

2003

## Access to justice: Lawyers' costs when acting pro bono in public interest litigation

Kay Lauchland

*Bond University*, [Kay\\_Lauchland@bond.edu.au](mailto:Kay_Lauchland@bond.edu.au)

Follow this and additional works at: <http://epublications.bond.edu.au/nle>

---

### Recommended Citation

Lauchland, Kay (2003) "Access to justice: Lawyers' costs when acting pro bono in public interest litigation," *The National Legal Eagle*: Vol. 9: Iss. 1, Article 6.

Available at: <http://epublications.bond.edu.au/nle/vol9/iss1/6>

This Journal Article is brought to you by the Faculty of Law at [ePublications@bond](mailto:EPublications@bond). It has been accepted for inclusion in The National Legal Eagle by an authorized administrator of [ePublications@bond](mailto:EPublications@bond). For more information, please contact [Bond University's Repository Coordinator](#).

# Access to Justice: Lawyers' Costs When Acting Pro Bono in Public Interest Litigation

**Kay Lauchland Associate Professor School of Law  
Bond University**

## The MV Tampa refugee crisis raises many moral and legal issues

In August 2001, 433 people were rescued from a ship in the ocean between Indonesia and Australia<sup>1</sup>. At the request of Australian authorities, they were taken on board a Norwegian freighter - the MV Tampa. These people were trying to reach Australia where they wished to claim asylum. They said they were refugees (mostly from Afghanistan), fleeing from their homeland. The freighter was only equipped to carry 50 people. Some of those rescued were sick. The captain of the freighter had insufficient food and medicine. Contrary to an instruction from Australia, the captain brought his vessel into Australian territorial waters. He sought to land these people on Christmas Island, a tiny island which is a territory of Australia (but closer to Indonesia than the mainland of Australia).

The Australian government sent SAS forces to intercept the Tampa and prevent it from landing these people on Australian soil. Forty-five SAS troops boarded the freighter and took control. The government closed the harbour and no-one could communicate with the people rescued. Some lawyers in Australia brought action in the Federal Court to try to make the government bring the people to mainland Australia.

Ultimately, the people were taken off the freighter and onto an Australian naval transport ship. They were taken to Nauru or New Zealand where their claims for asylum were processed.<sup>2</sup>

Many interesting legal issues and public policy and moral concerns arise from this sad happening. There was hot debate in Australian and international media about whether or not Australia acted within the law, and about whether its refugee policies and practices were just or unjust, generous or mean. The moral and policy debates continue. The issue of refugees is a complex, global dilemma. There is still debate about the legalities of the government actions, in domestic law at the time, and as a matter of international law. Subsequently, the government has passed legislation changing the domestic law of Australia to strengthen its power to detain and repel aliens. It has entered into arrangements with Nauru and New Guinea to process asylum seekers outside Australian territory to thwart acquisition of any minimal rights within Australia. This is called "the Pacific Solution". There are many issues raised by these circumstances - too many to cover in this short paper.

We are not, in this paper, addressing the rights and wrongs of any refugee policy. We will not explore the constitutionality or morality of the Pacific Solution. Whilst these are all issues of great importance in Australia today and for our future, in this paper I will draw your attention to a small but

significant issue: the position of the pro bono publico<sup>3</sup> lawyers. Although the involvement of volunteer lawyers in seeking to protect the rights of the asylum seekers may appear a narrow, in a sense peripheral, matter in relation to the MV Tampa situation, it raises issues of fundamental importance in our justice system.

## The lawyers get involved

The Victorian Council for Civil Liberties and Melbourne lawyer Eric Vadarlis made application to the Federal Court of Australia to have the refugees<sup>4</sup> brought to Australia for the processing of their claims for asylum. These lawyers were not able to make direct contact with the refugees and were seeking their removal to the Australian mainland in part so that the asylum-seekers could have access to legal advice and representation.<sup>5</sup>

The two primary claims brought by the lawyers on behalf of the refugees were in the alternative. The first was that they had entitlements under the Migration Act 1958 (Cth) - in particular to make formal application in Australia for temporary visas. To enforce those rights, the lawyers wanted the refugees brought to the mainland where they could have legal assistance in preparing such applications. The second claim was that, even if they had no rights under the Migration Act, they were being held on the freighter, by SAS troops, against their wills, and the Australian government was making plans to relocate them to Nauru and New Zealand without even consulting them. The legal claim of habeas corpus (probably familiar from US TV shows) requires the responsible authority to bring the person (people) concerned before the court and satisfy the court that the detention is lawful; and if it is not the court will release the detained person(s). This remedy is intended primarily to protect individuals from abuse of police powers and the like.

## The role of courts in supervising government power

No-one should be held by the administrative arm of government (including police and prison authorities) without recourse to the courts to determine whether they are being held and treated lawfully.<sup>6</sup> This protects people from being imprisoned without fair trial, and from being tortured or otherwise unfairly dealt with. Our system of law establishes some checks and balances between the administrative, legislative and judicial arms of government so that governmental power is not used in an excessive, unfair way. Judicial power is vested in the courts and cannot be usurped by the executive.<sup>7</sup> The government itself is subject to the rule of law.<sup>8</sup>

Aliens (non-Australian citizens), whether they entered the

country lawfully or not, can only be detained pursuant to statutory authority, and they can seek the aid of the courts to determine the validity of that detention, just as an Australian could.<sup>9</sup>

As a general rule, involuntary detention (imprisonment) is considered a form of punishment, which can be imposed only following a judicial determination of guilt. There are exceptions, including detention pending trial, and for public health purposes, but these are also subject to judicial supervision and review. While in our country, aliens are also subject to and enjoy the benefit the rule of law, however, unlike Australians, an alien may be excluded or expelled<sup>10</sup> from our country. To enable the expulsion of an alien, detention pending deportation, in the exercise of executive power, may be lawful.<sup>11</sup>

Under the Migration Act 1959 (Cth) the detention of aliens seeking entry to Australia is permitted until either they are deported or they are granted an entry permit. In *Chu Kheng Lim v Minister for Immigration*<sup>12</sup>, the majority of the High Court held that then section 54R which provided that "a court is not to release from custody a designated person" was invalid as a derogation from judicial power. It was appropriate then, for those seeking entry to Australia as refugees on the MV Tampa, to bring before a court a question as to the validity of the government's actions.

### The right to legal representation.

Courts are also subject to law. The courts recognise a right to a trial which is fair. There are a number of elements required so that natural or substantial justice is done, which the courts must determine generally and in each specific case.<sup>13</sup> There is no doubt that the right to be heard by an appropriate court is fundamental. But what of the 'right' to be represented by a lawyer?

Because of the complexity of the law and court procedures, people are entitled to be represented by lawyers in our superior courts, if they wish to employ them. In the Australian system, that does not mean that anyone (even one who cannot afford a lawyer) is entitled to have one provided by the State. The various States do provide legal aid funding to enable very poor people to have some limited legal assistance, but it is inadequate.<sup>14</sup> Many people cannot get this assistance. They have to mortgage or sell their houses and cars and anything else they have in order to fund litigation (including defending themselves from claims) - or give up their own claim. This situation is of more concern in criminal cases where the defendant may go to jail if s/he loses the case, and most legal aid funding is directed into criminal defence cases. The courts in Australia do not have the power to require the States to fund all impecunious litigants.

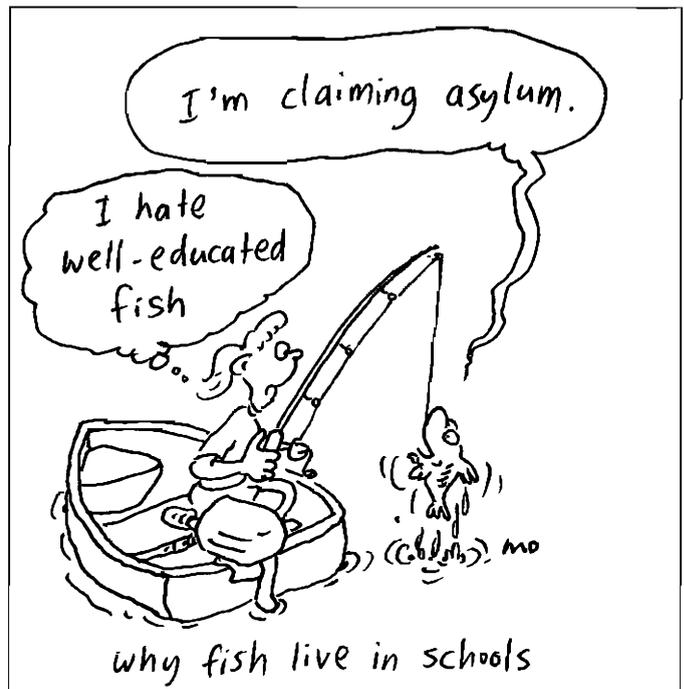
The courts cannot force the State to help litigants, but the courts do control the conduct of cases. In *Dietrich's*<sup>15</sup> case, an appeal was allowed, and a new trial ordered, because the trial judge did not stay or adjourn the trial until arrangements could be made for the accused to obtain counsel at public expense. In their joint judgment, Mason CJ and McHugh J said:

In our opinion, and in the opinion of the majority of this Court, the common law of Australia does not recognize the right of an accused to be provided with counsel at public expense. However, the courts possess undoubted power to stay criminal proceedings which will result in an unfair trial, the right to a fair trial being a central pillar of our criminal

justice system. The power to grant a stay necessarily extends to a case in which representation of the accused by counsel is essential to a fair trial, as it is in most cases in which an accused is charged with a serious offence.<sup>16</sup> [Emphasis added.]

Criminal cases are treated differently from civil litigation, and serious criminal cases require more stringent protection, because the liberty of the person is at stake. So in a criminal case although the State need not provide lawyers for defendants, it cannot proceed to trial against them without such representation where that will be unfair. Similar considerations should apply to refugee cases where people are being detained against their will, and may be forcibly returned to a place where their lives may be at risk. In Australia, we detain refugees who arrive without a pre-arranged visa. Their liberty is curtailed just as if they were convicted criminals. They need access to the courts to check that such detention is lawful. They also will need legal representation. Not only are they likely impecunious, they also have the dual disadvantages of an unknown or unfamiliar language and a legal system which may operate very differently from the system in their country of origin.

Unfortunately, the precedents which require a stay of criminal proceedings until an accused can obtain legal representation will not help someone who claims an important right is being infringed if that person cannot afford or is otherwise constrained from commencing litigation to enforce a right.



### Access to Justice through legal representation

Remember, in Australia, everyone is subject to the law, including the Prime Minister and the lawyers and each claimant for refugee status; even Queen Elizabeth II is subject to laws. Everyone who disputes the actions of the government and can raise a legitimate legal<sup>17</sup> question about the use of government power is entitled to be heard by a court. Every litigant is entitled to be represented by a lawyer. But what if a litigant cannot get to the court? What if he is men

tally disabled? What if she is in a coma after a car accident? What if he is a refugee on a boat miles from the mainland? In the Tampa case, it was argued, the refugees (and the ship which rescued them and its crew and cargo) were effectively being held captive by the Australian Government by use of military force. They were unable to communicate with Australians concerned about their welfare. The lawyers tried to offer them advice, and seek instructions to act, but were prevented by the government and the ship's owners and captain from talking to the refugees.

In many situations, where someone cannot instruct a lawyer, the court allows someone else to act and speak for that person (perhaps a parent who will employ a lawyer, sometimes just a lawyer). If the person concerned cannot give instructions, then the representatives must act in their best interests, as adjudged by the court.<sup>18</sup> In the case of alleged improper detention, even a stranger may apply for a writ of habeas corpus, because the liberty of the individual must be protected.

So everyone should be able to be represented before an appropriate court. But what if you cannot pay a lawyer?

## The cost of justice?

The ideal of service to the community is an essential element of a profession. Lawyers, as a group, accept an obligation to provide services free or at reduced cost to those who cannot otherwise obtain access to justice and for otherwise deserving clients, such as charities.<sup>19</sup> In many jurisdictions, law societies assist in arranging access to pro bono assistance.<sup>20</sup> Many lawyers and law firms engage in some pro bono work every year. Under the Federal Court rules provision is made for a pro bono scheme. On 4 September 2001, the Attorney General, The Hon. Daryl Williams AM QC MP, said:

Perhaps the most reassuring sign of the professionalism and the integrity of the Australian legal community is the 1.7 millions hours of pro bono work that lawyers do every year... [T]hese many individual efforts make an enormous contribution to the public good. They are a clear demonstration of the profession's generosity in contributing to the community. And they put the often abstract concept of justice - into practice.<sup>21</sup>

In Victoria (and elsewhere), the Public Interest Law Clearing House, an independent, not for profit legal referral service exists to help community groups and not for profit organisations, and individuals from disadvantaged or marginalised backgrounds to obtain pro bono legal assistance from the private legal profession.<sup>22</sup> Lawyers involved in the organisation (and others) were concerned about the refugees and tried to communicate with them but could not. They decided to act anyway. The Victorian Council for Civil liberties agreed to act as applicant in the MV Tampa litigation, along with Mr Vadarlis, who was prepared further to offer free migration advice to the refugees.<sup>23</sup>

In the Full Court of the Federal Court, French J (who had found against the applicants) praised them, saying:

The counsel and solicitors acting in the interests of the rescuees in this case have evidently done so pro bono. They have acted according to the highest ideals of the law. They have sought to give voices to those who are perforce voiceless and, on their behalf, to hold the Executive accountable for the lawfulness of its actions. In so doing, even if ultimately unsuccessful in the litigation they have served the

rule of law and so the whole community.

So what did happen in the Tampa litigation?

## Hearing at first instance

The lawyers and the court moved quickly. The MV Tampa had entered Australian territorial waters on Wednesday 29 August. The hearing before the Federal Court began at 5.30pm Friday 31 August and ran until 9.30pm that night, and from 11.00am-10.00pm Saturday and again until 10.00pm Sunday. Certain preliminary matters were resolved and the case continued on Monday through Wednesday.<sup>24</sup>

North J did not accept the claim that the government, while detaining the refugees pursuant to the Migration Act 1958 (Cth), must afford them the right to apply for visas on the mainland. He also indicated that the applicants had no standing (no right) to make that claim for the refugees without instructions. An individual has no standing to ask the court to enforce public rights unless her or his private rights are also affected, or she or he suffers some special damage because of the breach of law. Only the Attorney General has standing to enforce the law in the public interest - and he was a respondent to this application.<sup>25</sup>

His Honour accepted the second argument that, even if they had no rights under the Migration Act, the refugees were being detained by the Australian government without lawful authority. He granted a writ of habeas corpus ordering the government to release the detainees on the mainland (but the order was not to be carried out until an appeal against it was heard). Because the liberty of the person is so important, even a stranger can apply for habeas corpus.

His Honour indicated that he would award costs to the applicant lawyers. Burnside QC for the successful applicant, Victorian Council for Civil Liberties, indicated that they would not seek any costs from the government.

## Appeal in Full Federal Court

The government appealed the order and won in the Full Federal Court. Beaumont and French JJ held that, under the Commonwealth Constitution, the government could exercise executive power to exclude the refugees from entering Australia, and act to restrain their entry. They also considered that the government did not detain the refugees, but only acted to prevent them landing in Australia. Their inability to go anywhere else was due to their circumstances. The decision on appeal was not unanimous.

Black CJ expressed doubt as to the existence of a prerogative or executive power in the government to exclude refugees, whether at Common Law or under the Commonwealth Constitution. In any event, he held that the relevant legislation (primarily the Migration Act) covered the field and excluded the operation of any such executive power. He also agreed with the trial judge, North J, that the government was responsible for detaining the refugees, and that the remedy of habeas corpus was available. He would have dismissed the appeals.

Two Federal Court judges were prepared to grant the remedy and two were not, but the government was ultimately the successful party. The Full Court asked for further submissions on the issue of costs "particularly having regard to the public interest which the respondents [pro bono lawyers] have sought to advance in bringing these proceedings".<sup>26</sup> The government argued strenuously for a costs order against the lawyers. That is, they asked the Full Court

Vadarlis to pay the (potentially hundreds of thousands of dollars) costs to the government of the hearing before North J and the appeal.

## Further action

The government swiftly enacted new legislation to make it harder for people to claim any rights in similar circumstances. An application was made for special leave to appeal from the decision of the Full Court of the Federal Court to the High Court by Mr Vadarlis. This application was heard on 27 November 2001. Events had moved on, the statute law had been changed, and the refugees were all re-located in foreign countries. The issues litigated below now gave rise to only hypothetical questions, so the application was dismissed.

The High Court made no order as to costs. On 21 December 2001 the Full Court of the Federal Court handed down its decision on the question of costs, both of the trial and the appeal to the Full Court.

## The risk of acting pro bono - the costs order

Courts have a discretion to award costs. As a general rule, in civil litigation, the loser will be ordered to pay the costs incurred by the winner (as well as bearing her or his own costs). Where a party is successful on appeal, generally the loser on appeal will be ordered to pay the successful party's costs of both trial and appeal. The purpose of a costs order is to compensate the successful party for the cost of being involved in litigation, which has been incurred because of the conduct of the opposing party in commencing or defending the proceedings. The usual order - loser pays - will only be varied where there is good reason.

Various factors may, however, be relevant in the exercise of the court's discretion to make an unusual costs order. The dilemma for pro bono lawyers, especially volunteers as in this case who take on the role of litigant and hence the immediate risk of a costs order made against them personally, is that neither the public importance of the issues litigated, nor the fact that they are acting for free and not for personal gains are sufficient reason to vary the usual order that the loser should pay the costs of the winner. This was affirmed in the Full Court of the Federal Court. These are, of course relevant factors, as are the fact that the other side has won the case, and incurred substantial costs.

Since the preliminary matters litigated in the first week-end were partly resolved by a mediation process, Beaumont J held there was no clear 'winner' so no costs order should be made for that part of the litigation. In relation to the trial of the issues and the appeal, however, he would have ordered the pro bono lawyers to pay the costs. Some of the costs of appeal would have been recoverable from a fund available for such purposes. In this issue however, Beaumont was in the minority.

## The Conclusion

Black CJ and French J considered each of the factors mentioned above, and noted that these proceedings raised novel and important questions of law on which judicial opinion was divided (two Federal Court judges - one at trial and one on appeal - finding for the applicants and two for the respondents). In addition, it was significant that the government had since passed legislation to prevent the applicants

further litigating the issues, and to establish more clearly its legal right to act as it had. As well as the applicants acting with nothing to gain personally, their representatives (barristers) appeared for no charge and "the quality of representation (on all sides) ensured that the proceedings, and the important questions to which they gave rise, were pursued and resolved with expedition and efficiency"<sup>27</sup>. Their Honours held there should be no order as to costs of the appeal or the original hearing.

While they were ultimately unsuccessful, the lawyers who expended their time and energy to help people they had never met, with no hope of personal gain and the very real risk of substantial financial loss, upheld the best traditions of the profession. They also upheld the rule of law and ensured that the actions of the executive were scrutinised by the judiciary, as they properly should be in a free, democratic society. Regardless of one's views of the government policies on immigration, governmental action must remain subject to check, and the rights of the poor and powerless, whether citizen or alien, must be protected and championed by those with appropriate knowledge and understanding of our legal system, even at personal risk. The lawyers who undertook this task are to be commended.

1 The outline of the Tampa events is taken from the judgment of North J in *Victorian Council for Civil Liberties Incorporated v Minister for Immigration & Multi-cultural Affairs & Ors* [2001] FCA 1297. See also the websites of the Australian Department of Immigration and Multicultural and Indigenous Affairs at <http://www.immi.gov.au/facts/76offshore.htm>, accessed 16 March 2003; and the United Nations High Commission for Refugees at <http://www.unhcr.ch/cgi-bin/texis/vtx/statistics>, accessed 16 March 2003.

2 It seems likely that many would have been recognised as official refugees, but supervening events in Afghanistan caused a change in government and many were eventually repatriated home.

3 Pro bono publico means, literally, for the public good. Generally shortened to pro bono, it is used to refer to lawyers who provide legal services at no or low fee to assist poor or otherwise deserving parties seeking to protect or enforce legal rights.

4 The legal status of the people rescued by MV Tampa was unclear. For convenience I will refer to them as refugees - in the sense of those seeking refuge, although their legal entitlement to be granted refuge in Australia was not clear.

5 "Court Lifts Injunction - Boat People to Sail to PNG", *Sydney Morning Herald*. <http://old.smh.com.au/news/0109/03/national/national100.html>.

6 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

7 That is, the Prime Minister and other ministers, who form the executive government. This separation of powers is entrenched by the Commonwealth Constitution.

8 For a discussion on the scope of 'rule of law' see Evans, S, "The Rule of Law, Constitutionalism and the MV Tampa" [2002] Vol 13, *Public Law Review*.

9 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

10 During the 2003 war in Iraq you may have seen in the media that the Iraqi Ambassador was expelled from Australia.

11 Detention pending determination of entitlement to a visa is also lawful. See *Koon Wing Lau v Calwell* (1949) 80 CLR 533, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

12 (1992) 176 CLR 1.

13 Sir Anthony Mason, (1995) 19 *Criminal Law Journal* 7.

14 According to estimates from an Australian Law Reform Commission Report on Legal Aid, in December 1997 only 18% of Australia's population was eligible for legal aid funding for representation, where, by comparison, 75% of the population had been eligible for assistance in NSW in 1943 (dropping to 13% in NSW in 1973).

15 *Dietrich v The Queen* (1992) 177 CLR 292.

16 *Dietrich v The Queen* (1992) 177 CLR 292 at pp 297-298. Cf the US situation where a convicted person cannot be sentenced to a term of imprisonment unless, where necessary, the State has provided counsel; *Scott v. Illinois* (1979) 440 US 36.

17 There must be an actual question of law which affects the litigant. One cannot raise questions solely about government policy, or morality, or even a hypothetical legal question. Cf *McMillan, J*, "The Justiciability of the Government's Tampa Actions" [2002] Vol 13 *Public Law Review* 89.

18 In relation to standing in the Tampa case, consider the submissions made by the Human Rights and Equal Opportunity Commissioner available at <http://www.hreoc.gov.au/legal/guidelines/tampa.html>.

19 The Law Council of Australia has a policy statement defining pro bono publico which can be accessed at: <http://www.lawcouncil.asn.au/policies.html>.

20 For example, the New South Wales Law society runs a referral scheme for pro bono cases: see at <http://www.lawsocnsw.asn.au/legalhelp/about/probono.html>.

21 Williams D, "For the Public Good: Pro Bono and the Legal Profession in Australia" WebPages of the Attorney General for Australia, accessed 24 March 2003 at

<http://www.law.gov.au/www/attorneygeneralHome.nsf/Web+Pages/B4560C2DFA3AEAABCA256B59007B6D47?OpenDocument>.

22 Information accessed at: [http://lawvolunteers.org.au/volDBRecord\\_popup.asp?selection=34](http://lawvolunteers.org.au/volDBRecord_popup.asp?selection=34) on 24 March 2003. See also the organisation's WebPages: [www.pilch.org.au](http://www.pilch.org.au).

23 This information has been drawn from a speech delivered to the President's Lunch, Law Institute of Victoria on 15 May 2002, by Maxwell C, "Why Liberty Matters: Lawyers, The Rule of Law and Liberty Victoria" accessed at [http://www.liv.asn.au/news/pro\\_issues/miscdocs/maxwellsp.pdf](http://www.liv.asn.au/news/pro_issues/miscdocs/maxwellsp.pdf) on 24 March 2003.

24 Above FN 23.

25 Victorian Council for Civil liberties Incorporated v Minister for Immigration & Multi-cultural Affairs & Ors. [2001] FCA 1297.

26 Minister for Immigration and Multicultural Affairs & Ors v Eric Vadarlis [2001] FCA 1329 per French J.

27 Ruddock v Vadarlis [2001] FCA 1865 per Black CJ and French J.