

THE DILEMMA OF RIGHTS DISCOURSES FOR REFUGEES

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I. INTRODUCTION

Refugees have a right to remain in Australia. For those of us concerned about the plight of refugees worldwide and the conditions of refugee life after arriving in Australia, this is a cornerstone of our argument. In the current political climate, it is tempting to rearticulate the statement as *genuine* refugees who *are already here* have a right to remain.¹ This is a more precise formulation and acknowledges the fears and assertions of others who enter the public debate about refugees. But it is still a claim grounded in an assertion of right. Assertions of right are the strongest tools of the law.² Rights command respect; will be protected by the courts; and are more than mere privileges. As well as being the basic currency of the law, rights are also the banner under which struggles against oppression and exclusion have been fought (and sometimes won) over the past century. This has been an increasingly apparent phenomenon since the post-Second World War expansion of human rights. The intensity of intellectual debate over the value or utility of rights discourse³ and the banal

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1 This 'right' can be asserted against any country which is a signatory to the 1951 Convention Relating to the Status of Refugees 189 UNTS 150, as amended by the 1967 Protocol Relating to the Status of Refugees 606 UNTS 267, by virtue of Article 33(1). The key aspects of these conventions are incorporated into the *Migration Act* 1958 (Cth) by the combined effect of s 36 (which refers to the Refugees Convention and reproduces some of its requirements) and s 65 which provides that a visa be granted when the Minister is satisfied that the s 36 provisions are met.

2 Carol Smart argues that rights discourse and law are synonymous, that law is "the discourse of rights". See C Smart, *Feminism and the Power of Law*, Routledge (1989) p 8.

3 There is an enormous volume of writing in the rights debate. Examples include, P Williams, *The Alchemy of Race and Rights*, Harvard University Press (1991); A Hunt, *Explorations in Law and Society, Towards a Constitutive Theory of Law*, Routledge (1993); A Bartholomew and A Hunt, "What's Wrong with Rights?" (1990) 9 *Law and Inequality* 1; J Bakan, *Just Words: Constitutional Rights and Social Wrongs*, University of Toronto Press (1997); A Hutchinson, *Waiting for Coraf: A Critique of Law and Rights*, University of Toronto Press (1995).

proliferation of rights talk⁴ are both markers of the hegemonic position of rights claims in the law and in the public discourse of most Western societies. Despite this, in the area of refugee law the claim that refugees have a right to remain in Australia fails to operate as a forceful claim and has not permeated public or political discourse in any significant way.⁵

This article examines why refugee claims do not operate effectively as rights claims and argues that the explanation is the hierarchical nature of rights discourses. Not all rights are equal. Some rights are stronger than others and a rights claim made by a refugee is not equivalent to that of a sovereign nation to control its borders. The strength of differing rights claims depends upon their proximity to the core values of the legal system which enforces them. The sovereignty of the nation is the fact which grounds the legal system and creates the arena where rights claims are meaningful. Through national court systems rights are adjudicated and enforced, and ultimately supported by the coercive power of the state. Even internationally recognised fundamental human rights remain dependent on national legal systems. Accordingly, the rights of the nation operate as 'trump' rights. Rights which are a direct expression of sovereign power prevail over other rights. While a right is a claim to power, it is situated within pre-existing power arrangements. Both substantial and procedural rights are hierarchically arranged,⁶ and the rights of refugees are meagre in both schemes. The claims of refugees are so ineffective as rights claims that it may be appropriate not to consider them as such at all.⁷ Furthermore, making rights-based claims on behalf of refugees is often an ineffective strategy given the failure of refugee rights discourses in political and public arenas. More persuasive arguments are often made by appealing to humanitarianism, precisely because it is not rights-based. Although humanitarianism is opposed to rights discourse and opposed to equality, evidence suggests that it may be the best tool for arguments to improve conditions for refugees both worldwide and in Australia.

4 Examples include the public debate in Australia following the Federal Court's decision denying IVF treatment to women on the basis of that their marital status was discriminatory (*McBain v State of Victoria* [2000] FCA 1009 (28 July 2000)) which raised the question of whether children have a "right to a father". For another stark example, see I Grant, "The Right to Peanut Butter" *Globe and Mail*, 26 November 1997.

5 Even the present Minister for Immigration and Multicultural Affairs, who has not been noted for his support of refugee claimants in Australia, asserts the right of refugees to remain as a defence against criticism that he is not doing more to prevent the arrival of refugees. See, for example, M Videnieks and M Saunders, "Ruddock Rejects Court Call on Illegals" *The Australian*, 4 November 1999, p 3.

6 This dichotomy, like others, can and should be criticised for imprecision. In general, procedural rights are those which give access to legal fora and provisions, and substantive rights are those which provide for outcomes.

7 JC Hathaway argues that "[i]nternational refugee law rarely determines how governments respond to involuntary migration. States pay lip service to the importance of honouring the right to seek asylum, but in practice devote significant resources to keep refugees away from their borders. Although the advocacy community invokes formal protection principles, it knows that governments are unlikely to live up to these supposedly minimum standards." Introduction in JC Hathaway (ed), *Reconceiving Refugee Law*, M Nijhoff (1997) xvii.

This paper spells out this argument in four steps. First, I examine the 1951 Convention Relating to the Status of Refugees (“Refugees Convention”) and consider its position among international human rights instruments. Next, I look at the fragmented nature of rights discourses and demonstrate how discourses of fundamental human rights, procedural rights, substantive rights and sovereign rights overlap in the domain of refugee law. In the following section, I illustrate the overlap of rights discourses and the consequences of such an overlap by considering the refugee jurisprudence of the High Court of Australia. In the final section, I explain why humanitarianism is a superior, if impoverished, strategic choice for refugees and their advocates.

II. THE REFUGEES CONVENTION AS A RIGHTS DOCUMENT

The 1951 Convention Relating to the Status of Refugees⁸ contains provisions which are similar to those found in many international human rights documents. It binds state parties to treat refugees within their borders in a manner no worse than other foreign nationals; to principles of non-discrimination, freedom of religion, and to provide housing, public education and rationing. However, these provisions are almost never the controversial ones. The difficult issues in refugee law are first, the refugee definition in Article 1A(2)⁹ and second, the Article 33 protection against refoulement.¹⁰ The latter provision is the basis of the putative right to remain in a signatory nation. However, it is expressed as an obligation on the nation not to return refugees to places where they will be at risk. It is not stated as a right belonging to an individual and it only functions as a right to remain because of the pervasive right of nations to exclude outsiders. That is, protection against non-refoulement functions as a right to remain because in most cases individuals have nowhere else they may legally go except their country of origin and in that country they face persecution. Significantly, there is no provision at international law of a right to enter a country which is not one’s own.

Even in this measured and restrained form, a right to remain is not available to all refugees because some do have other places where they can legally go. The Refugees Convention sets out limiting provisions within Article 1 which are aimed at ensuring that refugee status is not necessarily permanent; that protection obligations do not extend to all countries at once, and that categories

8 Note 1 *supra*. Commonly known as the Refugees Convention.

9 Article 1A(2) defines a refugee as any person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such a fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.

10 Article 33(1) states: “No contracting state shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.”

of 'undesirables' are to be excluded from the refugee definition.¹¹ These provisions are bolstered by Article 33(2) which limits the non-refoulement principle when someone defined as a refugee has been convicted of a serious crime or poses a danger to the receiving nation.¹² Others will be excluded from protection against non-refoulement because of dual citizenship.¹³

This tentatively couched right to remain is scarcely treated as a right in the current context of Australian law. The Australian Government sets quotas for the number of refugees to be accepted each year. The quota is divided into a number of places for on-shore refugees, people determined to be refugees who are already in Australia, and another, much larger, number for off-shore refugees or those who are overseas seeking resettlement as refugees.¹⁴ The logic of a quota is antithetical to a rights claim. It suggests that 2 000 'rights' can be exercised per year and beyond that rights are exhausted. The present Government does not utilise the quota directly in this way. Instead, it reduces the number of off-shore refugees who can come to Australia if the on-shore refugee determination process exceeds its annual allocation. This means that the effect of the quota on the exercise of the right to remain is indirect. There are two further consequences of the quota system for the right to remain. One is that the capacity of the Government to process refugee claims is calibrated to manage approximately 2 000 claims per year.¹⁵ If significantly more asylum seekers attempt to exercise the right to remain that putatively accompanies refugee status, they will face considerable delays, along with the other pitfalls of a bureaucracy being asked to do more than it is able to do well. The second consequence is that the present Minister of Immigration believes that those awaiting resettlement overseas have a moral superiority over claimants in Australia.¹⁶ Despite the fact that the tying of the two quotas is a matter which is fully under the control of the Government, the Minister uses this link to

11 Note 1 *supra*, Refugees Convention, Article 1C-F.

12 The combined effect in Australia of these limiting provisions is discussed in a series of Australian Federal Court cases culminating in *Minister for Immigration and Multicultural Affairs v Gnanapiragasam* (1998) 88 FCR 1.

13 This was the case in the well known Canadian decision *Canada (Attorney-General) v Ward* (1993) 103 DLR (4th) 1 (SCC). This case has contributed to the worldwide development of refugee jurisprudence but Ward himself was found not to be a refugee.

14 Over the past three years, Australia's humanitarian program has had 10 000 places for those arriving directly from overseas (of whom 4 000 will fall within the refugee definition) and 2 000 places for those found to be refugees already in Australia. The target numbers for 2000-1 are the same. See the Departmental Website: <<http://www.immi.gov.au/facts/40human.htm>>.

15 This takes place at first instance through the Department of Immigration and Multicultural Affairs ("DIMA") and at the review stage before the Refugee Review Tribunal. Approximately 12 per cent of claims are accepted by DIMA: 1998-99 Annual Report at <http://www.immi.gov.au/annual_report/annrpt99/html>. The RRT alters the Department's determination in approximately 10 per cent of cases, although a comparison of RRT Annual Reports (<<http://www.rrt.gov.au/finalnry.html>>) shows that this number has been declining over the last five years. A low acceptance rate at both levels means that significantly more than 2 000 claims are examined each year.

16 Hon Philip Ruddock frequently states that domestic claimants take away the places of those who are in greater need. For example, see P Ruddock, speech to Sydney Conference on Immigrant Justice, 6 June 1997.

denigrate on-shore asylum seekers. His statements contribute to public and political discourse about refugees. The regulatory link between the two quotas could easily be removed if the Government did not want it to function as an effective counter to the right to remain.

There is a long established critique asserting that the Refugees Convention is more effective at keeping people out of prosperous nations than at letting them in.¹⁷ James Hathaway's comment that, "the notion of refugee law as a rights based regime is largely illusory"¹⁸ sums up this criticism. In addition to the narrow formulation of the refugee definition itself, the absence of a right to enter is vital. While states would breach the Convention by expelling refugees to places where they would be in danger, they are acting well within their 'rights' when they force boats carrying potential refugees away from their shores,¹⁹ impose significant penalties on transport companies for bringing in refugees,²⁰ return refugees to countries other than the ones they have fled in the first instance,²¹ and develop videos which depict the horrors of life in Australia, for mass distribution in refugee producing nations as part of the campaign to discourage potential asylum seekers.²² For nations which are distant from refugee-producing areas, mechanisms to deter refugee arrivals are limited only by their collective imagination and national scruples. A right to remain becomes less meaningful the fewer people there are to claim it. Rather than acting as a robust constraint on national sovereignty, refugee law is transformed into a site for these various assertions of sovereignty.

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- 17 Some examples include P Tuitt, *False Images: Law's Construction of the Refugee*, Pluto Press (1996); JC Hathaway (ed) note 7 *supra*; G Goodwin-Gill, "Refugees: The Functions and Limits of the Existing Protection System" in A Nash (ed) *Human Rights and the Protection of Refugees Under International Law*, Canadian Human Rights Foundation (1988) 149. JC Hathaway and RA Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection" (1997) 10 *Harvard Human Rights Journal* 115; C Sinclair, *Who Would Want to be a Refugee?*, PhD thesis, University of New England, 1995; P Hyndman, "Refugees Under International Law with a Reference to the Concept of Asylum" (1986) *ALJ* 148; G Melandes, "The Protection of Refugees" (1974) 18 *Scandinavian Studies in Law* 153.
- 18 JC Hathaway, "Reconceiving Refugee Law as Human Rights Protection" (1991) 4 *Journal of Refugee Studies* 113. Hathaway argues that positive reforms in refugee law could be achieved by reformulating the law around the concept of a fundamental right to return to one's own state. This proposition fits well with my argument here as it amounts to reorienting to a right which is more likely to be respected in international and domestic spheres. It is a right with a higher position on the hierarchy of rights.
- 19 As Australia has done, F Carruthers, "Refugees Sail for New Zealand Shores" *The Australian*, 17 November 1997.
- 20 These penalties are known as carrier sanctions. Current penalties under the *Migration Act* 1958 (Cth) include fines of up to \$10 000 (s 229) and imprisonment of up to two years if involved in intentional people smuggling (*Border Protection Act* 1999 (Cth)). Transport companies may also be required to remove those people they bring in to Australia.
- 21 This policy is often known as return to a 'safe third country'; see *Gnanapiragasam* note 12 *supra*. Australia also engages in seeking the co-operation of 'third countries' to attempt to limit refugee flows. This avenue has recently been pursued with Indonesia, a country which has served as a mid-point stopover for many fleeing the Middle East who eventually arrive in Australia in boats: M Saunders, "PM Seeks Wahid's Sympathy on Illegals" *The Australian*, 26 November 1999, p 6.
- 22 Australia has used videos depicting the perils of Australian snakes and spiders and details of Australia's mandatory detention regime in the Middle East: K Taylor, "Ruddock fears flood of illegal Games arrivals" *Sydney Morning Herald*, 13 July 2000.

III. FRAGMENTED AND HIERARCHICAL RIGHTS DISCOURSES

In discussing the minimal rights potential of the Refugees Convention, the two ends of the spectrum of rights engaged in refugee law have already been introduced. At the weak end, is the right an individual may claim not to be returned to a hostile state, at the other is the absolute right of the nation to close its borders. The hierarchical relationship between rights is the core of the dilemma of rights discourses for refugees. In addition to some rights being stronger and more likely to command both respect and enforcement than others, differing strains of rights discourses intersect in the domain of refugee law. While all of these discourses treat 'rights' as central, the values sustaining the term reveal that rights discourse is not monolithic but, rather, fragmented.

A straightforward functional definition of a right is any claim recognised by the law which some legal body will, in some circumstances, determine and enforce. This definition separates what I am discussing as 'rights' from the use of the term 'right' in popular discourse, and also from its use in aspirational and moral discourse. Thus, this definition of 'rights' excludes claims such as the 'right to live in a clean and healthy environment' or the 'right to a decent standard of living', claims which have moral and political resonance in many societies including Australia.²³ The point of narrowing the definition of a right in this way is to focus the discussion on what the courts can and will do, and to draw a close connection between a right and a national legal system. At a rhetorical level, a rights claim may be free-floating. To be enforceable in law it must ultimately be harnessed to some legal system. The moral and persuasive power of international law legitimates it as law in its own right,²⁴ but the domestic legal system remains the proving ground for rights claims. The ability of a nation to reject rights determinations made in the international arena, even if this only happens occasionally,²⁵ is evidence of the hegemony of national legal systems in this regard.

Within this functional definition of rights discourses, fundamental human rights, procedural rights, substantive rights and sovereign rights all have a place. Each of these discourses is grounded in different values and consequently their hierarchical relationship varies according to the setting in which they are being

23 Indeed, a number of claims which I would exclude from the definition of rights are contained in international law statements of rights such as the 1966 Covenant on Economic, Social and Cultural Rights 973 UNTS 3 and the Declaration on the Right to Development 1986, GAOR 41st Sess, Supp 53 at 186.

24 Along with the willingness of nations to act in the international realm on the basis of international law. But even in this realm, it is the *nation* which functions as actor to make the law extant.

25 An example in the migration law area is the Australian government's response to the United Nations Human Rights Committee ruling in *Australia v Applicant A*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) that conditions of detention of some refugee applicants were in breach of the International Covenant on Civil and Political Rights 1966, 999 UNTS 171. The Government distanced itself from the ruling and reaffirmed its own practices.

deployed. Fundamental human rights, for example, derive immense power from their basic relationship with dignity and humanity. There is a moral strength and unity in this discourse which grounds legally powerful and strongly emotive decisions, but it is not the same degree of strength which derives from, for example, constitutionally protected rights in domestic legal systems. What is 'fundamental' about fundamental human rights is often the emotional reaction provoked by their breach. When the refugee definition is linked to the discourse of fundamental human rights the refugee is identified as a rights holder, occupying one of Patricia Williams's 'islands of entitlement'.²⁶ But the island is a small one. The entitlement we accord to the refugee by virtue of fundamental human rights is nothing more than we would accord to anyone. A successful refugee claim is based on fitting into the narrow configuration of the refugee definition. That is, identifying oneself as distinct from all others who possess fundamental human rights.

Substantive and procedural rights also have a role to play in refugee determinations. As the analysis below demonstrates, the distinction between the two is illusory. While a substantive right may appear more valuable than a procedural one because it provides an outcome rather than a process, in the context of liberal legalism, procedure itself is a crucial value. Australian refugee law provides a good example of this relationship. The primarily substantive right entitlement is the narrow right to remain. But the procedural protections of this substantive right, which include merits review before the Refugee Review Tribunal, and judicial review in the Federal Court and the High Court, are equally important.²⁷ Both substantial and procedural rights discourses are framed by the power of a national legal system to recognise their claims and enforce their results. Behind that legal system stand the rights of the nation itself. The nation is a necessary prerequisite for the effective existence of either of these claims in a way that it emphatically is *not* for fundamental human rights claims. As the nation sets up the framework for testing these rights, the nation's own rights are unimpeachable from within that legal system. This removal of the nation to the status of assumed and supreme right is seen also in the international law act of state doctrine²⁸ and in the High Court of Australia's decision in *Mabo v Queensland (No 2)* where it was beyond the capacity of the Court to review the validity of the colonial occupation of Australia.²⁹ In these instances, as in refugee law and migration law more generally, the nation's rights are effective trumps even when they are not articulated in rights terms.

26 P Williams, note 3 *supra*, p 233-4.

27 The procedural protections must be understood in the context of a recent trend to reduce procedural protections for refugees, see text accompanying notes 48-78 *infra*.

28 This doctrine protects individuals from persecution when they are carrying out certain actions in the name of the state. It has been most recently and comprehensively asserted in the *Pinochet* case, *R v Bow Street Metropolitan Stipendiary Magistrate; ex parte Pinochet Ugarte (No 3)* [1999] 2 All ER 97.

29 (1992) 175 CLR 1.

IV. RIGHTS DISCOURSES IN THE HIGH COURT

The refugee jurisprudence of the High Court of Australia³⁰ can be divided into those cases where the central issue is interpretation of the refugee definition and those where other matters related to refugee claims are key. As the rights component of the refugee definition is minimal, rights discourses are subtly rather than overtly employed in the first group of cases. Nonetheless, each group contributes to illustrating the fragmented and hierarchical nature of rights discourses. What is most interesting in the first group of cases from the perspective of rights discourse is observing when and how the judges choose to engage in rights terms at all.

The leading Australian decision on the interpretation of the refugee definition, *Chan v Minister for Immigration and Ethnic Affairs*,³¹ establishes that a refugee must face a 'real chance' of persecution and that the assessment of refugee status is to be made at the time of the determination in the receiving state rather than at the time of the claimant's decision to leave their home. Beyond these two points, little is agreed upon in the five opinions. The references to human rights in the judgments are not used to interpret the Refugees Convention, but rather as references to actions which may *not* constitute persecution. For example, Justice Dawson states that it is unnecessary to determine whether "other serious violations of human rights for the same reasons would also constitute persecution".³² Justice McHugh states that exile or imprisonment "is such a gross invasion of his [Chan's] human rights as to constitute persecution for reasons of political opinion"³³ but that:

not every threat of harm to a person or interference with his or her rights for reasons of race, religion, nationality, membership of a particular social group or political opinion constitutes 'being persecuted'.³⁴

Both judges leave open the possibility that some human rights violations would not constitute persecution. In this analysis, refugees are rights holders, but the rights the Court is concerned with are not breached by Australia or claimed against it. Any breach of rights is associated with the actions of another state.

The analytic importance of rights discourse is highlighted in the case *Applicant A v Minister for Immigration and Ethnic Affairs* ("*Applicant A*")³⁵ where the High Court of Australia interpreted the phrase "membership of a

30 I have focused on the High Court as Australia's highest court. While many refugee cases do not, of course, reach this Court, it decides enough cases that its jurisprudence remains the guide for the Federal Court and the Refugee Review Tribunal. My objective here is an illustrative rather than exhaustive discussion of the leading cases up to 10 October 2000. While many leading cases are briefly considered here, other sources provide a more detailed and more comprehensive overview. See for example, M Crock, *Immigration and Refugee Law in Australia*, Federation Press (1998), Chapter 7, "Refugee Status".

31 (1989) 169 CLR 379.

32 *Ibid* at 400.

33 *Ibid* at 434.

34 *Ibid* at 429.

35 (1997) 190 CLR 225.

particular social group” in regards to two Chinese nationals fleeing the reach of the one-child policy. For Chief Justice Brennan in dissent, fundamental human rights were the key to interpreting the refugee definition.³⁶ They informed the interpretation of ‘persecution’ and, in turn, of ‘particular social group’:

If a putative refugee’s enjoyment of his or her fundamental rights and freedoms is denied by a well-founded fear of persecution for a reason that distinguishes the victims as a group from society at large, it would be contrary to the ‘principle that human beings shall enjoy fundamental rights and freedoms without discrimination’ [Refugee Convention Preamble]. It would therefore be contrary to the object and purpose of the Convention to exclude that putative refugee³⁷ from the protection which the Convention requires Contracting Parties to accord.

The other dissentient, Justice Kirby took the opposite approach, stating that:

The appeal is not about ‘fundamental human rights’ as such, although clearly upon one view, they are affected. The appellants seek no more than the enforcement of Australia’s domestic law.³⁸

The distinction here is crucial. It plainly indicates the superior power of domestic rights claims and the potential weakness that fundamental human rights, because of their universality, carry with them. Those claiming a right directly under the *Migration Act* 1958 (Cth) (“*Migration Act*”) raise a superior, specific, claim against Australia.

For the majority justices,³⁹ fundamental human rights were only discussed in reference to the Canadian case law which was argued. Their comments reflect the Court’s unanimous, but flawed,⁴⁰ view that the Canadian jurisprudence could be attributed to the *Canadian Charter of Rights and Freedoms*. This case presents a concise view of the hierarchy of rights. For those judges who took the narrowest view of the refugee definition, rights are a misleading side story. For Chief Justice Brennan, a broad interpretation of the Refugees Convention relied on a discourse of fundamental human rights. In the strongest possible reasoning for the claimants, that of Justice Kirby, the right asserted was a substantive one, valid against the Australian nation.

More recently, the Court has considered the interpretation of ‘particular social group’ in the case of *Chen Shi Hai v Minister for Immigration and Multicultural Affairs*.⁴¹ This case follows *Applicant A* closely as the claimant was a child born in contravention of the People’s Republic of China’s one-child policy. In this case, however, the Court had no difficulty unanimously finding that such children are likely to become part of the particular social group ‘black children’ and thus face persecution. The Court accepted that the discrimination faced by these children amounts to persecution. However, the Court did not engage in a

36 This approach is similar to that of the Supreme Court of Canada in *Ward* note 13 *supra*. *Ward* was relied upon by the claimants in *Applicant A* as a rich source of argumentation. I have analysed the relationship between the two cases in an article. See C Dauvergne, “Chinese Fleeing Sterilisation: Australia’s Response Against a Canadian Backdrop” (1998) 10 *International Journal of Refugee Law* 77.

37 Note 35 *supra* at 235.

38 *Ibid* at 296.

39 Dawson, McHugh and Gummow JJ.

40 Discussed in C Dauvergne, note 36 *supra*.

41 (2000) 170 ALR 553.

rights-based analysis, save for an oblique reference to fundamental human rights when it suggested that the treatment may “offend ... the standards of civil societies which seek to meet the calls of common humanity.”⁴²

In a 1998 case, *Re Minister for Immigration and Multicultural Affairs; Ex Parte SE* (“SE”) brought in the High Court’s original jurisdiction to issue prerogative writs against Commonwealth officers,⁴³ Justice Hayne, sitting alone, explicitly rejected arguments put to him in fundamental human rights terms. The unsuccessful refugee claimant whom the Government was attempting to return to Somalia argued that the section of the *Migration Act* which made his removal mandatory should be interpreted in light of human rights obligations. In the words of the judgment:

[T]o remove to a place where the applicant’s human rights may be violated was not reasonable and that the Act should be construed as not permitting or requiring action that would violate Australia’s obligations under various international instruments concerning human rights.⁴⁴

Justice Hayne’s response makes no mention of human rights:

To read the provisions of s 198(6) of the Act as limited in the way for which the applicant contends would, in effect, require the first respondent to exercise his power to permit the applicant to remain in Australia despite his having been refused refugee status. The power under ss 48B and 417 to permit persons such as the applicant to remain in the country are powers that are expressed as discretionary powers which the Minister is not under a duty to consider using. That being so, the construction of s198(6) for which the applicant contends is not arguable.⁴⁵

This response, in which human rights is displaced by administrative compliance, is typical of recent High Court decisions about the procedural rights of refugees. However, this case is distinguished from the others because it is shocking in the context of the *SE* case *not* to discuss human rights. British Airways was required to remove SE from Australia as he had arrived without documents on a British Airways flight. They arranged to do so with the help of a specialist, non-Australian company which intended to escort SE in handcuffs and to be with him at all times at flight stopovers. Despite evidence that the Department of Immigration had rejected the company’s suggestion that SE be sedated to facilitate removal, Justice Hayne held that:

[I]t is not necessary to consider whether the obligation to remove an unlawful non-citizen carries with it a power to exercise any force or physical restraint over that person until arrival at the first port of call or ultimate destination. It is not necessary to consider those matters because there is no evidence to suggest that the Minister or the Department or any officer of it threatens or intends to assert such a power over the applicant.⁴⁶

Obviously, forcibly removing individuals from the country is a messy business. Nonetheless, it is one thing for the Court to assert that the resultant human rights violations are an unpleasant accompaniment to a sovereign’s rights,

42 *Ibid* at 560. The case also determines that this persecution is ‘for reasons of’ social group membership. This was a central issue which emerged from the lower decisions.

43 (1998) 158 ALR 735

44 *Ibid* at 740.

45 *Ibid*.

46 *Ibid* at 739.

it is quite another to say that what British Airways chooses to do is none of our business. Despite this decision, SE was not removed immediately. The UN Torture Committee found that further attempts to remove him would violate the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴⁷

The analysis in *SE* confirms the place of fundamental human rights discourse in refugee decisions. Human rights analysis in these cases is focused outside the nation, it is not turned inward to *our* own behaviour and *our own* obligations. When a refugee raises a fundamental human rights argument, it is linked by the courts to something that happened to them in the past and will happen to them in the future, rather than being an entitlement they are claiming in the present. Moreover, these cases show that even this weak version of rights discourse is present only in the most sympathetic analyses of refugee claims. The narrow rights plank of non-refoulement under the Refugees Convention is not enough to shift refugee argument into a debate about a rights claim made against a refugee-receiving state.

The second group of important cases involving refugees cluster around the procedural rights of those claiming refugee status. The story revealed by these cases is that of a progressive reduction of procedural rights over the past decade. That is, refugee claimants have been moved progressively further away from the core rights of the citizen and the nation. For the most part, the courts have supported these legislative initiatives. The isolated resistance and occasional dissent reveal the importance of procedural rights for attempting to assert substantive rights and the link between full procedural rights and equality before the law.⁴⁸

In *Lim v Minister for Immigration* (“*Lim*”)⁴⁹ the High Court held that the provisions requiring mandatory detention of boat people arriving in Australia were constitutionally valid with the exception of the provision that “a court is not to order the release from custody of a designated person”.⁵⁰ The majority held this provision had to be struck out to permit a court to order the release of

47 23 ILM 1027 and 24 ILM 535.

48 These cases do of course arrive in the High Court following full airing in the Federal Court and that Court has sometimes taken a more robust view of procedural protections. For one analysis which suggests the Federal Court has embraced a commitment to judicial activism in this area see J McMillan, “Federal Court v Minister of Immigration” (1999) 22 *Australian Institute of Administrative Law Forum* 1.

49 (1992) 176 CLR 1.

50 *Migration Act* 1958 (Cth) s 177 (this provision was 54R at the time the case was argued). The mandatory detention provisions at that time applied only to ‘designated persons’ defined as: a non-citizen who: has been on a boat in the territorial sea of Australia after 19 November 1989 and before 1 December 1992 ;and has not presented a visa; and is in Australia; and has not been granted an entry permit; and is a person to whom the Department has given a designation by: determining and recording which boat he or she was on; and 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.

This section has since been reworded slightly. Section 189 provides for mandatory detention of unlawful non-citizens who are not boat-people. Detention can be terminated by the grant of a bridging visa.

persons unlawfully detained.⁵¹ The impugned legislation had been explicitly enacted ‘in the national interest’⁵² and was an attempt to remove all process rights from a narrowly defined group of ‘aliens’. Having concluded that the power to detain aliens applying for refugee status was incidental to the power to exclude or deport aliens, and further that this ‘application detention’ was not punitive, the Court held that it was therefore not a prohibited exercise of judicial power by the Executive.⁵³ It was precisely at the removal of process rights that the Court balked. In this legislation, the various process rights attendant to having detention reviewed by a court constitute the bare minimum for procedural rights.⁵⁴ Protection against arbitrary detention by executive decree is a core value of the common law system, intertwined with the evolution of all process rights beginning with habeas corpus. The decision underscores how integral process rights are to liberal legalism and its rule of law ideology.

While the decision preserves these rights, the identity of the appellants in the case was primarily as ‘alien’. Attempts made in argument to raise issues related to the Refugees Convention and the International Covenant on Civil and Political Rights – which would have framed the applicants both as rights holders and as something other than aliens – were not taken up in the judgment. Alien identity is intertwined with the legislation which empowers the executive to ‘designate’ individuals for detention by naming the boats on which they arrive and then assigning ‘identifiers’ to particular individuals.⁵⁵ The assumptions embedded in this ‘us-them’ distinction are questioned by Justice Gaudron who cautions against equating ‘non-citizen’ with ‘alien’ noting that:

membership of the community constituting the Australian body politic, for which the criterion is now, but was not always, citizenship, is a matter of such fundamental importance that, in my view, it is necessary that the questions be acknowledged even if they are not answered.⁵⁶

Justice McHugh also brings the Australian community to the forefront in his analysis by characterising the purpose of the legislation as “to prevent the alien from entering into the community until the determination [regarding an entry permit or refugee status] is made”.⁵⁷ This emphasises how detention contains these outsiders, despite the fact that the applicants are already within Australian territory. The case contrasts those identified as ‘aliens’, whose names and

51 Mason CJ, Toohey and McHugh JJ in dissent held that the section was to be read in the manner in which it was written and hence that it was valid.

52 *Migration Act 1958* (Cth) s176.

53 See note 49 *supra* at 30-32, per Brennan, Deane, and Dawson JJ; at 10, per Mason CJ; at 53, per Gaudron J; at 71, per McHugh J.

54 As Brennan, Deane and Dawson JJ state, “citizens of this country enjoy, at least in times of peace, 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.” *Ibid* at 28-9.

55 Under the impugned legislation, the state asserts complete control over the identity of the other. The state names each of the boats that these people arrive on and then numbers each of the people. The combination of naming and numbering is the executive act which brings individuals within the scope of the legislation. Someone who arrives on a boat illegally, but whose identity is not redefined in this way by the state, is beyond the reach of the legislation.

56 Note 49 *supra* at 53.

57 *Ibid* at 71. See also at 73.

numbers are assigned by the state, with the Australian community. *Lim* leaves the nation with control over the identifiers of individuals and accepts reduction of their procedural rights on the basis of their alien status. Fundamental human rights are not engaged. The case contrasts and affirms minimalist procedural rights for refugee claimants and the sovereign power of the state to control all, even the identity of the aliens.

A series of cases since *Lim* has tested additional reductions in procedural rights accorded to refugee claimants and upheld them in each case, with the opinions relying in part on contrasts between national and alien identities. In *Fang v Minister for Immigration and Ethnic Affairs* (“*Fang*”)⁵⁸ the Full Federal Court considered the case of a group of ethnic Chinese who had been born in Vietnam and expelled to China where they had allegedly been resettled.⁵⁹ The majority found that while the group was denied procedural fairness and the protection of provisions of international treaties this was the result of express parliamentary intent and therefore could not be interfered with by the Court.⁶⁰ The procedures which were upheld included not informing those arriving of their right to make a visa application, not informing them of their right to legal advice, and requiring precise language to constitute a refugee claim. Rejecting the traditional statutory interpretation rule that strict compliance with particular forms is not fatal because of the evident parliamentary intention to the contrary, the Court in *Fang* found that “the prescription of the form is one of substance and is not merely procedural”.⁶¹ This demonstrates perversely the substantive dimension of process rights. The majority’s acknowledgment that these applicants are likely to have cultural and linguistic difficulties, as well as being traumatised, isolated and detained⁶² did not inspire them to find ambiguity in the legislation.

Fang approved an important set of the Executive’s moves to limit procedural rights at the front-end of the refugee application process. The cases which followed, similarly upheld a narrowing of procedural rights after the primary decision-making stage. In *Minister for Immigration and Ethnic Affairs v Wu*

58 (1996) 135 ALR 583. Although this is not a High Court case, I have included it because its judgments are remarkable and were not considered by the High Court.

59 The group included some in a younger generation who had been born in China. Their claims included claims of very poor treatment and social ostracism in China.

60 Summing up his judgment, Nicholson J stated: “This is a case in which parliament has negated the possibility of common law concepts of procedural fairness applying in favour of the non-citizen applicants. Parliament has achieved this by the enactment of ss 45-57 and ss 193(2) and 198(4) of the Migration Act. The inference from the findings of the trial judge is that the representatives of the relevant arm of the executive were well informed of this and avoided acting so as to place the applicants in the position where they had the means to apply for a protection visa when the course remained open to them, prior to its preclusion by legislation. While that executive conduct does not accord with internationally expressed goals relating to conduct in relation to refugees, the conditions for application of international law, as prescribed by Australian domestic law, are not present to enable international law to control that conduct. Furthermore, such conduct was supported by the enactments of the Australian Parliament which, to that extent, evince an intention in relation to non-citizens to negate the application of those internationally commended basic procedural requirements.” Note 58 *supra* at 634.

61 *Ibid* at 617.

62 *Ibid* at 633.

*Shan Liang*⁶³ the High Court held that a shift in the language of the *Migration Act* from empowering the Minister to make a determination as to refugee status to allowing that the Minister ‘may determine’ that a person is a refugee “if the Minister is satisfied that the person is a refugee”⁶⁴ alters the focus of judicial review.⁶⁵ The decision has the effect of increasing the degree of curial deference to refugee determination decision-makers. In the majority opinions the issue is presented as one of pure procedure. In his separate judgment, where his Honour concurs regarding ‘satisfaction’,⁶⁶ Kirby J situates the decision at the border of the nation:

The decisions committed to them [refugee decision-makers] are extremely important for the persons involved. But they are also important to Australia as a recipient nation. This is because the composition of the community is in question. Its conformity with an important international convention is at stake. Its reputation as a country of refuge which decides claims of refugee status according to the law is involved.⁶⁷

While this broader perspective did not lead to a different conclusion in the case, it serves as an important reminder of the contrast being played out between individual-outsider and the nation and the role of these decisions in constituting the boundary of the nation. The deference to the Refugee Review Tribunal is confirmed in *Minister of Immigration and Ethnic Affairs v Guo*⁶⁸ in which the High Court warns the Federal Court against “reading such [RRT] reasons with an over-zealous eye”.⁶⁹

In its most recent refugee decisions, the High Court has upheld the 1994 amendments to the *Migration Act* which reduced the grounds of review available to the Federal Court in considering refugee decisions.⁷⁰ In both *Abebe v The Commonwealth; Re Minister for Immigration and Multicultural Affairs* (“*Abebe*”)⁷¹ and *Minister for Immigration and Multicultural Affairs v Eshetu* (“*Eshetu*”)⁷² the High Court confronted cases where the RRT had dealt with

63 (1996) 185 CLR 259.

64 *Migration Act* s 22AA (Cth)(at that time).

65 Note 63 *supra* at 275. The Court does also hold that it is no longer the case that a decision as to ‘satisfaction’ is unreviewable.

66 *Ibid* at 295.

67 *Ibid* at 292.

68 (1997) 191 CLR 559.

69 *Ibid* at 592, per Kirby J (in a separate concurring judgment).

70 Part 8 of the Act, introduced by *Migration Legislation (Amendment Act)* 1992. RRT decisions can now be reviewed on grounds of failure to observe procedures in the Act, inappropriate delegation, a decision not authorised by Act or regulations, improper exercise of power, error of law, fraud or bias, or no evidence. Decisions are not reviewable in the Federal Court on the ground of unreasonableness or breach of the rules of natural justice: s 476. As well, Part 8 removes some decisions under the Act from any type of Federal Court scrutiny. The constitutionally protected avenue of review in the High Court does, of course, remain.

71 (1999) 197 CLR 510.

72 (1999) 197 CLR 611.

credibility issues in problematic ways.⁷³ Despite this, the highest degree of deference is shown to RRT decision-makers. The *Abebe* case approves the reduction of grounds of review and *Eshetu* affirms that the Court will not permit the one plausible end run around this scheme which had remained.⁷⁴ As two of the dissenters in *Abebe* state:

to define the jurisdiction of a federal court to determine controversies with respect to those rights and liabilities by excluding grounds for relief which otherwise would be available has the effect of restricting or denying the right or liability itself.⁷⁵

The Judges conclude that this “stultifies the exercise of the judicial power of the Commonwealth”⁷⁶ and is therefore a constitutional wrong. The more serious wrong is, of course, to the rights holders. To hold a right with nowhere to exercise it makes it merely rhetorical and moves it outside a functional definition of rights.⁷⁷

The restrictions which narrow the procedural rights of refugee claimants also narrow the space for their identities to seep through into appellate jurisdiction. Procedural rights create a space for the identity of a refugee claimant to be articulated. We learn comparatively little about either Ms Abebe or Mr Eshetu from the High Court decisions as those decisions really have little to do with them. This calls to our attention the way in which the court controls the appearance of the individual’s identity to fit its jurisprudential objectives. As the identity of the individual is diminished, that of the nation overwhelms the balance so that the contrast between the two, which situates what is at stake in these cases, is no longer visible. The tension between the individual and the state which is traditionally portrayed in process rights embodies a recognition of the individual. As alien outsiders disappear from the equation, they lose this recognition. Rights express a relationship between people on either side of the boundary created by the right. In this setting, the nation’s boundary is at issue. When the right diminishes, its holder disappears from view. The nation is, as Fitzpatrick says, aspiring to unattainable universality.⁷⁸

73 With regard to Ms Abebe, the RRT states that “[t]he applicant now has a long history, much of it admitted by her, of having told untruths. Her claims as to fear and confusion wear thin after six or seven occasions of ‘clearing the slate’ as it were.” (cited in note 71 *supra* at 542). In Mr Eshetu’s case, the Full Court of the Federal Court found the RRT’s conclusions about his evidence to be so unreasonable that no reasonable decision-maker could have reached them. In each set of reasons it is clear that the Tribunal has developed an attitude of exasperation towards the claimant.

74 On the basis of s 420 of the *Migration Act* 1958 (Cth) an argument was put to the Court that ‘substantial justice’ incorporated necessarily the principles of ‘natural justice’. This argument was defeated in *Eshetu*.

75 Note 71 *supra* at 562, per Gummow and Hayne JJ. Gaudron J also dissented.

76 *Ibid.*

77 It is for this reason that I take issue with the conclusion of Gaudron and Kirby JJ that “the effect of s 476(2) is not to relieve the Tribunal from observance of the rules of natural justice or to authorise the making of unreasonable decisions. Rather, it is to forbid the Federal Court from reviewing a decision on those grounds”. See note 72 *supra* at 632. While they note that the Constitution protects the right to seek mandamus or prohibition in the High Court, the tenor of these recent decisions leads little room for optimism about the Court interpreting the criteria for those writs broadly.

78 P Fitzpatrick, “‘We know what it is when you do not ask us’: Nationalism as Racism” in P Fitzpatrick (ed), *Nationalism, Racism and The Rule of Law*, Dartmouth Press (1995) 11.

The treatment of the procedural rights cases by the courts therefore reveals something of the nature and power of procedural rights, and this in turn contributes to understanding the dilemma of rights discourses for refugees. The obligation upon a state not to refole refugees can be translated into a limited sort of substantive right to remain. Nevertheless, without an array of procedural rights to accompany them, substantive rights are ineffectual. This is underscored by the differing perspectives of Justices Kirby and Callinan. Justice Kirby classifies the refugee claimant as similar to all other people in Australia by stating that judicial review does not entitle an applicant to be accepted as a refugee, "it simply secures to him or her the basic entitlement, enjoyed by every person sheltering under the laws of this country, citizen or not".⁷⁹ In contrast, Justice Callinan reinforces a strict distinction between 'us' and 'them' regardless of whether 'they' are already in Australia and subject to the Australian legal system, with the view that the limited provisions for judicial review under the *Migration Act* "gave entrants to Australia ... certain rights in respect of what would otherwise be matters for the executive exclusively".⁸⁰ While procedural rights operate in a different plane of discourse from fundamental human rights, according them to others corresponds to a recognition of their humanity.

The High Court refugee jurisprudence demonstrates how discourses of fundamental human rights, procedural rights and substantive rights are intertwined in refugee law. These strands of rights discourse are subtly differentiated and hierarchically related to one another. While in many of the opinions, refugee claimants hold no rights of any kind, others portray asylum seekers as holders of some mixture of each of these claims of right. In keeping with a functional definition of rights, the strongest analyses of refugee rights are those which present refugee claimants as sharing the entitlements of other Australians, other members of the nation. The rights accorded to a citizen are the widest array available. With each step by which an individual is removed from the position of citizen, the rights they can claim against the nation are diminished. Comments about the national community contribute to the image of the nation these cases construct. As these cases raise issues of the national border and the composition of the community, the nation itself is present in this jurisprudence. The cases develop against the backdrop of the nation's right to exclude. This right predominates over all others in the cases, accounting for the fact that while the nation is not explicitly portrayed as a rights holder, its rights ground the very assumptions of the jurisprudence.

V. CONCLUSION: STRATEGIC HUMANITARIANISM

The principal problem of using rights discourses to bring about changes in refugee law is that a rights-based argument triggers a rights-based response. In questions of migration, the most unambiguous right is that of the nation to

79 Note 63 *supra* at 292.

80 Note 71 *supra* at 604.

exclude all outsiders. Of the diverse rights that liberal legalism will recognise and put its considerable forces behind, the right to exclude the alien is paramount because the existence of liberal legalism is intertwined with the existence of the liberal nation.⁸¹ The fundamental human rights claims of refugees, the potentially substantive protection against refoulement, and the procedural rights which are necessary in order to make these others meaningful, pale in comparison with the nation's right to exclude. For these reasons, the strategic potential of rights discourses is limited for refugee claimants, both in the courts and in public and political discourses.

The alternative to asserting a rights claim is a claim for humanitarian assistance. The bases of these two types of claim are starkly opposed. A rights claim is grounded in an assertion of equality and justice. We accord a right to others because we are required to by law, because nothing less would be fair. To deny others their right would be untenable and legally wrong. By contrast, a claim to humanitarian relief is grounded in a fundamental inequality. Humanitarianism is an act of bestowing; of generously giving to another who is in need. Without the imbalance of having and needing; of inequality; humanitarianism does not operate. Humanitarianism finds a parallel in mercy,⁸² a grant which is sought without any rightful expectation that it be accorded. To deny an appeal to humanitarianism is excusable because the appeal is beyond the ordinary scope of our moral duty.⁸³ When we act in a way that is humanitarian we are generous, compassionate, good.

The nation which admits those it is not required to by law, as a humanitarian gesture, also identifies itself with the good.⁸⁴ It gives to non-members what it is not obligated to, sharing its prosperity with those less fortunate. Australia is not alone in seeking to position itself in international and domestic spheres as 'good' because of its humanitarian admissions policies⁸⁵ and indeed has a strong reputation internationally in this area.⁸⁶ The discourse of humanitarianism is persuasive in this area of the law. Australia calls its migrant admission program for those admitted without close family ties or immediate economic value as its 'humanitarian program.' This program includes admission for refugees and

81 P Fitzpatrick, *Nationalism, Racism and the Rule of Law*, note 78 *supra*, p xv.

82 S Davis and L Waldman draw out this parallel in their 1994 review of the then Canadian system of humanitarian and compassionate grounds appeals entitled *The Quality of Mercy, Supply and Services Canada for Citizenship and Immigration Canada*, (1994).

83 A parallel can be drawn here with J Fishkin's analysis of the threshold of heroism. See *The Limits of Obligation*, Yale University Press (1982).

84 I elaborate on this argument in detail in C Dauvergne, "Amorality and Humanitarianism in Immigration Law" (1999) 37 *Osgoode Hall Law Journal* 599. I also argue there that differing strands of liberalism converge around the idea that the nation is morally compelled to admit at least some needy outsiders. This 'humanitarian consensus' provides the philosophical underpinning for refugee law, while at the same time being inherently malleable.

85 Hon Philip Ruddock has stated: "How we respond to the humanitarian crises that continue to plague the world defines us as a nation. How we act on the global stage conveys to others what we are. We are a nation that can be proud of its record of responding to refugee and humanitarian problems." Speech to the Victorian Press Club, 26 March 1998.

86 See M Crock, note 30 *supra*, p 124.

others in similar circumstances.⁸⁷ The weakness of rights-based claims on behalf of refugees is contrasted by the ease with which they can be ‘logically’ fitted into this category – those we admit because of our generosity. Indeed in *Chan*,⁸⁸ Justices Toohey and Gaudron, those most supportive of an expansive interpretation of the Refugees Convention, developed their reasoning on the basis of the “humanitarian purpose of the Convention”.⁸⁹

Exposing humanitarianism as unequal and self-serving is not the end of the story. For it is, of course, much more than that. The generosity of spirit and fact which underlies humanitarianism is not to be diminished. Without humanitarianism, national borders could well be even more tightly closed than they are today to those who cannot benefit the nation directly in some way.⁹⁰ Many people benefit from the generosity of Australia and other similarly situated nations. If the trade-off for this generosity is an enhanced international reputation and some nationalist self-satisfaction, the price is well worth it. In fact – and this is the most important reason for appreciating the difference between humanitarian claims and rights claims – this price is so small that we can well afford more.

Articulating refugee claims as rights claims has a slim basis in law and a strong basis in the fundamental humanity we share. For these reasons, it is tempting to put our claims on behalf of refugees in rights terms; that is, to take up the strongest tools the law offers. But, in the context of refugee claims, these tools are the least likely to work. There is a legal and a non-legal reason for this, and the two are interconnected. Legally, a rights claim triggers the rights-based response of the nation and the nation necessarily wins. Beyond the narrow confines of the court, in a place where public and political ethos are dominated by liberalism’s ambiguity about opening borders, asserting rights claims on behalf of refugees meets intractable disagreements.⁹¹ Accordingly, humanitarianism is strategic. The potential benefits of an expansion of humanitarian discourse are great and the price to be paid for this is small. We know intuitively the value of appealing to vanity, and the ministerial guidelines on humanitarian consideration confirm this.⁹² The cost of arguing on behalf of

87 The planning level for the Humanitarian Program was 12 000 in 1999-2000. This is to be comprised of 6 000 (2 000 onshore) who fit within the refugee definition. Those who are outside the formal refugee program are assessed on a variety of refugee-like criteria, as well as factors such as ties to Australia and potential settlement skills.

88 Note 31 *supra*.

89 *Ibid* at 413 per Gaudron J. Toohey J discusses the ‘humanitarian intentment’ of the Convention at 407. Justice Kirby also emphasises the humanitarian purpose of the Refugees Convention in *Chen* note 41 *supra*, but does not rely on that purpose to develop his response to the case.

90 I have argued elsewhere that both family migration, which directly benefits individual members of the nation, and economic migration which benefits the nation more diffusely, can be understood in this way. See C Dauvergne, “Beyond Justice: The Consequences of Liberalism for Immigration Law” (1997) 10 *Canadian Journal of Law and Jurisprudence* 323.

91 This philosophical point is argued in depth in C Dauvergne, *ibid* and C Dauvergne, “Amorality and Humanitarianism”, note 84 *supra*.

92 See *MSI 225: Ministerial Guidelines for the Identification of Unique or Exceptional Cases Where it May be in the Public Interest To Substitute A More Favourable Decision* under ss 345, 351, 417, 454 of the *Migration Act* 1958 (Cth). The guidelines place a strong emphasis on the Australian public interest.

refugee claimants from a position of inequality instead of a position of justice and equality is probably worth it for most individuals who can benefit from any advances made in this way. Should the world become a better place, we can move the argument to a higher plane. In the meantime, we can better understand the role our law is playing, and better appreciate the public need for gratitude⁹³ from those who receive our national goodness.

93 Australian public opinion was divided in 1999 over complaints by a small number of Kosovars who had come here on temporary protection visas. While their living conditions were clearly difficult and inferior to those that even very poor Australians lived in, some felt they had no right to complain. Others felt they were our guests and should be treated as such and expressed embarrassment and shame at the state of the accommodation. An example of the tension is seen in the contrast between DD McNicoll, "Roosting the Day We Took Them?" and James Murray, "Noblesse Oblige Should Begin at Home" both in *The Australian*, 17 June 1999, p 13. These differences of opinion are intractable within liberal social and moral frameworks.