The Tampa Decision: Refugee Rights versus the Executive's Power to Detain and Expel Unlawful Non-citizens

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I. Introduction

On that fateful day of September 11 2001, Justice North[1] granted a writ of *habeas corpus* for the release of the 433 Afghanis stranded on board the MV Tampa off the coast of Christmas Island. Only 7 days later, the majority of the Full Court of the Federal Court of Australia reversed his decision in *Ruddock and Others v Vadarlis and Others*[2], finding that there was no 'unlawful detention' attributable to the Commonwealth government such as to justify an order for release in the nature of *habeas corpus*.

II. Facts

On the 26th August 2001 a fishing boat carrying 433 people (referred to by the neutral term 'rescuees'), mostly Afghanis, was sinking in the Indian Ocean. The Australian authorities requested that the MV Tampa, a Norwegian registered container ship, rescue the people, which it did. The Tampa then headed for Indonesia, but changed course for Christmas Island after objections and threats by some rescuees that they would commit suicide if the captain did not change course. Many of the rescuees wanted to enter Australia and apply for protection visas. The Australian authorities refused to permit the Tampa's entry into Australian territorial waters. The port at Christmas Island was closed and vessels prevented from entering or leaving. However, on the 29th August the Tampa entered Australian territorial waters and stopped about four nautical miles off the coast of Christmas Island. In response, forty-five Special Armed Services (SAS) troops from the Australian Defence Force boarded the Tampa, and vessels were prevented from approaching the Tampa without the authorisation of the Commonwealth. On the 31st August the Victorian Council for Civil Liberties (VCCL) and Mr Vadarlis[3] filed applications claiming relief on behalf of the recuees against the Commonwealth (and certain of its Ministers, including the Minister for Immigration and Multicultural Affairs, Phillip Ruddock). They claimed, *inter alia*, that the rescuees were detained by the Commonwealth on board the MV Tampa without legal authority, and therefore entitled to an order for release in the nature of *habeas corpus*. The Commonwealth denied that the rescuees were 'detained', as they were free to go anywhere other than Australia, and argued that, in any event, it had a prerogative or executive power to expel the rescuees and to detain them for that purpose.

III. The Decision of North J at First Instance

North J prefaced his decision by stating that the issue of refugees was a topical one, and that the role of the court was not to determine Australia's policy on the treatment of refugees, or whether it was right or wrong. His role was to apply the law and determine if the government had acted in accordance with it.[4] North J then considered whether the rescuees had been detained for the purposes of *habeas corpus*. His honour rejected the

1 In the case of *Victorian Council for Civil Liberties v Minister for Immigration and Multicultural Affairs* (also *Vadarlis v Minister for Immigration and Multicultural Affairs*) (2001) 182 ALR 617.
2 (also *Ruddock and Others v Victorian Council for Civil Liberties and Others*) (2001) 183 ALR 1.
3 Mr Vadarlis is a solicitor practicing in Melbourne, who provides legal assistance to asylum seekers on a pro-bono basis.
4 Note 1 at [12].

Commonwealth's argument, based on the case of *Bird v Jones*,[5] that the rescuees were only partially restrained, being free to go anywhere other than Australia, and therefore not 'detained'. He considered that the distinction between partial and total restraint of freedom distracted attention from the more appropriate question where an order for release is sought. North J preferred to ask what is 'the effect of the restraint on the liberty of the person' and 'whether the restraint imposed is one which is not shared by the public generally'.[6] He considered that if the test were applied to the circumstances of the rescuees, an order for release would be justified.

North J found that there had been a total restraint on the rescuees' freedom as, in reality, the actions taken by the Commonwealth enabled it to retain 'complete control over the bodies and destinies of the rescuees'.[7] North J rejected arguments that the plight of the rescuees was self-inflicted, or that there were any avenues of escape available to them.[8] He found that the arrangements made by the government for the rescuees' relocation to either New Zealand or Nauru (for initial processing) only amounted to a continuation of their custody in a form chosen by those detaining them.[9]

On the question of whether there is a prerogative or executive power to expel aliens, and to detain them for that purpose, his honour considered it unlikely that such a power exists absent from statute. Further, given that the *Migration Act* contains comprehensive provisions concerning the removal of aliens, North J considered that the Act was intended to regulate the whole area of removal of aliens and left no room for any prerogative power on the subject.[10] Thus, he found that since the Commonwealth executive chose not to use the powers contained in the Act, but rather used an unlawful process to detain and expel the rescuees, the order for release could be justified.[11]

IV. The Full Court of the Federal Court — The Majority Decision

French J (with whom Beaumont J concurred) considered that there were two key issues on appeal:

(1) whether the executive power of the Commonwealth authorises the expulsion of the rescuees and their detention for that purpose; and
(2) whether the rescuees were subject to restraint attributable to the Commonwealth, and amenable to *habeas corpus*.[12]

1. Did the Commonwealth have a prerogative or executive power to expel illegal aliens from Australia?

French J considered that the executive power of the Commonwealth vested in the Crown by s61 of the Constitution, derived some if its content from the prerogative powers at common law, but is not a species of the royal prerogative.[13] The executive power under s61 can be 'abrogated, modified or regulated by laws of the Commonwealth'.[14] However, his honour contended that the operation of a statute upon an executive power was a matter of construction, and that a clear intention to limit or displace the executive power must be

5 (1845) 115 ER 668.
6 Note 1 at [86]–[87]. North J adopted the approach taken in the American cases of *Jones v Cunningham* 371 US 236 (1963) and *Chin Yow v United States* 208 US 8 (1907).
7 Note 1 at [81].
8 Note 1 at [68] [70]–[72].
9 Note 1 at [81].
10 Note 1 at [120], [122].
11 Note 1 at [102].
12 Note 2 at [162].
13 Note 2 at [183].
14 Note 2 at [181].

shown, either by express words or necessary implication.[15] French J warned that courts should be careful to find that a statute intends to displace an executive power merely by 'covering the field' of the subject matter of that executive power, as the object of the statute may be to just create another way of dealing with the subject matter.[16]

His honour affirmed the principle in *Musgrove v Toy*[17] and *Attorney-General (Canada) v Cain*,[18] and held that one of the executive powers of the Commonwealth, which is central to its sovereignty, is the power to prevent the entry of non-citizens, and includes powers incidental to that power such as the power to detain.[19] French J did not consider it necessary to consider the full extent of such a power. However, he held that this executive power would be sufficient, for the present purposes, to authorise adopting the necessary means to prevent the entry of a vessel into an Australian port, and to restrain persons from entering into Australia or compelling them to leave.[20] French J then turned to the question of whether the *Migration Act* evinces a clear and ambiguous intention to limit the use of the executive power in the way it was used in this case. In answering this question his honour considered that fact that the Act only confers power, and does not operate in such a way that is necessarily inconsistent with the subsistence of the executive power. Further, French J did not consider that Australia's entry into the *Convention Relating to the Status of Refugees 1951*, an in particular its obligations under Article 33,[21] had the effect of fettering the executive power, especially given that nothing the executive had done in the present case amounted to a breech of these obligations.[22] Consequently, his honour found that the steps taken by the Commonwealth in relation to the Tampa to prevent the rescuees form entering the migration zone and arranging for their departure, were within the scope of the its executive power, pursuant to s61 of the Constitution.[23] He considered that if parliament were concerned about the existence of an executive power in this area, it could exclude it by clear words to that effect in legislation.[24]

2. Were the rescuees subject to restraint attributable to the Commonwealth, and amenable to habeas corpus*?*

On this issue, French J agreed with North J at first instance and Black CJ, to the extent that he distinguished the cases on detention in the context of false imprisonment, and denied that total restraint of movement was necessary for detention amenable to habeas corpus. His honour considered the relevant question to be whether, on the facts, there was a restraint on a person's liberty of free movement which was not authorised by law.[25] However, his honour considered that where an authority did something in respect of persons which, in combination with other factors, resulted in their freedom of movement being curtailed, that restraint may not be attributable to the authority for the purpose of habeas corpus. Consequently, his honour found that the rescuees were not subject to restraint attributable to the Commonwealth.[26] Critical to both French and Beaumont JJ's

15 Note 2 at [184].
16 Note 2 at 185.
17 [1891] AC 272.
18 (Cain's case) [1906] AC 542.
19 Note 2 at [193].
20 Note 2 at [197].
21 ('Refugee Convention'). Article 33(1) of the Convention provides that '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 his race, religion, nationality, membership of a particular social group or political opinion'.
22 Note 2 at [203]. See also the comments of Beaumont J at [126].
23 Note 2 at [204].
24 Note 23.
25 Note 2 at [210].
26 Note 2 at [211]–[213].

reasoning was their view that in reality nothing the Commonwealth had done amounted to a restraint upon the rescuees freedom, since they had neither the right nor the freedom to travel to Australi.[27] The actions of the Commonwealth were 'properly incidental to preventing the rescuees from landing in Australian territory, where they had no right to go, and their inability to go elsewhere derived from a situation in which they had been placed by other factors'.[28] Also, French J considered that the NZ and Nauru arrangements provided the only practical escape from the situation, and did not constitute a restraint upon freedom attributable to the Commonwealth.

V. The Dissent of Black CJ

His honour followed the decisions in *Robtelmes v Brennan*[29] and *Cain's case*,[30] that the nation-state's sovereign power to exclude illegally entering aliens from its borders in times of peace, carries with it the ancillary powers of detention and expulsion. However he considered that this power derives only from statute.[31] With respect to the Commonwealth's argument that, in detaining and expelling the rescuees, it acted in exercise of its prerogative power to exclude aliens, Black CJ doubted that such a prerogative power still existed at common law.[32] Similarly he considered that 'it would be a very strange circumstance' for such a power, doubtful at best and historically long unused, to 'emerge in a strong modern form from s61 of the Constitution by virtue of general conceptions of national interest'.[33] However his honour did not find it necessary to express a concluded view on the issue of whether a prerogative power to exclude or expel exists at common law, since he considered that any power of this nature had, in Australia, been displaced.

His honour considered that where a 'prerogative is relied on as an alternative source of power to action under a statute, the prerogative will be held to be displaced when the statute covers the subject matter'.[34] On this point he affirmed the comments of Lord Denning and Lord Roskill in *Laker Airways Ltd. v Department of Trade*,[35] who held that the Crown should not be able to invoke the prerogative to achieve through the 'back door' that which cannot lawfully be achieved by the statute. Black CJ considered that it was not necessary to strictly require that the *Migration Act* manifest a clear intention to abrogate any prerogative power, since the existence of the prerogative power to exclude or expel aliens at common law was at best doubtful, and operated in field that had for a long time been the concern of parliament. His honour held that the provisions of the *Migration Act* and *Border Protection Legislation Amendment Act*,[36] when considered together, provide a comprehensive regime for the control of Australia's borders and the patrol of territorial waters in situations such as those the rescuees were in at the relevant time. If the Commonwealth executive had applied the regime of detention and bringing into the migration zone provided by s189 of the *Migration Act*, it would have not only subjected the rescuees to lawful detention, but given them the protection and rights under the Act, such as a claim for refugee status. Thus, Black CJ held that the parliament intended that in the field of exclusion, entry and expulsion of aliens the *Migration Act* should operate,

27 Note 2 at [125] and [214].
28 Note 2 at [212].
29 (1906) 4 CLR 395.
30 Note 18.
31 Note 2 at [7].
32 Note 2 at [29].
33 Note 2 at [30].
34 Note 2 at [37].
35 [1977] 1 QB 643 at 706–7, 722.
36 1999 (Cth).

to the exclusion of any parallel system of unregulated executive power not conferred by the parliament.[37]

Having established that there was no non-statutory executive or prerogative authority for the detention of the rescuees, his honour then proceeded to consider whether they had been detained for the purposes of *habeas corpus*. He distinguished the concept of 'detention' requiring actual detention and complete loss of freedom as being more applicable to cases relating to the tort of false imprisonment. Black CJ considered that the requisite elements of detention, necessary to found a writ of *habeas corpus*, are custody and control.[38] His honour rejected the Commonwealth's arguments, stating that the question should not be 'would the person be free if they went somewhere else?' but rather 'is the person detained here and now?'.[39] Black CJ's main point of distinction from the majority on this issue was that he did not consider the fact that the rescuees did not have any 'right' to enter Australia relevant to the question of whether the rescuees were detained.[40] He instead focussed on whether the rescuees were, in a real and practical sense, detained by the Commonwealth. For similar reasons to the trial judge's, his honour found that the rescuees were under the custody and control of the Commonwealth. He also agreed with North J that their was no reasonable means of escape, either on the Tampa or another vessel, and that the arrangements for the rescuees' relocation to New Zealand or Nauru only amounted to a continuation of the Commonwealth's control or custody in another form.[41]

The High Court refused special leave to appeal the decision.[42]

VI. Conclusion

In *Ruddock and Others v Vadarlis and Others* the Federal Court had the difficult task of balancing two fundamental and the competing rights: the right of the state to secure its frontiers, and the rights of individuals, refugee or otherwise, not to be subjected to unlawful detention. The Court's task was made even more difficult by being put under the spotlight of the intense public debate over the illegal refugee crisis. The Full Federal Court made the significant decision to affirm the existence of a sovereign right, vested in the executive government by virtue of s61 of the Constitution, to expel or exclude illegal aliens, and, if necessary, to detain them for that purpose. However, Black CJ provides a strong dissenting voice. He raises the valid question, should the executive government be permitted to do by the 'back door' what it cannot lawfully do under the *Migration Act*, especially where this area has long been regulated by Parliament. His argument is particularly striking when considered in light of the fact that the *Migration Act* and the *Border Protection Legislation Amendment Act*, which contemplated situations like those of the Tampa, regulates the actions of those exercising its powers and affords some protection and rights to unlawful non-citizens. Black CJ also alerts us to the dangers of the approach adopted by the majority that in determining whether there has been restraint upon a person's freedom amenable to habeas corpus, it is relevant that they do not have the 'right' to enter Australia. Should people be denied the protection afforded by *habeas corpus* simply because they are detained on a vessel out at sea and do not have a right to enter Australia? Surprisingly, there was scant consideration of Australia's international law obligations, except for the brief comments of French and Beaumont JJ that, even if the rescuees on the Tampa were

37 Note 2 at [61], [64].
38 Note 2 at 69.
39 Note 2 at 73.
40 Note 2 at [74]–[75].
41 Note 2 at [84].
42 *Vadarlis v Minister for Immigration and Multicultural Affairs* (2001) 22(20) Leg Rep SL1 per Gaudron, Gummow and Hayne JJ.

found to be refugees under the *Refugee Convention* definition, Australia's obligations under the Convention did not require the rescuees to be brought into Australia, but only that they not be *sent back* to the country from which they were fleeing from persecution. However, French J did acknowledge, in obiter, that such international law obligations might have consequences with respect to the processes to be applied in exercising any executive, or statutory, power.[43]

In the wake of Spetember 11th and the Tampa crisis, the Federal Government has rushed several amendments to migration laws and border protection legislation[44] through parliament in a bid to enhance its statutory powers. As the problem of illegal boat people continues to plague Australia, it will be interesting to see if the executive power to expel and exclude illegal aliens (and the powers incidental thereto), will be invoked more frequently or allowed to expand further in order to avoid the protections and rights afforded to such persons under common law, statutes, and through Australia's international law obligations.

43 Note 2 at [203].

44 These include: *Migration Legislation Amendment Act (No 1)* 2001; *Migration Legislation Amendment Act (No 6)* 2001; *Border Protection Act* 2001; *Border Protection (Validation and Enforcement Powers) Act* 2001; *Migration Amendment (Excision from Migration Zone) Act* 2001; and *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act* 2001.