Ruddock v Vadarlis*, above n 8, 525-6.

¹⁹ See, for example, the *Transitional Movement Act 2002* (Cth), which provides that asylum seekers can be moved to Australia to receive medical treatment but are deemed to be ‘transitory persons’. ‘[The *Transitional Movement Act 2002* (Cth), by] designating them as ‘transitory persons’... provid[es] that any application they make for a visa is not valid ...’: *Applicants WAIV v Minister for Immigration Multicultural & Indigenous Affairs* [2002] FCA 1186, [4] (Unreported, French J, 20 September 2002). This Act reveals Australia’s ongoing control over the destiny of asylum seekers on Nauru. See also *Ruddock v Vadarlis*, above n 8, 526.

²⁰ Section 5(l) *Migration Act 1958* (Cth); see Flynn and LaForgia, above n 9.

²¹ Research Note No 42 2003-04, above n 17.

places: the ‘offshore entry person’.²² The ‘offshore entry person’ has two possible fates, either to be kept on the excised place or transferred to a declared country, for example, Nauru.²³ In both instances the right of access to the original jurisdiction of the High Court is maintained, under both the *Constitution* and the *Migration Act* itself.

Section 494AA of the *Migration Act* provides:²⁴

- (1) The following proceedings against the Commonwealth may not be instituted or continued in any court:
 - (a) proceedings relating to an offshore entry by an offshore entry person;
 - (b) proceedings relating to the status of an offshore entry person as an unlawful non-citizen during any part of the ineligibility period;
 - (c) proceedings relating to the lawfulness of the detention of an offshore entry person during the ineligibility period, being a detention based on the status of the person as an unlawful non-citizen;
 - (d) proceedings relating to the exercise of powers under section 198A.

²² Section 5 of the *Migration Act 1958* (Cth) defines an ‘offshore entry person’ as a person who: (a) entered Australia at an excised offshore place after the excision time for that offshore place; and (b) became an unlawful non-citizen because of that entry. See, generally, Flynn and LaForgia, above n 9.

²³ *Migration Act 1958* (Cth) s 198A:

- (1) An officer may take an offshore entry person from Australia to a country in respect of which a declaration is in force under subsection (3).
- (2) The power under subsection (1) includes the power to do any of the following things within or outside Australia:
 - (a) place the person on a vehicle or vessel;
 - (b) restrain the person on a vehicle or vessel;
 - (c) remove the person from a vehicle or vessel;
 - (d) use such force as is necessary and reasonable.

²⁴ See also ss 494AB and 245F(8B) of the *Migration Act 1958* (Cth), both of which specifically retain the right to judicial review under s 75(v).

- (2) This section has effect despite anything else in this Act or any other law.
- (3) Nothing in this section is intended to affect the jurisdiction of the High Court under section 75 of the Constitution.

The parliamentary paper confirms that ‘offshore entry people’ who, for example, have been removed to the declared country of Nauru, fall under s 494AA of the *Migration Act*. However, the author of the paper goes on to observe that in relation to s 494AA: ‘[a]ction in the High Court under section 75 of the Constitution is not affected, *although in practice this will be beyond the reach of such people*’.²⁵

There is no suggestion that access to the High Court may merely be difficult. Rather, there is a bold statement that such access ‘will be beyond the reach’ of offshore entry people. This confirms that, despite the inclusion of s 494AA, in practice s 75(v) has been subverted.

The issue of the subversion of constitutional guarantees can also be viewed on a more general level. This is illustrated by the following exchange between the then Shadow Minister for Immigration and the then Minister for Immigration, concerning the policy of offshore processing:

Ms Gillard: I know what the Minister is going to say: I have heard him say it before. He is going to say that processing offshore avoids the bells and whistles Australian processing system or, in his terminology, ‘convention plus’. I am sure I have quoted you correctly because you are nodding at me. I say to you, Minister, that if you have got concerns about the Australian processing arrangement then why do you not fix that?

Mr Ruddock: Because of the *Constitution*.²⁶

²⁵ Research Note No 42 2003-04, above n 17 (emphasis added).

²⁶ Commonwealth, *Parliamentary Debates (Hansard)*, House of Representatives, 20 June 2002, 4030. See also, this and other examples cited in R LaForgia, ‘Attorney General, Chief Law Officer of the Crown: But where is the law?’ (2003) 28 *Alternative Law Journal* 163. The same policy objectives are evident in the United States

These comments by judges, the opinion expressed in a parliamentary paper, and the response made by a Minister clearly point to an impression that the constitutional guarantee provided by s 75(v) is in practice being eroded. Justice Gaudron expressed her concerns through the example of a hypothetical person in mandatory detention. Justice Mildren pointed to the executive's secretive attitude towards asylum seekers. The parliamentary paper noted the practical impossibility of asylum seekers, on excised offshore places, accessing the jurisdiction of the High Court. Finally, the then Minister for Immigration indicated his general policy aim of avoiding the *Constitution*.

At the very least these examples are, to return to the words of Gaudron J, 'a little anomalous'. How can meaningful access to the jurisdiction of the High Court be given to asylum seekers to review the actions of those who control them?

III THE 'CLEVER' GOVERNMENT

The second observation by Gaudron J was that the government was 'clever'. The government's cleverness lies in its appreciation of the fact that it cannot directly remove the constitutional guarantee provided by s 75(v). That constitutional guarantee cannot be removed by the *Migration Act*, or any other statute. 'The jurisdiction

Government's holding of prisoners at the offshore territory of Guantanamo Bay in Cuba. The objective is to avoid the operation of the United States domestic law, including the *Constitution*. There was, however, a Supreme Court ruling in June 2004, *Rasul v Bush, President of the United States*, 542 US 466 (2004), stating that the prisoners have a right to review the lawfulness of their detention. Despite this ruling, a 2005 Amnesty International Report, *United States of America Guantanamo - icon of lawlessness* (6 January 2005) AI Index: AMR 51/002/2005, 1, states: 'More than six months after the US Supreme Court ruled that the federal courts can hear appeals from the Guantanamo detainees, it is not because of the slowness of the legal system that hundreds remain held without charge or trial and virtually incommunicado in the naval base. *It is the result of a government seeking to drain the Supreme Court ruling of any real meaning* and aiming to keep any review of detentions as far from a judicial process as possible.' (emphasis added). The author thanks an anonymous referee for raising this point.

of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament.’²⁷

Had the government sought to *directly* remove or deny the right of an ‘offshore entry person’ to access the High Court’s jurisdiction under s 75(v) any such action would have been unconstitutional. However, the reference to s 75 of the *Constitution* in s 494AA(3) of the *Migration Act* is a constitutional ‘rubber stamp’. The government included this reference to s 75(v) knowing full well that, as a matter of practicality, asylum seekers in excised offshore places or declared countries cannot access the High Court’s jurisdiction under s 75(v). Thus, the government achieved *indirectly* what it could not do directly.

This is a clever strategy. As yet, there has been no High Court decision relating to an indirect attack on s 75(v) of the *Constitution*. Likewise, as yet, no High Court decision has examined the practical effect of a law and found that, *in effect*, the government has subverted s 75(v) by denying access to the High Court’s original jurisdiction.

The recent case of *Plaintiff S157/2002 v Commonwealth*²⁸ dealt with a *direct* legislative attempt to reduce the operation of s 75(v) through

²⁷ *Plaintiff S157/2002 v Commonwealth*, above n 2, 26 (Gleeson CJ).

²⁸ *Plaintiff S157/2002 v Commonwealth*, above n 2. The majority of academic comment about this case concerns the validity of s 474 of the *Migration Act 1958* (Cth), which inserted a privative clause in the Act, and s 474’s relationship to s 75(v). This article does not consider that aspect of the decision. For a thorough analysis, see D Keff and G Williams, ‘Review of executive action and the rule of law under the Australian Constitution’ (2003) 14 *Public Law Review* 219, 232, the authors state:

The decision of the High Court in *Plaintiff S157* is an important landmark in our understanding of the relationship between the Australian *Constitution* and judicial review of executive action. The decision also develops rule of law principles in finding that the *Constitution* provides for an entrenched minimum level of judicial review (based upon the concept of jurisdictional error) for actions by an officer of the Commonwealth.

See generally, J Basten, ‘Revival of procedural fairness for asylum seekers’ (2003) 28(3) *Alternative Law Journal* 114; C Beaton-Wells, ‘Restoring the rule of law - *Plaintiff S157/2002 v Commonwealth of Australia*’ (2003) 10 *Australian Journal of Administration Law* 125; D Bennett, ‘Privative clauses - An update on the latest developments’ (2003) 37 *Australian Institute of Administrative Law Forum* 20; S Evans, ‘Privative clauses and time limits in the High Court’ (2003) 5(4) *Constitutional Law and Policy Review* 61; D Kerr, ‘Deflating the *Hickman* myth: Judicial review after

a privative clause. The case is not, therefore, relevant to the problem of an *indirect* attack. However, Callinan J explored the possibility of considering the actual impact that the legislation would have on access to the High Court's jurisdiction. His reasoning constitutes the first attempt to consider the practical problems of asylum seekers accessing the High Court's jurisdiction.

Justice Callinan considered the constitutionality of s 486A, which had introduced into the *Migration Act* a time limit of 35 days within which an asylum seeker could make an application to the original jurisdiction of the High Court under s 75(v). The time limit is contained in s 486A of the *Migration Act* which states:

- (1) An application to the High Court for a writ of mandamus, prohibition or certiorari or an injunction or a declaration in respect of a privative clause decision must be made to the High Court within 35 days of the actual (as opposed to deemed) notification of the decision.
- (2) The High Court must not make an order allowing, or which has the effect of allowing, an applicant to make an application mentioned in subsection (1) outside that 35 day period.

Justice Callinan first observed that nothing on the face of s 486A of the *Migration Act* removed the right of access to s 75(v): 'I have observed, s 486A does not of itself, on its face, appear to seek to extinguish the right conferred by s 75(v) of the Constitution.'²⁹

He then stated the pivotal question for the purposes of this article:

Nonetheless the questions remain: whether, notwithstanding its appearance, [s 486A of the *Migration Act*] does in fact so substantially interfere with or limit access to the constitutional remedies for which s 75(v) provides, that it goes beyond regulation and renders them either nugatory or of virtually no utility.³⁰

Plaintiff S157/2002 v The Commonwealth (2003) 37 *Australian Institute of Administrative Law Forum* 1.

²⁹ *Plaintiff S157/2002 v Commonwealth*, above n 2, 69 (Callinan J).

³⁰ *Ibid.*

Justice Callinan framed the question of validity as a question of substance over form. In considering the effects that s 486A had on limiting access to s 75(v), he took judicial notice of the fact that some individuals seeking to access the High Court pursuant to s 75(v) would be ‘living or detained in places remote from lawyers.’³¹ He also considered that some people seeking these remedies might be incapable of speaking English,³² and concluded that:

In those circumstances, to prescribe 35 days within which to bring properly constituted proceedings in this Court under s 75(v) of the Constitution, which can only as a practical matter be filed in one of the capital cities, effectively would be to deny applicants recourse to the remedies for which it provides.³³

Justices Gaudron, McHugh, Gummow, Kirby and Hayne in their joint judgment, and Gleeson CJ in his separate judgment, did not decide the issue as to the constitutionality of the time limit. Their construction of the privative clause had, in effect, deprived the time limit of any practical operation, so they were not required to rule on the matter.³⁴ Despite not explicitly dealing with the constitutionality of the time limit, the transcript of argument in *Plaintiff S157/2002 v Commonwealth* reveals a striking similarity with Callinan J’s approach. The following is an extract from an exchange between Gummow and Kirby JJ and the Solicitor General, David Bennett:

Gummow J: Why do you say one day would be bad? A period of one day, I think you said that would ---

Mr Bennett: Because, your Honour, that would, in effect, be a removal of the right. The time limit cannot be so unreasonably short that it ceases to be a procedural regulation.

³¹ Ibid 71 (Callinan J).

³² Ibid.

³³ Ibid. On the time limit, see Evans, ‘Privative clauses and time limits in the High Court’, above n 28.

³⁴ Kerr, above n 28, 10.

Kirby J: Once you concede, in effect, the removal of the right, you have lost this argument, because for some people 35 days, in effect, deprives them of that right; deprives them of that right because they cannot speak English, they have no access to lawyers and have no access to migration, they are in detention, their lawyer misleads them, their lawyer is confused, the *Migration Act* person puts it in the wrong drawer, and so on. Once you concede that the test is, in effect, depriving the person of the right, then you have lost the point.³⁵

It can be no coincidence that Callinan J's judgment referred to the very issues that Kirby J raised during oral argument. It could be presumed from reading this extract from the transcript that both Kirby and Gummow JJ were sympathetic to Callinan J's approach.

The author does not want to overstate Callinan J's position.³⁶ He did not develop this approach in any detail.³⁷ Rather, his judgment was based on judicial notice of the relevant aspects of asylum seekers' lives. In truth, Callinan J's judgment appears to have been an instinctive response to the absurdity of the Commonwealth's argument that, despite the 35 days time limit, their remote detention and their lack of English language skills, asylum seekers still had real access to the original jurisdiction of the High Court. For a judge with a well-known theatrical and literary bent, this was a Gilbertian situation!

To deal with the indirect subversion of s 75(v), the High Court would have to develop an analysis that was willing to consider the

³⁵ Transcript of Proceedings, *Plaintiff S157/2002 v Commonwealth* (High Court of Australia, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Callinan and Hayne JJ, 4 September 2002).

³⁶ *Plaintiff S157/2002 v Commonwealth*, above n 2, 52-6. Ironically, Callinan J's judgment was quite deferential to the executive. If anything, he underplayed the role of judicial review as compared to the other members of the court. Also, he was willing to consider that a longer time limit may be valid: 71. See H Robertson, 'Truth, Justice and the Australian Way - *Plaintiff S157 of 2002 v Commonwealth*' (2003) 31 *Federal Law Review* 373, 386.

³⁷ See Evans, 'Privative clauses and time limits in the High Court', above n 28, on the lack of development of Callinan J's approach.

practical aspects of an asylum seeker's life. The Court would have to consider arguments as to the executive's total control of an offshore entry person, and the illusory nature of any access to its jurisdiction. It would have to acknowledge that, in reality, the constitutional guarantee was being thwarted.

The strongest argument in favour of the High Court attempting to deal with the issue of the subverting of s 75(v) is one of logic. The Court has endorsed the simple and compelling proposition: 'you cannot do indirectly what you are forbidden to do directly.' This maxim has often been used as a guide to the interpretation of constitutional guarantees.³⁸ If the justices of the High Court were willing to be guided by this maxim, they could develop a jurisprudence able to investigate the government's current practical subversion of s 75(v).

IV WHAT IS LOST?

When the government subverts s 75(v) the most obvious loss is to the individual asylum seeker who cannot practically access the High Court's jurisdiction to enforce her or his rights. Sometimes, it is this individual loss that becomes the focus of the debate regarding s 75(v), and the merits of judicial review more generally. For example, Professor McMillan, commenting in the context of the *Tampa* incident (to support his argument that there was no real disadvantage in the non-justiciability of the asylum seekers' claims) stated: 'In a practical sense, the rescuees' prospective loss was an appeal right against asylum refusal.'³⁹

This observation fails to take account of the pivotal balance between the individual and public dimensions of the rule of law. What has also been lost is that officers of the Commonwealth are no longer under the constitutional gaze of s 75(v). The Australian public is left

³⁸ Sir Anthony Mason, 'Form and Substance' in A Blackshield, M Coper and G Williams (eds), *The Oxford Companion to the High Court* (2001) 282. On a substantive approach to s 75(v) in relation to privative clauses see S Ford, 'Judicial review of migration decisions: Ousting the *Hickman* privative clause?' (2002) *Melbourne University Law Review* 28.

³⁹ McMillan, above n 8, 92.

with only the illusion of an important constitutional guarantee. It is this public dimension of s 75(v) that is overlooked if one centres only on the individual. As Dawson J stated in relation to another constitutional guarantee:

It is, of course, of the very nature of a constitution that it deals with matters of public concern and it is not to be expected in a constitution such as the Constitution of the Commonwealth of Australia which, almost without exception, deals with the structure and relationships of government rather than with individual rights or freedoms, that there should be found provisions by way of guarantee with a private rather than a public significance.⁴⁰

The public significance of s 75(v) is that it guarantees the Australian people are governed by an executive that is at all times under the rule of law.

[T]he most important aspect of the Court's original jurisdiction is that conferred by Section 75(v) of the Constitution, under which the Court is given the power to ensure that the conduct of officers of the Commonwealth is according to the rule of law. This is an essential part of the maintenance of the rule of law, and of ensuring the Constitution is obeyed not only by Parliament but also by the executive...⁴¹

Under the present laws and policies relating to asylum seekers the Commonwealth government is, in reality, no longer under the gaze of s 75(v) of the *Constitution*. The people of Australia are being governed by an executive that is not, in a practical sense, under the

⁴⁰ *Brown v The Queen* (1986) 160 CLR 171, 208. Justice Dawson was referring to the public interest in a trial by jury as guaranteed by s 80 of the *Constitution*.

⁴¹ Justice Murray Gleeson, 'The Rule of Law and the Constitution', *Boyer Lectures 2000* (2000) 87. The public dimensions of the section were also highlighted by Black CJ and French J in *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229, 243:

In proposing what became s 75(v) Inglis Clark sought to enshrine in the Constitution provision for judicial review of executive action. When Edmund Barton formally moved the insertion of the provision in March 1898... The words of the power he said, could not do harm and might 'protect us from a great evil'. Those words emphasise the importance attached to the justiciability of the limits of executive power.

rule of law. Justice Gaudron, in *Vadarlis v MIMA*, was frank enough to acknowledge this possibility. This article has been an attempt to discuss her comment, so that at least it cannot be said: ‘We didn’t know’.