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Shipwrecks, asylum seekers, and the rule of law: The Tampa case

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Shipwrecks, Asylum Seekers, and the Rule of Law: The Tampa Case

(Minister for Immigration and Multicultural Affairs, the Attorney-General, Minister for Defence, and the Commonwealth of Australia v Eric Vadarlis & Victorian Council for Civil Liberties V 1007/01 & V1008/01 (unreported), Full Federal Court of Australia)

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The Facts

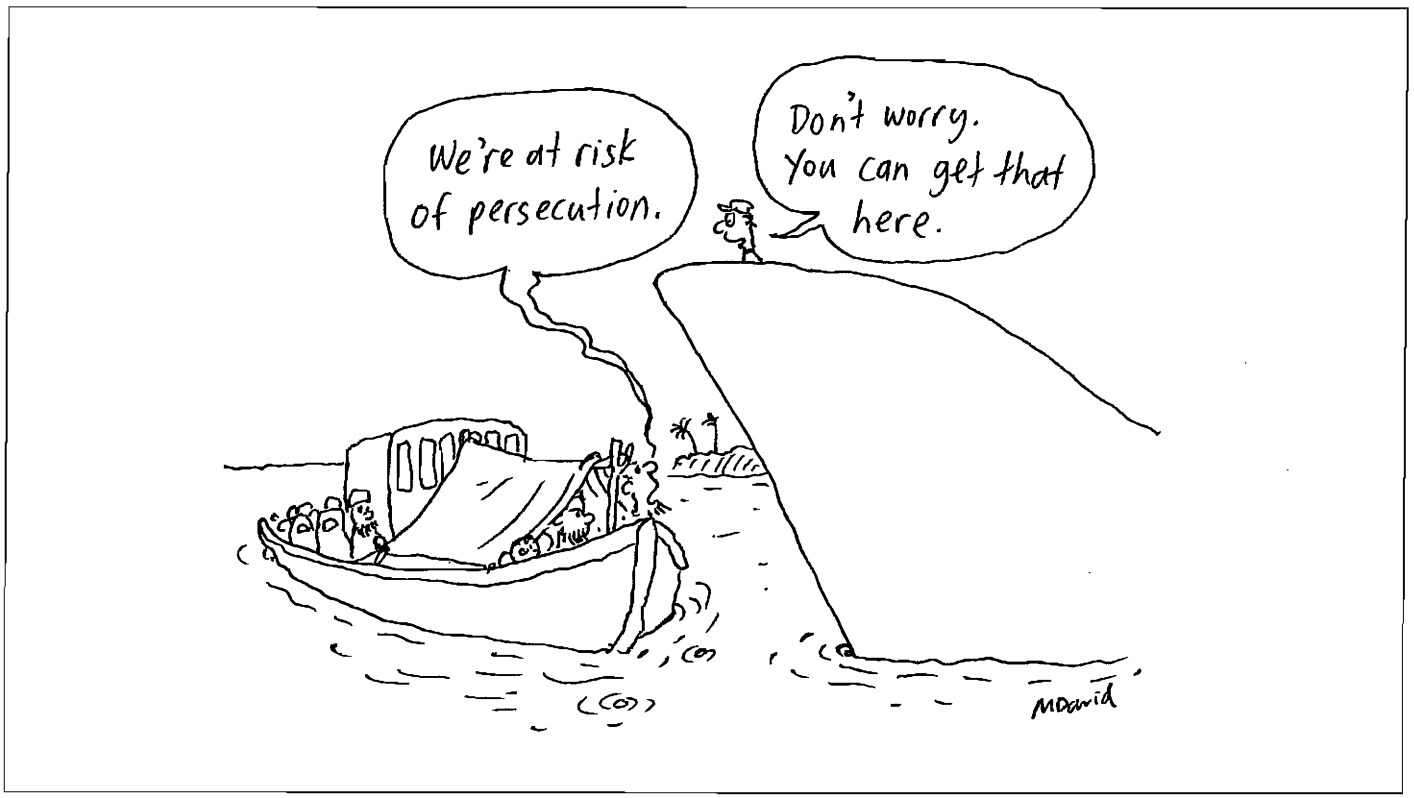
On 26 August 2001, a small Indonesian vessel, dangerously overloaded, was in imminent danger of sinking in the Indian Ocean. It was observed by the planes of Australian Coast watch. They requested a Norwegian container ship heading for Singapore, the M.V. Tampa, to go to its aid, as it was a vessel in distress. The Tampa did so. Its crew rescued 433 men, women and children from the vessel and transferred them to the Tampa. The Indonesian boat was abandoned and shortly afterwards sank.

Those on board had come most recently from Indonesia and were heading for Christmas Island, an Australian external territory. There they planned to seek asylum in Australia as refugees. Many of the men, women and children on board claimed to have come from Afghanistan, Iran, Iraq, and Palestine. Under the Convention Relating to the Status of Refugees (1951) which Australia ratified and legislated in 1954 in the Migration Act, Australia is obliged to give refuge to those people who fall within the legal definition of "refugee". A refugee is defined as a person with a well-founded fear of persecution, one who fears for his or her own safety.

Under a series of international treaties including the International Convention on Maritime Search and Rescue, the International Convention on Salvage, and the United Nations Convention on the Law of the Sea (UNCLOS), and also through longstanding maritime custom, a Master of a ship must go to the assistance of those in peril on the seas, unless to do so puts the master's vessel or crew in danger.

There then ensued a stand-off between the Australian immigration and customs authorities and the Master of the Tampa. The Australian government announced that to further its policy of attacking "people-smugglers" - those who, for large sums of money brought people clandestinely into Australia without appropriate entry papers, it would deny entry to Australia to those on board the Tampa. This, it was thought, would be a deterrent to the people smugglers based in Indonesia who were exploiting the miserable situation of those seeking asylum in Australia.

Australia takes each year a maximum number of 12,000 refugees. The policy of the government is that the quota is compiled from those found after investigation to be refugees. If persons arrive in Australia without a visa or overstay their permit, they are placed in a detention centre until an investigation is made of their status. If they are found to be illegal immigrants, they are deported to their country of origin. If it is not possible to do this, for example if the country is at war, then they are detained indefinitely until they can be returned.



The Master of the Tampa, despite orders from the Australian authorities to the contrary, took his vessel into Australian waters near Christmas Island. He took the view that his ship was in danger because it was now grossly overloaded and authorised only to carry a limited number of persons. He could not therefore proceed to his destination, Singapore, or Indonesia, the country from which his passengers had embarked. He wanted to disembark the passengers on Christmas Island. The Tampa was then boarded by armed Australian SAS troops, who took effective control. Other armed naval vessels then stood close by. Some basic medical supplies and personnel, and food and other amenities were placed on board. Finally the rescuees were taken off and placed on board an Australian naval vessel, and taken to Nauru and New Zealand, where their claims for asylum are being processed by the United Nations High Commission for Refugees.

Whilst the naval vessel with the refugees was on its way to Nauru, Eric Vadarlis, a Victorian solicitor, and the Victorian Council for Civil Liberties, a human rights organisation, brought an action before the Federal Court against the responsible federal Ministers and the Commonwealth of Australia alleging that the rescuees on the Tampa were being illegally detained by the Commonwealth government, and seeking an order in the nature of habeas corpus[1] from the Court that those detained should be brought ashore on the Australian mainland.

This case, both at trial and on appeal, brought before the Court some issues of great significance to our democratic system of government. It illustrates:

- the roles played by the legislative, executive, and judicial arms of government
- their relationship to each other
- that each of these is determined by law
- and that courts determine whether any of the arms of government are acting according to law
- In this context, much of the substance of the law comes from Australia's international obligations freely entered into by treaties and incorporated into Australian law by the Australian Parliament.

What the case was not concerned with, was the policy of the federal government towards asylum seekers or the merits of the actions of the government. That is, as the Court said itself, "a debate for other forums. The questions before the Court are questions of law".

Many criticisms were made of the judges for hearing this case.[2] It is worth quoting the words of the Chief Justice of the High Court, Murray Gleeson C.J, in an address on the State of the Judicature in Australia, delivered in Canberra on 14 October.

> *There is no form of judicial responsibility which is more likely to bring courts, and individual judges, into the area of political conflict than what is sometimes called judicial review of legislative and executive action. This is not because the courts seeks a political role. It is because, in litigation of this kind, the issues at stake often have political significance and excite partisan sympathies. In a system of government organised under a federal Constitution, legislative, executive and judicial power is divided between the component parts of the federation by the agreement which formed the basis of the federal union. The terms of that agreement are set out in the Constitution. From time to time, citizens or governments claim that some exercise of power is contrary to the Constitution, and therefore unlawful or invalid ... Citizens are entitled to an authoritative declaration to that effect. It is an aspect of the rule of law that it is the responsibility of the judicial arm of government to resolve disputes about ... the lawfulness of legislative or executive power ... This is a matter of duty, not choice.*
>
> *This may sometimes mean that the will of a democratically elected parliament is defeated, or that executive action which enjoys the support of Parliament, and of the majority of citizens, is frustrated or impeded.*
>
> *That is the necessary consequence of the rule of law in a democracy. The majority of people, through their elected representatives, acting within the Constitution, may alter the law, but they may not disregard it.*

Legal Issues

The legal issues to be resolved by the court were very complex. The fact that, of the four judges who heard the case, two were in favour of the applicants and two in favour of the government shows how difficult these matters were. The majority of the Full Federal Court were in favour of the government, and so the government succeeded in its defence. The reasoning in the judgments is clearly set out at length.

The trial judge, North J, found that the rescuees had been detained, because they had no reasonable prospect of getting off the Tampa given their numbers, the distance to the nearest port, and the presence of armed SAS troops. He further concluded that the Australian government had no authority by reason of its inherent prerogative powers as a government to so detain the rescuees. Any such power had long ago been replaced by the Migration Act as the legislation that controls the entry and deportation of aliens from Australia. North J. therefore ordered that the rescuees be released.

The case immediately and urgently went on appeal to the full Federal Court. The issues were:

- Did the government have authority from its status as the government of Australia (the executive power) to exclude the asylum seekers from Australia?
- Did the asylum seekers have a right to enter Australia?
- Were the asylum seekers "detained" by government for the purposes of the writ of habeas corpus?[3]

One of the major underlying questions to these issues was how far had the inherent powers of the Crown (the government) to exclude aliens from the territory of Australia continued to exist after parliament had passed legislation (the Migration Act) on the same subject matter. Both the existence and content of the inherent power were in dispute, as well as the effect of the Migration Act on it.

Another controversial context question was the extent to which the Australian Parliament had given effect to all its international treaty obligations in Australian law. Even those treaties had some gaps in their coverage of all the possible events that could occur when asylum seekers come by sea without prior permission, as well as the obligations that arise in relation to ships in distress on the high seas.

Finding the answers to these questions took the court back over a review of several hundred years of judicial decisions,

as well as a careful analysis of Australian legislation. The judges did not agree exactly in their analysis and conclusions, differing on the importance of some issues of law and of fact.

The Chief Justice of the Federal Court, Black C.J., found in favour of the applicants. The executive power of government is set out in section 61 of the Constitution and refers to the "execution and maintenance of this Constitution, and of the laws of the Commonwealth". In his view, the government could justify detention only if it could point to a statute that authorised it to protect Australia's borders against the unlawful entry of non-citizens in time of peace. No such statutory authority existed. He then found that the rescuees had no reasonable means of escape from the Tampa and therefore were detained. The fact that habeas corpus was sought on their behalf to give them an opportunity to seek asylum in Australia was seen by him as irrelevant.

The two other judges of the Federal Court, French J and Beaumont J., found that the rescuees had no right to enter Australia, either at common law or by statute. French J held that the government did have "a power to prevent the entry of non-citizens and to do such things as are necessary" for that purpose. He could not find any Australian case law that would assist him, but did conclude that the Migration Act had not deprived the government of any of its inherent governmental powers, but that it merely set out an infrastructure within which they were exercised. The government acted within its powers under the Migration Act, and therefore this was not a situation in which habeas corpus was available.

Beaumont J was prepared to find that the rescuees had no right to enter Australia and that therefore they had not been unlawfully excluded or detained. He also made the point very clearly that he was considering the point only from a view of Australian law, not the law as stated in international treaties. Treaties as such are not part of Australian law, but take effect only insofar as they have been made part of the law by Australian legislation.

Policy Considerations

As students of law and as citizens, we must be concerned not only with questions of law, but also with the merits of the government's policy and actions towards asylum seekers. That is one of the reasons why we have elections. In forming our assessment of the policy, whether or not our government is acting in accordance with the obligations we have taken on internationally must be relevant. We do not want to belong to a country that is seen as an "international delinquent". Nor, it should be suggested, do we want to depart from our tradition of giving people a fair go. We should, as a civilised society and one made up of migrants and the descendants of migrants, be prepared to accept those into our community who can no longer live in their own countries and who seek to give their families a chance of a better and safer life. The measure of their desperation is what they have done to seek asylum only to find, as in this case, that the government was determined to go to extraordinary lengths to prevent them having a chance of proving in our legal system their claim to be accepted as refugees. It is this denial of access to the legal system by government action that is the most extraordinary aspect of this extraordinary case.

It is important to note that the judges, the court officials, the party and their counsel went to great lengths to proceed as quickly as possible. The court sat at weekends. The appeal proceeded immediately. The parties co-operated in the arrangements. All counsel and solicitors for the applicants acted pro bono, that is without taking any fee for their services. Everyone was conscious of the urgency and importance of the case.

Some Questions to Debate

1. *Should the Australian government have the right to decide who can enter Australia - citizens, non-citizens, permanent residents?*
2. *Should asylum seekers have a right of entry to Australia if they can establish that they are refugees or dependent members of the family of a refugee?*
3. *Should asylum seekers have this right of entry only if they have been shown to be refugees before they come to Australia?*
4. *If the government can exclude or detain non-citizens who have entered without lawful authority, should this law be changed?*
5. *Should the present war against terrorism make a difference to our previous practices in relation to refugees - namely that the numbers are limited and that only established refugees are to be taken in?*
6. *How far should these questions be determined by courts, or by Parliament, or by public opinion?*

[1] Habeas corpus (which means in English "You have the body") is an ancient procedure in our law which requires the Crown (the government) to produce a person before the court where that person is alleged to be in the unlawful custody or control of the Crown. It has always been seen as a basic foundation of the system of the rule of law.

[2] Many criticisms were also made of those who brought the claim. There was no legal contest to their right to appear before the court, or of the relevance of the remedy that was sought. The Attorney-General, however, criticised them stating that 'court applications from groups with no direct interest in the matter have hampered efforts to resolve this matter.' As this article is being written, the Commonwealth government is seeking its costs of defending the action from those who brought the action.