Comments and Notes

Climbing Jacob's Ladder: The High Court and the Administrative Detention of Asylum Seekers in Australia

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1. *Introduction*

On 8 December 1992, the High Court delivered its judgment in a case which raised significant issues about the manner in which the federal Parliament can legislate both to detain aliens, and to immunise such detentions from the scrutiny of the courts. From the perspective of refugee advocates in Australia, virtually every aspect of *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (hereafter *Chu Kheng Lim*)[1] was disappointing. The High Court's ruling gave little joy to the plaintiff Cambodians, some of whom by that time had spent over three years in custody. In spite of holding that the Cambodians' original detention had been illegal, the Court found that special legislation passed in May 1992 could be relied upon to justify their continued incarceration.

Chu Kheng Lim was disappointing also for those who have been following the ongoing saga of the High Court's relationship with the government on issues pertaining to human rights. A majority of judges held unlawful a section prohibiting any court from ordering the release of the detainees. However, the substantive effect of the ruling on the detention clauses meant that this was very much a Pyrrhic victory. Even if it was too much to expect the release of the Cambodian plaintiffs, the High Court could have been more expansive in its approach to the issues at the centre of the case. The decision leaves unanswered many questions concerning the rights of aliens in Australia and the role to be played by the Courts as guardian of those rights. At a time of unprecedented activism in the High Court — when it has moved to discredit the notion that Australia before white settlement was *terra nullius*;[2] to uphold the accused's right to counsel in circumstances where lack of legal representation would make a criminal trial unfair;[3] and to assert that reasonable freedom of political expression is a necessary condition of democratic government[4] — the decision in *Chu Kheng Lim* is, at best, bland.

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1 (1992) 110 ALR 97.

2 See *Mabo v The State of Queensland* (1992) 107 ALR 1.

3 See *Dietrich v The Queen* (1992) 109 ALR 385.

4 See *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681 and *NSW v Cth of Aust (No 2)* (1992) 108 ALR 577.

2. *The Background to the Case*

The High Court's judgments in *Chu Kheng Lim* contain lengthy analyses of often complex legislative provisions. This complexity — and the fact that the Cambodians did not win their release — may explain why the case received so little attention in the media.[5] In reality, the issues involved in the case were quite simple. They went to the very heart of the power relationship between the government and the judiciary. However, the events that gave rise to the case were neither simple nor ordinary.

The plaintiffs were Cambodian nationals who came to Australia on two different boats. One group arrived on or about 27 November 1989; the other (with the exception of an infant born in Australia) arrived by boat on or about 31 March 1990. All of the plaintiffs were taken into custody and have been detained ever since. All sought asylum in Australia on the basis that they meet the definition of "refugee" set out in the international Convention and Protocol Relating to the Status of Refugees.[6] With the assistance of volunteer lawyers in Darwin, refugee applications were made by the first group on or about 8 December 1989. The second group applied in early May 1990 and were aided by Melbourne-based lawyers. Delegates of the Minister for Immigration, Local Government and Ethnic Affairs (hereafter "the Minister") rejected both groups between 3 and 6 April 1992. By that time the first arrivals had been moved to a detention centre at Port Hedland in the far North of West Australia, while the second group had been transported from Melbourne to Sydney. Funding was given to lawyers in Melbourne and Sydney to allow the applicants continued access to legal advice.[7]

Much was made by the Minister of what he alleges were the delaying tactics of the lawyers representing the Cambodians.[8] The fact remains that determinations of the applicants' legal status were not delivered until over two years after the first claims for refugee status were made. As soon as these decisions were notified to the plaintiffs, applications for judicial review were brought in the Federal Court of Australia pursuant to the Administrative Decisions (Judicial Review) Act 1977 (Cth). These proceedings sought to challenge the legality of the decisions which had refused the Cambodians refugee status. In spite of the time taken to make them, these decisions were so badly flawed that the Minister conceded at the door of the court that the cases should be sent back for re-assessment.[9]

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5 The High Court's judgment also coincided with an announcement by the Opposition leader, John Hewson, that he intended to make changes to the Liberal Party's policy platform dubbed "Fightback" on 18 December 1992. This announcement dominated the news of the day.

6 The Convention was done at Geneva on 28 July 1951 and the Protocol, at New York on 31 January 1967 (hereafter "the Refugee Convention and Protocol").

7 Funding was granted to the Refugee and Casework Service in Melbourne to continue as the legal representatives of the Cambodians who had been moved from Melbourne to Sydney. Money was also given to the Refugee Council of Australia which recruited lawyers from Sydney and Melbourne to act for the Cambodians who had been moved from Darwin to Port Hedland.

8 See Commonwealth Parliamentary Debates, House of Representatives, 5 May 1992, at 2389-90, per Minister Hand; and id at 2388, per Mr Theophanous; and House of Representatives, 11 November 1992, at 2622, per Minister Hand.

9 Orders were made to this effect by O'Loughlin J on 15 April 1992. The Minister declined

It was at this point that lawyers for the Cambodians decided to press on and attempt to secure the release of the detainees through the Federal Court pending new determinations being made.[10] Their release was sought on the basis that they were being detained without legal authority. This application was adjourned for hearing on 7 May 1992. On 5 May of that year, some two days before the Federal Court was to hear arguments on whether the Cambodians should be released, the Federal Parliament passed the *Migration Amendment Act* 1992 (Cth). The legislation passed through both Houses of Parliament in little more than one hour. It was given the Royal Assent on the following day. The effect of the legislation was to insert into the *Migration Act* 1958 (Cth) (hereafter "the Act"), a new Division 4B preventing the release of the detainees, who were included in a new class of "designated persons". The nature of the legislation and the immediacy of the relationship between the amending Act and the litigation pending in the Federal Court prompted the lawyers for the Cambodians to challenge the new provisions on the ground that they were an abuse of the judicial power conferred on the Courts by the Constitution.[11]

The amending Act marked a turning point in the drawn-out saga of the Cambodian refugee claimants in more ways than one. First, it made very plain the depth of the government's — and the Minister's personal — involvement in the refugee determination process for these people.[12] It also confirmed the extent of the political feeling about the asylum seekers by the opposition. The initiative was one that could have been achieved only with the full co-operation of the two major parties.[13]

Second, the legal representation of the Cambodians was to move into higher gear. Where the claimants' cases had been handled previously by volunteer agencies with few resources, approaches were made to some of the biggest legal firms in Australia. The original lawyers acting for the Cambodians were assisted in the running of the High Court challenge by the Melbourne of-

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to comment on how the decisions were flawed. However, the arguments raised by the plaintiffs included allegations of gross procedural impropriety. For example, in some cases, the chairperson of the committee set up to adjudicate on appeals and make recommendations to the Minister had purported to act simultaneously as committee chairperson and the Minister's delegate in considering the committee's recommendation.

10 The applications were made under s15 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

11 See s71 of the Constitution. This and the other arguments raised by the plaintiffs are discussed further below.

12 See, eg, Commonwealth Parliamentary Debates, House of Representatives, 5 May 1992, at 2372ff, per Minister Hand; and id at 2384, per Mr Mackellar; id House of Representatives, 11 November 1992 at 2620-3, per Minister Hand; and id Senate, 7 December 1992 at 4297ff per Mr McKiernan.

13 It is worth noting that some Senators claimed after the passage of the legislation that they had not been told of the relationship between the amending Act and the litigation pending in the Federal Court. See Brennan, F, SJ, "Litigating the Rights of the Marginalised — A Revolution in the Rights of Asylum Seekers and Indigenous Peoples" paper presented at the 1993 New Zealand Law Conference: *Revolution by Lawful Means: Law and Politics* at 7. In this context, it is interesting to note that the relevance of the amendments to applications before the Federal Court was highlighted first by the Democrats. See Commonwealth Parliamentary Debates, Senate, 5 May 1992, at 2235, per Sen Coulter; and at 2259 per Sen Harradine.

fice of Mallesons Stephen Jaques. Since that time virtually all the Cambodians held at Port Hedland and in Sydney have been offered and are receiving legal aid from large firms of solicitors,[14] as well as from a number of leading silks and senior counsel.[15] In the result, it was clear that the battle lines were now drawn, and that Minister Hand would not intervene in the refugee process to grant any Cambodian asylum unless ordered to do so by the courts. Whether Mr Hand's approach to the problem is shared by his successor, Minister Bolkus, remains to be seen.

3. *The High Court Challenge*

A. *Introduction*

The plaintiffs came to the High Court seeking declaratory and injunctive relief against the Minister and the Commonwealth of Australia. Mason CJ stated a case for the High Court that raised two questions. The first asked whether certain of the amending provisions were invalid in respect of the applications made in the Federal Court for the release of the plaintiffs. The second asked whether, if the provisions were invalid, the Defendants were under a legal duty to decide the plaintiffs' applications for release from custody under either the Refugee Convention and Protocol or the International Covenant on Civil and Political Rights. Because of the answer given to the first of these questions, no member of the High Court looked in any detail at the implications of the amending Act being in conflict with these international instruments.[16]

B. *The Legislation*

The key to the amending Act was its description of "designated person". Section 54K defined such a person for the purposes of the division as:

> a non-citizen who:
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> a) has been on a boat in the territorial sea of Australia after 19 November 1989 and before 1 December 1992; and
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> b) has not presented a visa; and
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> c) is in Australia; and
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> d) has not been granted an entry permit; and
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> e) is a person to whom the Department has given a designation by:

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14 In Melbourne, the firms of Mallesons, Stephen Jaques and Clayton Utz have taken on cases. In Sydney, similar commitments have been made by Blake, Dawson Waldron; Allen, Allen and Hemsley; and Gilbert and Tobin; while Mallesons, Stephen Jaques and Patrick J Gethin have been working in Perth in conjunction with a number of other local firms.

15 Applicant counsel include Peter Rose, Tony North QC, Maree Kennedy, Peter Galbally QC, Paul Santamaria, Gary Maloney, and Peter Hanks of the Melbourne Bar; and David Gitterns QC, Allan Robertson, and Patricia Sharp of the Sydney Bar. In Perth, Henric Nicholas and John Cameron have added their expertise.

16 One judge to pay some attention to this issue was McHugh J. However, he found that if the terms of the international instruments had been enacted into Australia's domestic law, their terms were overborn by the paramountcy clause contained in *Migration Act* s54T of the Act. See above n1 at 151-2.

i) determining and recording which boat he or she was on; and

ii) giving him or her an identifier that is not the same as an identifier given to another non-citizen who was on that boat;

and includes a non-citizen born in Australia whose mother is a designated person.

The plaintiffs conceded that they fell within this definition. The new division as it affected the detainees was described by Toohey J in the following terms:[17]

> Through a combination of sections (ss54L, 54M, 54N, 54P, 54Q and 54R), Div 4B seeks to ensure that a designated person is kept in custody if already there and is placed in custody if not, and is only released from custody if the person is removed from Australia under s54P or is given an entry permit under ss34 or 115. Section 54Q contains a qualification to the custody requirements, namely, that ss54L and 54P cease to apply to a designated person in certain circumstances; those circumstances have not arisen so far as the plaintiffs are concerned. It should be noted that, by virtue of s54P(1), if a designated person asks the minister, in writing, to be removed from Australia, an officer must remove that person "as soon as practicable". The person must also be removed in the other circumstances to which s54P refers.

The leading judgment in *Chu Kheng Lim's* case was that of Brennan, Deane and Dawson JJ[18] who approached the case by looking first at the legal basis on which the plaintiffs were being detained at the time the amending Act was passed. They then examined, in turn, the extent of the constitutional power to legislate with respect to aliens; the nature of the doctrine of the separation of powers under Chapter III of the Constitution and the ambit of the power to exclude, deport and detain non-citizens. They concluded by analysing the amending Act in accordance with the general principles they had expounded. This framework provides a useful structure within which to examine the case in greater detail.

C. *The Plaintiff's Custody at the Date of the Amending Act*

Brennan, Deane and Dawson JJ began their analysis of this aspect of the case by re-stating the principle that, subject to qualifications regarding enemy aliens in a time of war, aliens within Australia are not outlaws and may not be detained without some "positive authority conferred by the law".[19] After looking at the legislation in force before May 1992, these judges, together with three of their colleagues, held that the plaintiffs' original custody was, or was probably, unlawful.[20]

The government sought to justify the initial detention of the plaintiffs by relying on s88 of the Act. This was designed for the short-term custody of stowaways and persons on board a water-borne vessel who would be illegal entrants if allowed to disembark. The section is a "turn-around" provision that envisions the quick removal of detainees on board the vessel on which they

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17 Id at 125.

18 Id at 103ff.

19 Id at 107.

20 Id at 107-110, per Brennan, Deane and Dawson JJ; at 126-127 per Toohey J; at 134 per Gaudron J; and 143 per McHugh J.

travelled to Australia back to the place from whence they came. The High Court made it clear that this section was not appropriate in cases involving the long-term detention of asylum seekers. Brennan, Deane and Dawson JJ held that as soon as it became apparent that the detainees could not be returned on board the vessels in which they travelled to Australia, s88 could not be relied on to justify their detention. The Court remarked that counsel for the government had informed them that the boats on which the plaintiffs arrived had been burnt.[21] Although the Minister later told Parliament that this was not so,[22] the real point made by the High Court held true. Whatever the outcome of the plaintiffs' applications for refugee status, it was clear that they were never going to be sent back to Cambodia on the boats on which they arrived. In this way, Brennan, Deane and Dawson JJ made it clear that the Federal Court applications made in May 1992 for the release of the detainees probably would have succeeded.

D. "Designated Persons" and the Constitutional Power to Legislate with Respect to Aliens

For most members of the High Court[23] in *Chu Kheng Lim*, the breadth of the definition of the term "designated person" in the amending Act was a matter of concern. The government's expressed intention was to cast the net wide enough to catch all the Cambodians, irrespective of whether or not they had "entered" the country within the meaning of the Act. As Brennan, Deane and Dawson JJ pointed out, however, the elements of the definition given in s54K had the potential to apply to a wide range of people, including any New Zealand citizen who happened to be boating in Australian waters between the dates specified.[24] The Court did little more than express its concern about s54K, however. In effect, the Court held that the constitutional validity of the provision was ensured by the reference to "non-citizens".

The Court reiterated its stand on the extent of the constitutional power of Parliament to legislate with respect to aliens.[25] It held that s51(xix) of the Constitution rendered prima facie valid any law that affects non-citizens either generally or as members of a particular category or class.[26] The question for the Court became whether there was any implied restriction or limitation implicit in the Constitution when read as a whole that prevented sl51(xix) from being relied upon to authorise the amending Act. The plaintiffs argued that

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21 See id at 109, per Brennan, Deane and Dawson JJ; at 127, per Toohey J; and at 143, per McHugh J.

22 See the comments of the Minister, Mr Hand, Commonwealth Parliamentary Debates, House of Representatives, 16 December 1992 at 3949.

23 See above n1 at 110-1, per Brennan, Deane and Dawson JJ; at 135-139, per Gaudron J; at 144-145, per McHugh J.

24 New Zealand citizens have been given a general exemption from the requirement of holding a visa or entry permit. Similar exemptions are given to the crew of some foreign vessels. See s16 of the Act.

25 See the earlier case of *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183-184.

26 Above n1 at 100, per Mason CJ; at 113, per Brennan, Deane and Dawson JJ; at 128 per Toohey J; at 135ff, per Gaudron J; and at 143-144, per McHugh J. Note the qualifications expressed by Gaudron J at 136-138. These were not germane to the plaintiffs' case.

such a restriction was to be found in Chapter III of the Constitution which vests the judicial power of the Commonwealth in the courts.

E. The amending Act as a usurpation of the judicial power vested in the courts

For the plaintiffs' lawyers, the most enervating aspect of the amending legislation was its effect on the applications that had been pending in the Federal Court seeking the release of the detainees. It was the extent to which the legislation was targeted at this court case that lay at the heart of the argument that the legislation constituted a usurpation of the judicial power.

However, the argument could not be put in such crude terms. Whatever the moral outrage of those affected, there is nothing inherently illegal in a government changing the goal posts when it comes to the view that it may otherwise lose the game. As the High Court said in *Australian Building Construction Employees and Builders' Labourers' Federation v Commonwealth*:[27]

> It is well established that Parliament may legislate so as to affect the rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution.

In *Chu Kheng Lim*, the plaintiffs' case entailed a more sophisticated examination of the nature of the power to detain non-citizens and the extent to which this can be exercised by the executive government without the involvement of the judiciary.

Brennan, Deane and Dawson JJ began their discussion of this issue by looking at the functions which, either because of their nature or historical considerations, are regarded as being exclusively judicial in character. The most important example of such functions, the court held, is the "adjudgment and punishment of criminal guilt under a law of the Commonwealth".[28] They found that, with few exceptions,

> the citizens of this country, at least in times of peace, enjoy 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.[29]

For a number of reasons, the Court held that this immunity did not extend to non-citizens detained in anticipation of either the grant of an entry permit or of deportation. Chief among these was the finding by the Court that the detention of an alien prior to admission or expulsion did not amount to an exercise of the judicial power. The Executive was not punishing the detainees but was merely safeguarding the national interest.[30] The Court found that the Executive's power to detain an alien in these circumstances is incidental to the power to admit and expel aliens conferred on Parliament by sl51(xix) of the Constitution.[31]

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27 (1991) 172 CLR 501. The case is cited by Toohey J in *Chu Kheng Lim*, above n1 at 132.
28 Id at 114.
29 Id at 115.
30 Id at 114-115.
31 Id at 100, per Mason CJ; at 117-118, per Brennan, Deane and Dawson JJ; at 128 per Toohey J; at 135ff, per Gaudron J; and at 143-144 per McHugh J.

The only real division in the High Court in *Chu Kheng Lim's* case came in applying these principles to the new Div 4B of the Act. Even then, the point of difference had no impact on the outcome of the case. The Court was ad idem about the validity of ss54L and 54N, the two provisions requiring the detention of "designated persons". They held that the provisions did not constitute a usurpation of the judicial power by the Executive. This was because the sections did not sanction punitive action by the executive, nor did they purport to allow for the unlimited detention of "designated persons". For Brennan, Dawson and Deane JJ, the time limit of 273 days specified in s54Q may not have been sufficient evidence that the scheme was "reasonably capable of being seen as necessary for the purposes" specified. However, they were swayed by the fact that the detention of the designated persons could be brought to an end at any time by the detainees making a written request for removal under s54P. In this context, Brennan, Deane and Dawson JJ relied on the 1949 case of *Koon Wing Lau v Calwell*.[32] The Court also rejected the notion that the coincidence between the amending legislation and the applications pending in the Federal Court amounted to a usurpation of judicial power. Although they may have been the cause for the legislation, the Court pointed out that the plaintiffs were not the only people affected by the new regime.

Where the Court split was in the analysis of s54R. This was the section that purported to ban any court from ordering the release of a designated person. Brennan, Deane and Dawson JJ, with whom Gaudron J agreed, held that the provision did amount to an usurpation of the judicial power contained in Chapter III of the Constitution. The Court found this was so, because a plain reading of ss54R and 54U allowed for the conclusion that the courts were being completely excluded from reviewing the detention of a "designated person". They said:[33]

> If it were apparent that there was no possibility that a "designated person" might be unlawfully held in custody under Div 4B, it would be arguable that s54R did no more than spell out what would be the duty of a court of competent jurisdiction in any event. If that were so, s54R would be devoid of significant content. In fact, of course, it is manifest that circumstances could exist in which a "designated person" was unlawfully held in custody by a person acting in purported pursuance of Div 4B.

Although they did not rule on its validity, Brennan, Deane and Dawson JJ noted that s54U may also constitute an attempt to place beyond curial scrutiny the act of giving a non-citizen a designation. That section provides that a statement by a Departmental officer that a person has been given a designation is conclusive evidence of a designation having been given.[34]

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32 (1949) 80 CLR 533. See id at 117-118, per Brennan, Deane and Dawson JJ. This case was also referred to by other members of the Court. See id at 134, per Gaudron J; and at 144, per McHugh J. The case of *Koon Wing Lau* is discussed further below n47ff.

33 Above n1 at 120-121.

34 Although the High Court did not find it necessary to deal with this point, it should be noted that similar provisions in the past have been interpreted by the courts as doing no more than reversing the normal onus of proof. In other words, s54U would do no more than throw the onus of proving that a person did not come within s54K on that person. See, eg, *R v Governor of Metropolitan Gaol: Ex parte di Nardo* [1962] 3 FLR 271; and *Prasad v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 101 ALR 109.

Mason CJ, Toohey and McHugh JJ dissented on the question of the validity of s54R. They took the view that s54R could be read down so as to allow the courts jurisdiction to review the legality of a person's detention under ss54L or 54N.

4. *Chu Kheng Lim Reviewed*

The crucial issue in *Chu Kheng Lim's* case was whether the detention provisions in ss54L and 54N of the Act constituted a usurpation by the Executive of the judicial power set out in Chapter III of the Constitution. In essence, all the members of the High Court ruled that no abuse of power had been shown because those effected by the provisions were non-citizens, or aliens. In so doing, the High Court reiterated the traditional view that, in the context of Australia's domestic laws, aliens have fewer human rights than citizens. The question remains whether such a ruling can be sustained in a world where isolationist philosophies are fast giving way to the internationalism of the "New World Order".

The plaintiffs' alienage is a thin thread on which to uphold the validity of legislation that would not be accepted for a moment in a field other than immigration. Indeed, the High Court in *Chu Kheng Lim* was at pains to acknowledge that the subject legislation would not be valid if it applied to Australian citizens. It is for this reason that the majority judges spent so much time examining the definition of "designated person" in s54K of the Act and the extent to which it could apply to New Zealand citizens — persons who enjoy a special, quasi-citizen status in Australia.[35]

In relation to the custody of citizens, it is worth noting the courts' attitude to detention provisions in areas such as the remand of prisoners pending trial on criminal charges. In seventeenth century England, the courts used to send out jail commissioners to bring to trial anyone who was on remand for too long a time.[36] More recently, the Australian High Court has made it clear that where delay in bringing an accused to trial results in gross unfairness to the accused, the Court can intervene to ensure that justice is done.[37] Although there has been no Australian case in recent times where the High Court has gone so far as to stay the prosecution of an accused on the basis of delay in bringing a case to trial,[38] it is worth noting that prisoners on remand in Australia always have a right to bail, or release on conditions pending their trial. No such right was enjoyed by the Cambodian plaintiffs. This is in spite of the fact that lengthy delays clearly have the potential to adversely affect the processing of the refugee applications in question.

Even if no attack is made on the general premise that aliens should be treated differently from citizens, it is difficult to accept the justifications given by the High Court for sanctioning the validity of Div 4B of the Act. Brennan,

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35 See above n23.

36 See the history recounted in *Jago v District Court of New South Wales* (1989) 87 ALR 577 at 586-587, per Brennan J and at 609, per Toohey J.

37 Ibid.

38 See, however, the line of English cases cited by Toohey J, id at 609.

Deane and Dawson JJ were not convinced that the limits placed on the length of the plaintiffs' detention under ss54Q and 54P(2) of the Act were sufficient to show that the legislation was reasonable given the purpose it was designed to fulfil. Section 54Q effectively limits the total period during which a "designated person" can be kept in custody to a total period of 273 days after the making of an application for an entry permit. Where no such application is made, s54P(2) requires the removal of a "designated person" after the expiry of two months (or longer prescribed period) from date of arrival in Australia. As Brennan, Deane and Dawson JJ point out, the plaintiffs in *Chu Kheng Lim* had been in custody for years before the commencement of Div 4B of the Act.[39] The Court might have observed here that the time limit of 273 days given in Div 4B does not mean that release is required within that chronological period. Section 54Q provides for the exclusion from calculation of days where stipulated events are taking place, such as the hearing of court or tribunal actions, or time taken by a person outside the control of the Department to furnish information. Indeed the time limit itself was extended in December 1992 to allow a further 90 days' custody should a court remit a case back to the Department for reconsideration.[40]

However, the Court was satisfied with the reasonableness by the terms of s54P(1) of the Act. This enables the detainees to request repatriation to their countries of origin. The government is bound to end their detention by complying with this demand. Brennan, Deane and Dawson JJ took the view that this provision gave the detainees a degree of control over their incarceration by allowing them a means by which to obtain their own release.

In my view, the Court's reliance on this sub-section to justify the constitutional validity of the detention provisions lacks cogency. To state that "designated persons" are free to bring their captivity to an end ignores the central characteristic of most, if not all, people caught by Div 4B of the Act — namely, that they are applicants for refugee status. By definition, genuine refugees cannot go home without placing themselves in some form of jeopardy.[41] "Designated persons" need not be applicants for refugee status. However, if the High Court was prepared to acknowledge the reality of the plaintiffs' situation in the context of ss54Q and 54P(2) of the Act, then consistency would require a similar approach to the interpretation of s54P(1). Given that the plaintiffs have all applied for recognition as refugees, it is perverse to say that they are free to bring their custody to an end by requesting repatriation.

The High Court's failure to consider the significance of the plaintiffs' potential status as refugees at this point highlights the narrow vantage from which the Court scrutinised Div 4B of the Act. Viewed from an international

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39 See above n1 at 119.

40 See ss54Q(4), (5) and (6) of the Act, introduced by *Migration Amendment Act (No 4)* 1992. At the time of writing, some detainees are approaching their fourth year of captivity.

41 It is a measure of the desperate situation that the Cambodian plaintiffs are being forced to live through in Australia that some have exercised this option and returned home in spite of the fears they hold for their own safety. All have done so for reasons that made their continued stay in Australia untenable. For example, one couple returned because a relative in Cambodia was gravely ill. In another case, a male detainee at Port Hedland was charged with the criminal assault of a fellow in-mate. The charges were dropped when the man volunteered to go back to Cambodia.

legal perspective, there is another basis on which the High Court could have found the amending Act unreasonable or excessive. At international law refugee status is a question of fact, determined by a set definition spelt out in the Refugee Convention and Protocol.[42] In theory, it would be possible for a "designated person" who was, in fact, a refugee to request repatriation under s54P(1) of the Act. That provision then mandates the removal of the person back to their country of origin. It does not stipulate that the request be made freely; nor is there a concession made for persons who request repatriation and then change their mind.[43] In the case of a genuine refugee, return in these circumstances could contravene art 33 of the Refugee Convention. That article prohibits the return or *refoulement* of a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened" on specified grounds. Some commentators argue that the principle of *non refoulement* is now so well established at international law that it has become a norm of customary international law.[44] In other words, it is a principle so universally accepted that it has a normative effect on the legal obligations of nations even if they are not parties to the Refugee Convention and Protocol.

In view of the High Court's comments in *Mabo v Queensland* (hereafter *Mabo*),[45] it is surprising that the Court did not deem it appropriate to consider the international legal ramifications of s54P(1). In *Mabo*, decided only six months before *Chu Kheng Lim*, the Court recognised for the first time a form of native title to territory in Australia vested in certain categories of our aboriginal people. Brennan J (speaking for the majority) showed a keen awareness of current international legal thinking on matters pertaining to the recognition of the land rights of indigenous groups. He found that international custom could be used to justify a departure from principles accepted previously as part of the common law. Brennan J's comments provide an interesting context within which to compare the High Court's treatment of Div 4B of the Act. In *Mabo* he said:[46]

> The opening up of international remedies to the individuals pursuant to Australia's accession to the Optional Protocol of the International Covenant of Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary to both international standards and to the fundamental

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42 See art 1A of the Refugee Convention and art 1 of the Protocol.

43 The impact of this inflexibility became apparent in the case of a female hunger striker detained under Div 4B who manifested an intention to sign a ss54P(1) request. As the woman had made several attempts to commit suicide and was exhibiting psychotic symptoms, her treating doctor certified her as insane so as to prevent action on any request for removal.

44 See, eg, Hathaway J, *The Law of Refugee Status* (1992), 26; Goodwin-Gill, G, "Non-Refoulement and the New Asylum Seekers" (1986) 26 *Virg J Int'l L* 897; and Sexton, R, "Political Refugees, *Nonrefoulement* and State Practice" (1985) 18 *Vand J Transntl L* 791.

45 (1992) 107 ALR 1.

46 Id at 29.

> values of our common law to entrench a discriminatory rule which, ... denies them a right to occupy their traditional lands.

In *Chu Kheng Lim* the High Court was concerned with a statute passed by Parliament rather than with the common law. Even so, one might have expected the Court to take some account of the international legal implications of the legislation in question when assessing its validity and proper construction.

In fact, the High Court in *Chu Kheng Lim* made no attempt to distinguish any of the old authorities pertinent to the case on the basis of changes that have occurred in international legal thinking. The most striking example of the Court's uncritical reliance on such caselaw was its use of the 1949 decision of *Koon Wing Lau v Calwell* (hereafter *Koon Wing Law*)[47] to uphold the detention provisions in ss54L and 54N of the Act. That case arose out of a challenge to the constitutionality of the *Wartime Refugees Removal Act* 1949 (Cth). The essential purpose of that legislation was to preserve the White Australia policy. Its function was to ensure that Asians and other coloured people stranded in Australia during the Second World War could be sent on their way after the cessation of hostilities. This was done irrespective of the conditions facing the returnees in their countries of origin. The High Court was asked in that case to rule, inter alia, on the validity of detention provisions designed to facilitate the removal of the refugees in question. It held that as long as the detention provisions were necessary for the removal of deportees or for the assessment of applications for an entry permit, they could be justified as incidental to the Executive's power to exclude, admit and deport aliens.[48] If the legislation in question in *Koon Wing Lau* does not represent a high point in Australia's moral history, neither do the judgments of the majority in the High Court in that case. Webb J spoke in the following terms about the persons at whom the Act was targeted:[49]

> Their presence here is wholly the result of war, and is as visible and as tangible as the unrepaired damage done by enemy bombing to an Australian city, and may as validly be dealt with under the defence power.

In 1949, such attitudes may have been acceptable to Australian society and to an international community that had not yet finalised the drafting of the Refugee Convention. There can be little doubt that they are as alien to the thinking of today's High Court justices as they are to the world community at large. If enacted today, there can be little doubt that the legislation at issue in *Koon Wing Lau* would be in direct conflict with Australia's obligations under the Refugee Convention and Protocol. For this reason, the High Court's unquestioning reliance on the case as an authority is at best disappointing. In view of Brennan J's comments in *Mabo* quoted earlier, it would be somewhat ironic if the plaintiffs' failure to obtain a remedy from the High Court were to lead them to make a complaint about their detention to the Human Rights Committee in Geneva.[50]

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47 (1949) 80 CLR 533.

48 See the discussion above n1 at 117-118.

49 Above n47 at 594-595.

50 This is the procedure established under the First Optional Protocol of the International Covenant of Civil and Political Rights. On this point see Chinkin, C and Thomson, P, "Using the Optional Protocol: the Practical Issues" in Centre for Comparative Constitutional

Perhaps the most sorry aspect of *Chu Kheng Lim*, however, is the reasons of the Chief Justice, with whom Toohey and McHugh JJ agreed,[51] for upholding s54R of the Act. This provision purported to forbid any court from ordering the release of a "designated person". The Chief Justice held that the section did not amount to an abuse of the judicial power. Rather, he sustained its validity by reading down its terms. In his view, the provision did no more than enjoin the courts from ordering the release of a "designated person" who was being held in lawful detention. It did not prevent the courts from requiring the release of persons held unlawfully.[52]

Mason CJ appears to base his reasons on Parliament's failure, or possible failure, to appreciate what it was doing. He argued that Parliament and its legislative drafters appear to have regarded Div 4B of the Act as a self-executing series of provisions. "Designated persons" were to be held in custody until the 273-day time limit had expired; until they had been granted entry permits; or until they had requested repatriation to their countries of origin. For Mason CJ, if the division had been self executing, it would have been "a mischievious interpretation to read s54R literally" and thus thwart the intention of the legislature which was merely to limit curial scrutiny of these self-executing provisions. However, as Mason CJ pointed out, when Div 4B is read with care, it is clear that the powers to detain and release cannot be so confined. For example, where a designated person has requested repatriation under s54P and the government has failed to accede to this demand, detention would be unlawful. The drafters failed to see that such scenarios could occur and so failed to make express the power of the courts to examine cases where custody had ceased to be lawful. Again, he said, this was no reason for giving s54R a literal interpretation. He held that because Parliament provided for circumstances in which custody had to be terminated under ss54Q and 54P, s54R had to be qualified in the manner he had indicated.[53] Mason CJ continued:[54]

> Even if that were not so, it would be quite extraordinary to ascribe to Parliament an intention to require a court not to release a person held in unlawful custody. Unless a clear and unambiguous intention to do so appears from a statute, it should not be construed so as to infringe the liberty of the subject. Furthermore, such a clear and unambiguous intention is not sufficiently manifested by the use of general words.

The assertions made by the Chief Justice in this passage are difficult to comprehend. The words of s54R cannot be described as general, except in the sense that they are unconfined. The provision was enacted as a plank of Div 4B and must be perceived as such. The purpose of that package is clear. There can be little doubt that the government intended to take on the Federal Court over the issue of keeping the Cambodians in detention. It sought to do so by making it clear that "designated persons" were to be kept in custody as Parliament — and not the courts — directed. The words used in s54R are hardly

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Studies *Internationalizing Human Rights: Australia's Accession to the First Optional Protocol* (1992) at 6ff.

51 See above n1 at 132-133, per Toohey J; and at 146, per McHugh J.

52 Id at 100-103.

53 Id at 101.

54 Id at 101-102.

ambiguous. The provision states that "A Court is not to order the release from custody of a designated person".

In fact, it is only possible for Mason CJ to clothe s54R with a mythical ambiguity, by ascribing to Parliament and its drafters a failure to appreciate that Div 4B is not self-executing in nature. To use the Chief Justice's own words, it is, indeed, "quite extraordinary" to uphold a clear and unambiguous provision which sought to deprive persons of curial scrutiny of the lawfulness of their custody by asserting that Parliament could not have intended to do what it did. Mason CJ did not seek to ground his exculpatory assertion on any of the extraneous interpretative material available to him, such as explanatory memoranda or statements made by the Minister to Parliament. Had he done so, Mason CJ might have found more to support the robust view of s54R taken by the majority[55] than his own interpretation of the provision.

A cursory perusal of the Parliamentary debates indicate a clear intention to prevent the courts from questioning the power of the Executive to incarcerate "designated persons". In his second reading speech Minister Hand said:[56]

> The most important aspect of this legislation is that it provides that a court cannot interfere with a period of custody. I repeat: the most important aspect of this legislation is that it provides that a court cannot interfere with a period of custody. No law other than the Constitution will have any impact on it.

The following exchange between the present Minister and one-time Liberal Minister, Mr Mackellar, is also instructive of both the motives and the prevailing mood of those who supported the May amendments:[57]

> Mackellar: Another thing that the honourable member for Kalgoolie (Mr Campbell) said was that lawyers should be kept out of the immigration process — and I say "Hear, hear" to that.
>
> Hand: We all do.
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> Mackellar: Lawyers and the courts have assumed an ever increasing role and to that extent in many ways have taken control of the programme away from the Minister and the government of the day. We do need to make sure that the legal system does not preclude the government of the day and the Minister of the day from exercising their responsibility properly. I think that has occurred to a great extent, and I am very pleased to see that the amendments coming before the House today go at least some way towards resolving that problem.

In some ways, the attempt in s54R to oust curial scrutiny of the detention of "designated persons" goes to the very heart of the amending Act's purpose or raison d'être. As the majority judges in *Chu Kheng Lim* acknowledged, the language used in s54R could not have been more explicit. It is to be regretted that the minority judges did not take a firmer line on such an attempt to undermine the authority of the judiciary.

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55 Brennan, Deane, Dawson and Gaudron JJ rejected this interpretation of s54R on the grounds that the intent of the provision was clear and that any reading down of the section would deprive it of its effective content. Above n1 at 121-122.

56 See the comments made in Commonwealth Parliamentary Debates, House of Representatives, 5 May 1992, at 2372.

57 See id at 2384.

5. *Defining the Relationship Between the Courts and the Government in Migration Decision-making*

As legislation passed since May 1992 has demonstrated, both the Government and its opposition appear to have firmed in their belief that the final say in migration cases should rest with the bureaucracy, and not with the courts. The *Migration Reform Act* 1992 extends the rights of migrant applicants — including refugees — to tribunal review of their cases on the merits. The relevant tribunals have been given broad-ranging powers in matters governing the conduct of hearings but are controlled tightly by the regulatory scheme which sets their terms of reference. More significant are a series of provisions introduced to limit the involvement of the Federal Court in the review of migration decisions. For the first time, these decisions are to be excluded from the mainstream of federal curial review normally governed by the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and by s39B of the *Judiciary Act* 1903 (Cth). From November 1993,[58] the Act will establish its own criteria for the judicial review of migration decisions. It will codify procedures so as to direct the courts on matters of natural justice.[59] Just as significantly, the Act will remove the more open-ended grounds for review of decisions such as unreasonableness and irrelevancy.[60]

The *Migration Reform Act* 1992 is an obvious and very open attempt by the Parliament to limit the power of the courts. As the comments of both the Minister and the shadow Minister in the course of the legislation's second reading debate illustrate, the "reforms" owed much to the government's experience in the refugee area. Minister Hand's virtual obsession with the Cambodian case was evidenced by his repeated references to the asylum seekers in Parliament and by his frequent attacks on the Cambodians' lawyers.[61] In December 1992 the then shadow Minister, Mr Ruddock, made no secret of the nexus between the reform legislation and developments in the refugee field. He said:[62]

> When we look at the creative way in which the High Court of Australia got into the business of determining refugee claims, when it was always intended that these should be administrative matters dealt with by the government of the day, we can appreciate that the government by allowing the ADJR Act to continue to apply in this area was creating a rod for its own

58 The relevant provisions come into force on 1 November 1993. See *Migration Reform Act* 1992, ss1(3).

59 See Div 2, sub-divs E-H; and s166LG.

60 See Part 4B of the Act as amended.

61 See, eg, Commonwealth Parliamentary Debates, House of Representatives, 5 May 1992, at 2372, 2378, 2384; id 4 November 1992, at 2620-23 (where the Minister accused the lawyers of encouraging their clients to go on hunger strikes); and id 16 December 1992, at 3953-94. For an equally vitriolic attack on supporters of the asylum seekers, however, see the comments of Senator McKiernan, Senate, 7 December 1992, at 4299-4301.

62 See Commonwealth Parliamentary Debates, House of Representatives, 16 December 1992, 3935. Mr Ruddock's reference to judicial creativity in the High Court is primarily a complaint about the High Court's decision in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379. On this point, see further, Joint standing Committee on Migration Regulations *Australia's Refugee and Humanitarian System: Achieving a Balance Between Refuge and Control* (1992) at 59ff.

> back. It has always seemed to me and I have argued this strongly, that the role of the courts collectively in this area has brought about a significant problem for the government of the day.

The fact that a softly-softly approach by the High Court is not going to improve the situation is borne out by Parliament's response to the ruling in *Chu Kheng Lim* concerning the illegality of the plaintiff's original detention. When the plaintiffs issued writs seeking damages for the tort of false imprisonment, special legislation was passed setting the rate of damages payable for the wrongful detention at one dollar a day. The legislation also extended the effective period during which the detainees could be kept in custody.[63] Parliamentarians from both major parties took the opportunity offered by the amending Act to make further gratuitous attacks on the High Court and the judiciary in general.[64]

Away from the heat generated by the government's struggle for control, it is well to note that the chief beneficiary of the legislative reforms is the bureaucracy. It is the Department's decisions that become less susceptible to judicial scrutiny. The politicians and the bureaucrats counter with the assertion that, for their part, the courts have strayed too far into the (forbidden) realms of policy and merits review. Whether or not this has been the case, one might question the wisdom of singling out one jurisdiction from the broad field of public administration. If the role of the courts is to act as a check on the misuse of administrative power, such a situation must diminish in stature Australia's system of administrative law. In some respects, the migration reforms give more than a hint of nostalgia for the days of what one bureaucrat has called the age of "judicial innocence".[65] Then, migration decisions were considered to be part of the prerogative power of government, and an inappropriate subject for judicial review. In an era where administrative law has invaded every aspect of bureaucratic life, the effect of these most recent migration reforms can only be to foster the view that immigration is a law unto itself.

6. *Conclusion*

The conservatism of the High Court in *Chu Kheng Lim* may be open to criticism, but it is not entirely surprising. The case was one that involved two very problematic areas for the court. First, it raised questions about the division of power between Parliament and the courts. In the final analysis, all members of the present High Court seem to hold firm views about the ultimate supremacy of Parliament as law-maker in Australia. This is so, however unpalatable the legislation under review may be to the courts. The second area of difficulty

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63 See *Migration Amendment Act (No 4)* 1992 (Cth), Act No 235 of 1992, assented to on 24 December 1992. This legislation is currently under challenge in the High Court. See also above, n39.

64 For example, the assertion was made that the High Court had based its ruling on the validity of the Cambodians' original detention on the "technical" issue of whether or not the boats on which the asylum seekers arrived were still in existence. See the comments of Minister Hand, Commonwealth Parliamentary Debates, House of Representatives, 16 December 1992 at 3949ff; and of Senator Teague, Senate, 16 December 1992, at 5441.

65 See Arthur, E, "The Impact of the Administrative Law on Humanitarian Decision-Making"(1991) 66 *Canberra Bull Public Admin* 90.

was the subject-matter of the case itself. While world opinions may have changed in areas such as the *refoulement* of refugees, the admission and general treatment of asylum seekers remains a very grey area. Public opinion in Australia still shows a sense of ambivalence towards these people, as the nation continues to feel its geographic and cultural isolation in the Asian region. In many ways the High Court's ruling in *Chu Kheng Lim* reflects this uncertainty. The majority delivered a reprimand to the government, but only in qualified terms. No-one on the bench was prepared to take the quantum leap required to force the government to release the detainees.

In fairness to the High Court, its failure to intervene in this fashion does not make it exceptional amongst the world's judiciaries. In the Western world, most courts have taken a conservative approach to reviewing the executive in matters pertaining to immigration.[66] What is extraordinary in the context of the major Western democracies is the terms of the legislation at issue in *Chu Kheng Lim* and the government's absolute determination to keep the asylum seekers in detention, whatever the cost.

There can be little dispute that the ongoing detention of the Cambodian asylum seekers is a scandal of international proportions. The human cost to those kept in detention has been enormous. Hungerstrikers have been threatened with force-feeding, and the consequences of being certified insane.[67] The strain of incarceration has led to assaults and vendettas within the group. The Australian tax-payer has been asked to foot a bill of somewhere in the vicinity of thirty million dollars for the incarceration of less than 500 people.[68] Some of this money has been spent on establishing and running a special detention facility in one of the most remote and inhospitable corners of Australia. Some has gone on funding legal advisers in mitigation of decisions which ensured that the asylum seekers are housed geographically far away from the lawyers acting on their behalf. From within the Department, dissidents have emerged

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66 For a comparative analysis of the English and American jurisprudence, see Legomsky, S, *Immigration and the Judiciary: Law and Politics in Britain and America* (1987). On United Kingdom laws, see also Newdick, C, "Immigrants and the decline of Habeas Corpus" (1982) *Public Law* 89; and Vincenzi, C, "Aliens and the Judicial Review of Immigration Law" (1984) *Public Law* 93. On United States laws, see also Hull, E, *Without Justice for All: The Constitutional Rights of Aliens* (1985); and Henkin, L, *Constitutionalism, Democracy and Foreign Affairs* (1990) and Helton, A C, "The Legality of Detaining Refugees in the United States" (1986) 14 *NYU Rev L & Soc Change* 353. On the Canadian laws see Matas, D and Simon, I, *Closing the Doors: The Failure of Refugee Protection* (1989).

67 See *Migration Regulations* 1989, rr 182C and 182D, passed to enable the force-feeding of hunger strikers. This legislation solicited a strong objection from the Australian Medical Association, which argued that it was contrary to international conventions governing the conduct of medical practitioners in the case of hunger strikers. The government also declared the hospital to which the hunger strikers were transferred a detention centre, much to the chagrin of the hospital authorities. When one of the hunger strikers developed psychotic symptoms, her treating doctor had her scheduled as an involuntary patient. She was sedated and transferred at the direction of the Department from the hospital to a psychiatric facility.

68 See the comments of Senator Chamarette, Senate, 17 December at 5442-44; and of Senator McKiernan, on 7 December at 4301. Compare the comments of Mr Ruddock who justified the May legislation on the ground that the cost to the taxpayer of locating illegal migrants who have absconded is approximately $9,000 per person. See House of Representatives, 5 May 1992, at 2375.

suggesting a deliberate policy to wear down the resolve of the asylum seekers by denying them access to any but the most basic educational and recreational facilities.[69] Allegations are made also that the asylum seekers' treatment is being influenced by Australia's involvement in the United Nations Peace Plan for Cambodia. It is claimed that it would be antithetical to grant refugee status to these people at a time when Australia is assisting in the repatriation into Cambodia of thousands of refugees from Thailand and other countries in the region. This view finds support in the government's consistent refusal to accept that the Cambodians' fears of persecution are well-founded when objective evidence from that area of the world suggests that the situation in Cambodia is far from stable.

By September 1993, many of the applicants in *Chu Kheng Lim's* case were still being held under Div 4B of the Act. The 273 day period stipulated in s54Q had yet to expire because of the exclusion from calculation of days during which the applicants' cases are before the courts and therefore outside the control of the Department. With the resolution of the applications months away, the Cambodians' legal advisers are hard pressed to explain, much less justify, the laws mandating the detainees' continuing incarceration. The government's detention policy has become a hotly debated issue, with a series of seminars around Australia in June during Refugee Week.[70] In August 1993, the Joint Standing Committee on Migration began an inquiry into Australia's detention practices. In the same month, Neaves J took the step of ordering the release of a group of Chinese asylum seekers who had been held in detention for more than 273 days without even primary decisions being made in their cases.[71] For the Cambodians at Villawood Detention Centre in Sydney, this decision was acutely ironic, as they had been in detention for over two years before the arrival of the Chinese boat people in question.

On the substantive issue of the refugee status of the Cambodian detainees, one Federal Court judge has taken a conservative approach to the claims made on judicial review.[72] On the whole, however, the indications seem to be that the tide of opinion favouring the detention of border asylum seekers is beginning to turn.

The Keating government's attitude to on-shore asylum seekers is, at best, mystifying. The few hundred people who have arrived on Australian shores since 1989 pale into insignificance when compared with the numbers received each year by other countries, both in our own region and in other parts of the Western World. By the same token, there are few countries in the developed world which have gone to Australia's lengths so as to keep asylum seekers in detention pending determination of their status.[73] To countries which operate

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69 See the comments of Mr Michael Phillips on SBS television's Dateline, 18 November 1992.

70 The collected papers from these seminars are to be published in a monograph. See Crock, M (ed), *Crime, Punishment and Deterrence: The Detention of Asylum Seekers in Australia* (forthcoming).

71 See *Tang Jia Xin v Senator Nick Bolkus*, Unreported, Neaves J, 13 August 1993.

72 See the decision in *Lek Kim Sroun v Minister for Immigration, Local Government and Ethnic Affairs*, Unreported, Wilcox J, 22 June 1993.

73 See Piper, M, "Detention and Other Restrictions on the Movement of Asylum Seekers: The International Perspective" in Crock, M (ed), above n70.

within the schema of a constitutional Bill of Rights, legislation like Div 4B of the Act must seem an anathema.

In some respects, the High Court's ruling in *Chu Kheng Lim* is reminiscent of the decision made by the same Court in *Salemi v Mackellar [No 2]*.[74] There, the Court held by a narrow majority that an illegal migrant denied the benefit of an amnesty called by the Minister, had no right to be accorded a hearing before being deported. *Salemi*'s case was decided in 1977, some four or so years after the Whitlam government brought an end to the White Australia Policy. Within less than a decade, it became clear that the views expressed by the majority in *Salemi* were no longer tenable. The case has never been overruled overtly by the High Court, but it was distinguished comprehensively as "old law" in *Kioa v West* in 1985.[75]

It will be interesting to see whether the High Court's reasoning on the issue of the administrative detention of asylum seekers undergoes a similar change in years to come. Sooner or later, Australia's treatment of aliens like the Cambodian refugee claimants will have to be examined within the framework of human rights law. Unless the courts take a stand, there is a real danger that these people will continue to be pawns in a political game.

Until this occurs, the Cambodians are condemned to live with their hope or their despair, forever climbing their Jacob's ladder. As one of the asylum seekers held in Sydney remarked to the author: "Australia is not heaven for us. But we had to get out of Cambodia and I cannot take my children back there."

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74 (1977) 137 CLR 396.

75 See *Kioa v West* (1985) 159 CLR 321.