

Case Note

Out of Sight but Not out of Mind: *Plaintiff M61/2010E v Commonwealth*

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Abstract

On Armistice Day, 2010, the High Court handed down a unanimous decision upholding the rights of asylum seekers held on Christmas Island to have their applications decided according to law and the rules of procedural fairness. The decision in *Plaintiff M61/2010E v Commonwealth* ('*Plaintiff M61*') was widely regarded as a victory for the rule of law in Australia. This case note first dissects the court's sophisticated and concise reasoning in *Plaintiff M61*. It then considers briefly the implications of the decision to continue processing asylum seekers on Christmas Island. The implications for plans to re-institute regional processing in Papua New Guinea or Nauru are considered in greater detail. The argument of this case note is an optimistic one: that the centrality of the rule of law in Australian jurisprudence suggests strongly that an attempt to remove asylum seekers from the reach of the courts may not be as easy as taking them offshore.

I Introduction

On Armistice Day 2010, the High Court handed down a unanimous decision upholding the rights of asylum seekers held on Christmas Island to have their applications decided according to law and the rules of procedural fairness. The decision in *Plaintiff M61/2010E v Commonwealth* ('*Plaintiff M61*')¹ was widely regarded as a victory for the rule of law in Australia. This case note first dissects the court's sophisticated and concise reasoning in *Plaintiff M61*. It then considers briefly the implications of the decision to continue processing asylum seekers on Christmas Island. The implications for plans to re-institute regional processing in Papua New Guinea or Nauru are considered in greater detail. The argument of this case note is an optimistic one: that the centrality of the rule of law in Australian

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¹ (2010) 272 ALR 14.

jurisprudence suggests strongly that an attempt to remove asylum seekers from the reach of the courts may not be as easy as taking them offshore. Once asylum seekers enter Australian territory, they are Australia's responsibility, and the link between status assessment and granting a visa may prove difficult to avoid. As long as the High Court remains devoted to guarding and ensuring the operation of the rule of law in Australia, governments who attempt to exclude judicial oversight of executive actions face an uphill battle.

II Background Facts

Plaintiffs M61 and M69 were Sri Lankan nationals who entered the territory of Christmas Island, which, for the purposes of the *Migration Act* 1958 (Cth) ('*Migration Act*') is an 'excised offshore place.'² As unlawful non-citizens in an excised offshore place, the plaintiffs were detained on Christmas Island pursuant to s 189(3). Section 46A(1) provides that an unlawful non-citizen in an excised offshore place cannot apply for a visa. The only way such a person may obtain a visa is if the Minister exercises his or her power under s 46A(2) to 'lift the bar' and allow the person to make a valid visa application. Under s 46A(7), the Minister does not have to consider exercising that power. A similar non-compellable power exists in s 195A, under which the Minister may grant a visa for which there has not been a valid application.

Following an announcement by the Minister for Immigration and Citizenship ('the Minister') on 29 July 2008, the Department of Immigration and Citizenship ('the Department') developed a two-stage system to assess the status of persons claiming to be owed protection obligations who entered Australia in an excised offshore place.³ First, there would be a Refugee Status Assessment ('RSA') carried out by officers of the Department. If the assessment was unfavourable, an asylum seeker could apply for an Independent Merits Review ('IMR'), carried out by independent contractors engaged by the Department. In this case, the RSA and IMR concluded that neither plaintiff was a person to whom Australia owed protection obligations.

Each plaintiff claimed a denial of procedural fairness and error of law in carrying out the RSA and IMR. Each plaintiff claimed relief by way of injunction, certiorari and mandamus. Plaintiff M69 also claimed relief by way of declaration.

² *Migration Act* s 5(1).

³ Chris Evans, 'Labor unveils new risk-based detention policy' (Media Release, 29 July 2008) <<http://www.minister.immi.gov.au/media/media-releases/2008/ce08072.htm>>.

III Reasoning

A Jurisdiction

The court had jurisdiction to hear the matter arising out of its original jurisdiction under s 75 of the *Constitution*, in particular: s 75(iii) (matters in which the Commonwealth is a party); s 75(v) (matters in which mandamus and injunction are sought against an officer of the Commonwealth — here the Minister and departmental officer); and perhaps s 75(i) (matters arising under any treaty — here the *Convention Relating to the Status of Refugees*⁴).⁵

B Validity of s 46A

Plaintiff M69 submitted that s 46A of the *Migration Act* was invalid on the grounds that it breached Ch III of the *Constitution*. The argument proceeded from the proposition that Ch III confers on the judicature the power to declare and enforce ‘the limits of the power conferred by statute upon administrative decision-makers.’⁶ Accordingly, every grant of power must have enforceable limits. More specifically, it was argued that s 46A(7), which provided that the Minister need not consider the exercise of the power, was invalid.⁷

The court made short work of this argument, stating that s 46A(7) was not of ‘so little content’⁸ as to fail to reach the threshold of an exercise of legislative power. The court held that ‘[m]aintenance of the capacity to enforce limits on power does not entail that consideration of the exercise of a power must always be amenable to enforcement.’⁹ If the Minister decided to consider the exercise of the power, s 75(v) could be engaged to enforce the limits of that exercise. The challenge to the validity of s 46A(7) having failed, there was no question of the validity of the other provisions of s 46A.

⁴ Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) (*Refugees Convention*).

⁵ *Plaintiff M61* (2010) 212 ALR 14, 26.

⁶ *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135, 152–3.

⁷ *Plaintiff M61* (2010) 272 ALR 14, 27.

⁸ *Ibid.*

⁹ *Ibid.* 28.

C Lawfulness of Detention

The lawfulness of the plaintiffs' detention was not at issue in the proceedings. However, the foundation of the lawfulness of their detention was key to the outcome of the case. The plaintiffs argued that their detention was lawful under statute. Specifically, detention was lawful in order to allow inquiries to be made 'under and for the purposes of the *Migration Act*.'¹⁰ The Commonwealth, on the other hand, argued that the inquiries made while the plaintiffs were detained had no statutory foundation, but that the detention was lawful because the inquiries 'might, but need not, lead to an exercise of power under the *Migration Act*.'¹¹

The statutory foundation for the initial detention of the plaintiffs was s 189(3) of the *Migration Act*, which provides, relevantly, that an unlawful non-citizen must be kept in detention until either removed from Australia in accordance with s 198, or granted a visa. Section 198(2) relevantly provides that an officer must remove 'as soon as reasonably practicable' an unlawful non-citizen detained under s 189(3), who has not been immigration cleared and who has not made a valid application for a visa. In this case, neither plaintiff could be immigration cleared, and neither could apply for a visa: a catch-22 situation. The conditions for removal therefore seem to have been satisfied as soon as the plaintiffs were taken to Christmas Island, and any prolonged detention was therefore unlawful.

However, the court relied on the text and historical context of the *Migration Act* to explain why s 198(2) allows prolongation of detention while refugee status is assessed. First, the text of s 198(2) includes as a prerequisite for removal that the person has not made a valid visa application. However, s 198(2) applies to persons detained under s 189(2), (3) or (4). A person detained under any of these powers is precluded from making a valid visa application by s 46A(1). The court held that the fact that s 198(2) contemplates that such a person might make a valid visa application 'suggests strongly'¹² that detention is lawful while the Minister makes inquiries in relation to his power to lift the bar under s 46A(2).

Second, the *Migration Act* was enacted to ensure that Australia complies with its international obligations under the *Refugees Convention* and *Protocol*. The main obligation that Australia owes is not to return a person to a country where he or she has a 'well-founded fear of persecution'.¹³ Australia, through the *Migration Act*, has chosen

¹⁰ Ibid 16.

¹¹ Ibid.

¹² Ibid 21.

¹³ *Refugees Convention*, art 33.

to meet this obligation by granting protection visas in suitable cases. The insertion of s 46A and s 198A therefore reflects ‘a legislative intention to adhere to ... Australia’s obligations under the *Refugees Convention* and the *Refugees Protocol*.’¹⁴ It follows that the obligation to remove a person who meets the criteria in s 198(2) should be read as allowing detention while such enquiries are made as will enable the Minister to decide whether to exercise his power under s 46A or s 195A, these being the only provisions that ensure Australia meets its international obligations in relation to refugees.

The court specified that while s 198(2) must be read as accommodating the possible exercise of power under s 46A or s 195A, this did not necessarily show that the RSAs and IMRs had a statutory basis.¹⁵

D Statutory or Non-Statutory Basis of RSAs and IMRs

The Minister’s announcement on 29 July 2008 was that the system of RSAs and IMRs was to be applied to *all* unlawful non-citizens who entered Australia by entering an excised offshore area and who raised ‘claims or information which prima facie may engage Australia’s protection obligations.’¹⁶ The manuals stated that the purpose of the RSAs and IMRs was to advise the Minister whether Australia’s obligations under the *Refugees Convention* were engaged. There was emphasis on the fact that the processes were ‘non-statutory’ and as a result, the *Migration Act* and case law relating to the *Migration Act* were merely guides.

The court noted that six considerations were relevant to the determination of the statutory or non-statutory basis of power to conduct RSAs and IMRs:

First, the powers under ss 46A and 195A may *only* be exercised by the Minister *personally*. Second, the assessment and review were made in consequence of a ministerial direction. Third, in the circumstances of these cases, the continued detention of an offshore entry person, while an assessment and review were conducted, was lawful only because the relevant assessment and review were directed to whether powers under either s 46A or s 195A could or should be exercised. Fourth, if, on assessment or subsequent review, it was decided that Australia did have protection obligations to the claimant, a

¹⁴ *Plaintiff M61* (2010) 212 ALR 14, 23.

¹⁵ *Ibid.*

¹⁶ *Ibid* 24.

submission concerning the exercise of power under s 46A would be made to the Minister. Fifth, the plaintiffs submitted that a favourable assessment always or, as the plaintiffs put it, 'automatically' led to the Minister exercising power under s 46A. Sixth, if, on assessment or subsequent review, it was decided that Australia did not have protection obligations to the claimant, no submission would be made to the Minister (emphasis in original).¹⁷

The central tension introduced by these considerations is between the lawfulness of continued detention under the *Migration Act* on the one hand, and the alleged non-statutory basis of the procedures that prolong the detention in the first place.¹⁸ Ultimately, the Commonwealth could not have its cake and eat it too. The court reasoned, avoiding mention of the controversial decision in *Al-Kateb v Godwin*,¹⁹ that 'it is not readily to be supposed that a statutory power to detain a person permits continuation of that detention at the unconstrained discretion of the Executive,'²⁰ if there is another construction reasonably open. In this case, the tension could be resolved if the Minister's announcement in July 2008 was understood as a decision by the Minister to consider exercising his powers under ss 46A or 195A in all cases where an offshore entry person makes a claim for protection.²¹ Neither section obliges the Minister to consider exercising the power. However, once the Minister decided to consider exercising his powers under s 46A and s 195A in every case, in order not to breach Australia's international obligations, the RSA and IMR procedures were characterised as manifestations of a statutory exercise of power.

E Obligation of Fairness and Lawfulness

In *Annetts v McCann*, Mason CJ, Deane and McHugh JJ held:

It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.²²

The Commonwealth submitted that even if, contrary to their argument, a power was being exercised under s 46A(2), there was no obligation to afford procedural fairness because it is a power to confer a

¹⁷ Ibid 28–9.

¹⁸ Ibid 29.

¹⁹ (2004) 219 CLR 562.

²⁰ *Plaintiff M61* (2010) 272 ALR 14, 29.

²¹ Ibid 30.

²² (1990) 170 CLR 596, 598.

right rather than a power to ‘destroy, defeat or prejudice’ a person’s rights.²³ The court pointed out, however, that it is not just rights, but ‘interests or legitimate expectations’ that may be prejudiced.²⁴ The court declined to explore the position of ‘legitimate expectations’ in this area of the law, but said that the obligation to afford procedural fairness ‘extends to the exercise of a power which affects an interest or a privilege.’²⁵

While an offshore entry person had no right to have the Minister consider exercising his power, nor a right to have the power exercised, the rights and interests of the plaintiffs were affected because the inquiries made under and for the purposes of s 46A or s 195A prolonged their detention. The court held that it was of no consequence that the plaintiffs may have endured the prolonged detention ‘without protest.’²⁶ As there were no plain words of necessary intentment excluding the implications, it follows that the RSAs and IMRs, as manifestations of a statutory power to consider the exercise of power, must be procedurally fair and must be carried out according to law.

F *Were the RSAs and IMRs Fair and Lawful?*

With respect to Plaintiff M61, failure to treat the *Migration Act* and case law relating to its interpretation as binding on the decision maker was an error of law.²⁷ Plaintiff M61 claimed he faced persecution in Sri Lanka as a member of a particular social group — ‘Tamil business owners,’ or ‘Tamils who are perceived to be wealthy.’²⁸ Failure to have regard to this claim was a denial of procedural fairness. Failure to put to the plaintiff country information which had a bearing on the decision was also a denial of procedural fairness.²⁹

Similarly, with respect to Plaintiff M69, there was error of law in that the decision maker did not treat Australian legislation and case law as binding.³⁰ Further, the failure to put to the plaintiff country information concerning the treatment of failed asylum seekers returning to Sri Lanka was a denial of procedural fairness.³¹ It is interesting to note that under the *Migration Act*, onshore applicants to the Refugee Review Tribunal do not have a right to be provided with adverse country information.

²³ *Plaintiff M61* (2010) 272 ALR 14, 32.

²⁴ *Ibid.*

²⁵ *Ibid* 33, quoting *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 360 (Mason J).

²⁶ *Plaintiff M61* (2010) 272 ALR 14, 33.

²⁷ *Ibid* 35.

²⁸ *Ibid* 34–6.

²⁹ *Ibid* 36.

³⁰ *Ibid* 37.

³¹ *Ibid.*

G Remedy

The plaintiffs claimed relief by way of injunction, certiorari, mandamus, and declaration. It was not necessary to grant an injunction since there was no danger that the plaintiffs would be removed from Australia while the case was pending.³²

Since the Minister had no duty to consider the exercise of the power, the court could not grant mandamus to compel the Minister to do so. The fact that mandamus was not available meant that the granting of certiorari would be ineffective.³³ Certiorari and mandamus are usually granted together, and if the Minister cannot be compelled to re-exercise his power in accordance with law, there is little utility in quashing the decision.³⁴ The court noted that when mandamus and certiorari are not available, a declaration normally should not be made.³⁵ However, in this case a declaration could be granted because it was directed to determining a legal controversy rather than a hypothetical question.³⁶ The force of a declaration is not to be underestimated, as a person acting contrary to a declaration could be held in contempt of court. Further, the decision had the effect of ensuring Australia complied with its international obligations, the importance of which are evidenced by the legislature and the executive, and reflected in the public interest.³⁷

A declaration was therefore granted that:

in recommending to the Minister that the plaintiff was not a person to whom Australia has protection obligations, the third-named defendant made an error of law, in that he (or in the matter of Plaintiff M69, she) did not treat the provisions of the *Migration Act* 1958 (Cth) and the decisions of Australian courts as binding, and further, failed to observe the requirements of procedural fairness.³⁸

³² Ibid 17.

³³ Ibid 37.

³⁴ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441, 461.

³⁵ *Plaintiff M61* (2010) 272 ALR 14, 38.

³⁶ Ibid.

³⁷ Ibid 38–9.

³⁸ Ibid 39.

IV Implications

A *Processing on Christmas Island*

The only thing offshore processing does is put people at risk out of sight and out of mind, away from supporters and advocates, and out of reach from adequate mental and physical health services they often so desperately need.³⁹

The objective behind processing asylum seekers offshore in ‘excised areas’ is to limit access to Australian law and Australian courts. The same objective lay behind the Howard government’s ‘Pacific Solution’. The asylum seekers’ isolation is both physical, cutting them off from legal advice and other services, and metaphorical, disallowing access to the safeguards and checks provided by the Australian system of judicial review. However, after *Plaintiff M61*, this objective appears to have been defeated. Ironically, not only has the primary purpose been eroded, but rights which have been modified or removed for onshore applicants via Division 4 of Part 7 of the *Migration Act* are not so removed for offshore applicants. This means that applicants in excised offshore places potentially have more rights to procedural fairness than onshore applicants: an outcome the government surely was not anticipating. Since asylum seekers offshore now have the same (or greater) legal protection as those onshore, some have suggested that ‘the case for offshore processing crumbles’.⁴⁰

The court, however, did not strike down any part of the scheme. Instead, it altered the underlying assumptions on which the scheme was operating: whereas the government believed its assessment process was ‘non-statutory’ and thus unreviewable, the court found that the process was in fact statutory and hence subject to judicial review. The government is therefore not compelled to stop offshore processing, and the two-tier system of onshore/offshore immigration processing can (and will) continue. Further, Julian Burnside QC commented that while the government may not be able completely to circumvent the decision, ‘they might be able to take some of the force out of it.’⁴¹ For example, the government would probably be able to legislate around the decision by removing the right to a fair hearing. As long as the language is clear and, importantly after *Plaintiff M61*, as long as the courts are not taken

³⁹ Sunile Govinnage, ‘Off the Wall on Refugee Policy’ (9 May 2011) *The Drum* <<http://www.abc.net.au/unleashed/1843040.html>>.

⁴⁰ Michael Gordon, ‘History Takes High Ground’, *Sydney Morning Herald*, 12 November 2010.

⁴¹ ABC Television, ‘High Court’s Asylum Decision Allows “Fair” Hearings’, *Lateline*, 11 November 2010 (Julian Burnside) <<http://www.abc.net.au/lateline/content/2010/s3064204.htm>>.

completely out of the picture, there seems to be nothing stopping this kind of action.⁴² Such a response, however, would have been unfortunate, and has not occurred.

The government's response to the decision so far has been to implement a new Protection Obligation Determination process to replace the RSA and IMR processes.⁴³ The new process was implemented on 1 March 2011 and applies to people arriving in Australia in excised offshore places from that date, and also to those on Christmas Island who had not yet been interviewed at that time.⁴⁴ The RSA has been replaced with a Protection Obligation Evaluation ('POE'), conducted by a departmental officer. The IMR has been replaced with an Independent Protection Assessment ('IPA') conducted by an 'independent protection assessor.'⁴⁵ The key differences between the old and new schemes are that POE officers may send matters straight to the IPA when an unfavourable decision is made, removing the need for a review application. Assessments are carried out according to law and the standards of procedural fairness.⁴⁶ The Department said a key focus was to give asylum seekers 'an opportunity to respond to any information that may have a negative effect on the assessment of their claims'.⁴⁷ To this end, there has been a review of existing procedures and training, an update of procedural guidelines for staff and training officers, and recognition of the legitimate role of judicial review.⁴⁸

It was never very likely that the government would cease offshore processing altogether. The alleged deterrent effect and the political effect of physically removing the issue from Australia are too strong. However, now that procedural fairness must be accorded to offshore applicants for refugee status, the practical legal effect of offshore processing has considerably diminished. The costs to the Australian government, on the other hand, have not. Between the next financial year and the end of 2014-15, the government estimates it will

⁴² George Williams and Andrew Lynch, 'The High Court on Constitutional Law: The 2010 Term' (Paper presented at the Gilbert and Tobin Centre of Public Law Constitutional Law Conference, Sydney).

⁴³ Immigration Advice and Rights Centre Inc, *Immigration News 2: News in Brief* (29 April 2011) Immigration Advice and Rights Centre Inc <http://www.iarc.asn.au/_blog/Immigration_News_2/post/News_in_Brief/>.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ Chris Bowen, 'Government Announces Faster, Fairer Refugee Assessment Process' (Media Release, 7 January 2011) <<http://www.minister.immi.gov.au/media/cb/2011/cb157059.htm>>.

⁴⁸ Department of Immigration and Citizenship, 'Changes to Refugee Status Determination' (Fact Sheet, 2011) 2.

have spent \$2.5 billion on offshore processing.⁴⁹ The human costs in terms of the mental health of detainees have also continued to rise, evidenced by the destructive protesting in March this year.⁵⁰

B Processing on Manus Island or Nauru

Despite decrying the Pacific Solution as a ‘cynical, costly and ultimately unsuccessful exercise’,⁵¹ the current Labor government seems set to reinstitute a scheme almost exactly the same as the one it had criticised. The government has indicated that it intends to reinstitute regional processing, most likely on Manus Island in Papua New Guinea.⁵² If a Coalition government comes to power at the next election, it is also likely to reinstitute the Pacific Solution, probably by re-opening the detention centre on Nauru.⁵³ Not only will this be costly — the government spent about AU\$1 billion processing about 1700 detainees on Manus and Nauru between September 2001 and June 2007⁵⁴ — but there is also no guarantee that a return to the Pacific Solution will avoid the legal ramifications of the decision in *Plaintiff M61*. The question of whether asylum seekers processed in Nauru during the Pacific Solution were entitled to procedural fairness and, consequently, access to judicial review, was never considered by an Australian court.⁵⁵

Predictably, Immigration Minister Chris Bowen has said that plans for a regional processing centre would not be affected by the High Court’s decision.⁵⁶ Equally predictably, David Manne, the lawyer who led the High Court challenge, and head of the Refugee and Immigration Legal Centre, argues that it is ‘unlikely the government

⁴⁹ Leo Shanahan, ‘Asylum-Seeker Influx Sees Detention Bill Rocket’, *The Australian* (Sydney), 11 May 2011.

⁵⁰ See, eg, Chris Bowen, ‘Independent Review into Christmas Island Detention Centre Protests and Escapes’ (Media Release, 18 March 2011). <<http://www.minister.immi.gov.au/media/cb/2011/cb162787.htm>>; ABC Television, ‘Beanbag Bullets Fired on Christmas Island Rioters’, *Lateline*, 15 March 2011 <<http://www.abc.net.au/lateline/content/2011/s3164930.htm>>.

⁵¹ Chris Evans, ‘Last Refugees Leave Nauru’ (Media Release, 8 February 2008) <<http://www.minister.immi.gov.au/media/media-releases/2008/ce08014.htm>>.

⁵² Malcolm Farr, ‘Julia Gillard Forced into Embarrassing Retreat on Manus Island Asylum Seeker Processing Centre’ *News.com* (online), 6 May 2011 <<http://www.news.com.au/top-stories/julia-gillard-forced-into-embarrassing-retreat-on-manus-island-asylum-seeker-processing-centre/story-e6frfkp9-1226051086818>>.

⁵³ Tony Abbott, *Interview With Derryn Hinch*, *Radio 3AW* (9 May 2011), Tony Abbott <<http://www.tonyabbott.com.au>>.

⁵⁴ Farr, above n 52.

⁵⁵ Mary Crock and Daniel Ghezelbash, ‘Due Process and the Rule of Law as Human Rights: The High Court and the “Offshore” Processing of Asylum Seekers’ (2011) 18 *Australian Journal of Administrative Law* 101, 113.

⁵⁶ Paul Maley and Sid Maher, ‘Offshore Detention “Likely to be Longer” After High Court Ruling’, *The Australian* (Sydney), 12 November 2010.

could cure the fundamentally flawed process ... by sending people to Timor or Nauru.⁵⁷ Whether the High Court's decision in *Plaintiff M61* will have any effect on regional processing is hard to say without knowing exactly how the government intends to implement the scheme, but we can make some tentative predictions.

The key obstacle facing the Commonwealth in *Plaintiff M61* is unlikely to arise in a case concerning regional processing. The problem for the Commonwealth was that the detention of asylum seekers was made lawful under the *Migration Act*, and the government could not then deny that decisions made about the asylum seekers were made outside of that statutory regime. If detention occurs outside Australia, however, the legality of such detention is determined by reference to the laws of that country. This is the foreign act of state doctrine. That is: an allegation that a foreign sovereign state has acted unlawfully in its own territory is not justiciable in an Australian court.⁵⁸ The doctrine may not apply where the relevant conduct of the foreign state involves a fundamental breach of public international law or human rights standards.⁵⁹ However, the detention of asylum seekers in Nauru was held lawful under Nauru law by the High Court, acting as the ultimate appellate court for Nauru.⁶⁰ Further, in *Sadiqi v Commonwealth (No 2)*, the court held that Nauru's segregation of non-citizens while refugee claims were being determined or pending their removal could not involve a clear violation of any international law.⁶¹ Therefore, assuming the foreign act of state doctrine applies, the link between detention and status assessment could be broken, such that the Commonwealth could implement a non-statutory and thus non-reviewable process of assessment.

There are two counter arguments to this prima facie position. First, the legality of detention on Manus Island or Nauru might be reviewable. Second, even if the legality of detention is not reviewable, judicial review might not be completely excluded.

It may not be a given that a court can never exercise jurisdiction with regards to the legality of detention on Manus Island or Nauru. In *Rasul v Bush*⁶² the United States Supreme Court held that it had jurisdiction to review the legality of executive detention of aliens in Guantanamo Bay, Cuba, a territory over which the United States 'exercised plenary and exclusive jurisdiction, but not "ultimate

⁵⁷ Yuko Narushima, 'Timor Solution in Tatters', *Sydney Morning Herald* (Sydney), 12 November 2010.

⁵⁸ *Sadiqi v Commonwealth (No 2)* (2009) 181 FCR 1.

⁵⁹ *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249; *Hicks v Ruddock* (2007) 156 FCR 574; *Habib v Commonwealth* (2010) 183 FCR 62.

⁶⁰ *Ruhani v Director of Police (No 2)* (2005) 222 CLR 580.

⁶¹ (2009) 181 FCR 1, 53.

⁶² 542 US 466 (2004).

sovereignty”⁶³. The American context is, of course, different, in terms of both the relevant law and practice. The United States ‘held an indefinite lease over the subject area rendering it for practical purposes a place essentially belonging to the United States.’⁶⁴ It is unlikely Australia would be considered as asserting a ‘de facto assumption of jurisdiction’ on Manus Island or Nauru, such that the legality of detention could be called into question. Nevertheless, despite the differences, the US experience shows that courts have been willing to extend jurisdiction to non-citizens detained in foreign countries where the nexus with the court’s jurisdiction is strong.

Certainly, if the asylum seekers were detained by Australian governmental officers, there would be jurisdiction in federal courts to hear a writ of habeas corpus.⁶⁵ This is because the *Constitution* provides entrenched jurisdiction to review actions of officers of the Commonwealth, including the lawfulness of detention by such officers.⁶⁶ It is unlikely, however, that Commonwealth officers will carry out the actual detention of asylum seekers. Rather, asylum seekers would be detained by the Papua New Guinean or Nauruan governments.

Assuming that the legality of detention is not justiciable, it is arguable that the processing of asylum seekers on Manus Island or in Nauru is nevertheless amenable to judicial review in terms of procedural fairness and lawfulness of decision-making, depending on the way the scheme is executed.

Offshore entry persons may be taken to a ‘declared country’ for the purpose of determining whether persons are owed protection obligations under s 198A of the *Migration Act*. Under subsection (3), the Minister may:

- (a) declare in writing that a specified country:
 - (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
 - (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and
 - (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country;

⁶³ Sydney Tilmouth, ‘Citizenship as a Constitutional Concept: *Singh v the Commonwealth of Australia* and *Rasul v Bush, President of the United States*’ (Paper presented at the University of New South Wales Centre of Public Law Constitutional Law Conference, University of New South Wales, 2005) 10.

⁶⁴ *Ibid.*

⁶⁵ James Renwick, ‘Detention without Trial: The Relevance for Australia of the US Supreme Court Decisions in *Hamdi*, *Rasul* and *Rumsfeld*’ (Paper presentation at the Judicial Conference of Australia, Sunshine Coast, 3 September 2005) 7.

⁶⁶ *Ibid.* 8.

- and
- (iv) meets relevant human rights standards in providing that protection.

This provision was the cornerstone of the Pacific Solution, and was never removed from the *Migration Act*. Therefore, the current government could transfer offshore entry persons to Manus Island or Nauru without amending the *Migration Act*. Being outside Australia, in a declared country, s 46A does not apply to prevent an offshore entry person apply for a visa.⁶⁷

The High Court, in its discussion of the history of the *Migration Act*, noted that *both* s 46A and s 198A were enacted in order to adhere to Australia's obligations under the *Refugees Convention* and *Protocol*.⁶⁸ Australia's main obligation under these instruments is not to *refouler* a refugee.⁶⁹ A refugee is defined as a person who:

owing to 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 fear, is unwilling to avail himself of the protection of that country.⁷⁰

Hence, even though on its face s 198A requires no more of the government than to drop off asylum seekers in a declared country and let that country deal with them, in practice this will not be the case. Australia's refugee policy shows a clear intention to comply, or at least appear to comply, with its public international law obligation of *non-refoulement*.⁷¹ The asylum seekers will be held in detention and processed 'at the behest of the Australian authorities.'⁷² It is not clear who will process the asylum seekers. During the Pacific Solution, half the asylum seekers were processed by Australian officials, and half by the United Nations High Commissioner for Refugees. We can assume, therefore, that Australian government officials or contractors engaged by the government will be involved.

The issue changes from an administrative law issue, with the legality of executive detention at its heart, to an international law issue, with Australia's international obligations as the central factor. The essential argument in favour of judicial review is that asylum seekers

⁶⁷ However, such persons cannot apply for a Protection (Class XA) visa: *Migration Regulations 1994* (Cth) sch 1, 1401(3).

⁶⁸ *Plaintiff M61* (2010) 272 ALR 14, 23.

⁶⁹ *Refugees Convention* art 33.

⁷⁰ *Ibid* art 1A(2) and *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) art 1(2).

⁷¹ Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press, 2011) 81.

⁷² *Ibid* 652.

who come to Australia are Australia's responsibility. This is because Australia owes protection obligations to such people, and chooses to recognise and implement those obligations through the *Migration Act*. The removal of asylum seekers to a declared country is enabled by legislation. Both detention and processing will be carried out at the request of, and bankrolled by, the Australian Government. Further, the removal of asylum seekers to a declared country is *for the purpose of* allowing the Minister to decide whether or not to grant a visa. These factors point strongly to a link between status assessments and Australian law. As long as status determination is linked to the grant of a visa, the nexus between asylum seekers and Australian law will be hard to break.⁷³ As such, decisions made about asylum seekers after they have been removed from Australian territory could be amenable to judicial review.

There are, however, two other problems with extending procedural fairness requirements to asylum seekers held in declared countries. First, what if no Commonwealth officials are involved in the processing of asylum seekers? In *Plaintiff M61* itself the court avoided the issue of the meaning of 'officer of the Commonwealth'⁷⁴ by reasoning that because the processing scheme was based on statute, it did not matter that some of the processors were not government officials. As above, there is some scope for a similar argument in a regional processing context. Crock and Berg suggest that even if the decision makers were private contractors, the nexus between status determination and the exercise of the Minister's power could still be established.⁷⁵ Australian courts, however, have generally been reluctant to undertake judicial review of 'public administration in private hands'.⁷⁶ Given the 'increasing interpenetration of the norms of public and private law,'⁷⁷ it is argued that this reluctance should not last.

Second, what are the 'interests' that such asylum seekers could assert as requiring the exercise of procedural fairness? Plaintiffs M61 and M69 had sufficient interests because they were being detained by the Australian authorities, and that detention was prolonged for the purpose of status assessment. While asylum seekers held on Manus Island or Nauru would not be detained *by* the Australian government, they would nevertheless be detained⁷⁸ *for the purposes of* the

⁷³ Crock and Ghezelbash, above n 55, 114.

⁷⁴ *Constitution* s 75(v).

⁷⁵ Crock and Berg, above n 71, 652.

⁷⁶ *Ibid* 139; see *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277.

⁷⁷ Margaret Allars 'Public Administration in Private Hands' (2005) 12 *Australian Journal of Administrative Law* 126, 146.

⁷⁸ Despite the *Migration Act*'s somewhat illogical statement that such persons are not in 'immigration detention': *Migration Act* s 198A(4).

Australian government. Alternatively, their interests might be affected 'by virtue of the dangers faced if returned to their countries of origin.'⁷⁹

It follows that status determination on Manus Island or Nauru could be reviewable in terms of procedural fairness, even if the legality of detention cannot be challenged. However, if the government were to break the link between status assessments and the grant of a visa, this would probably be enough to put the process beyond the reach of the courts.

The government has recently revealed a new refugee policy, dubbed the 'Malaysia Solution.' The implications of this scheme, and the implications of regional processing as far as international refugee and human rights law is concerned,⁸⁰ are beyond the scope of this case note.⁸¹

V Conclusion

Australia is not the only country to attempt to remove asylum seekers from the ambit of judicial oversight. Guantanamo Bay, before it was a prison for enemy combatants captured in the wars in Iraq and Afghanistan, was an offshore detention centre for asylum seekers from Haiti and Cuba seeking entry to the United States.⁸² Its goal was to deny asylum seekers access to the protections of United States law. Like the High Court in *Plaintiff M61*, the US Supreme Court held in *Rasul v Bush*⁸³ that the detainees could not be denied the jurisdiction of the courts.

Unlike the United States, Australia does not have a Bill of Rights. What we do have, however, is a *Constitution* and a common law tradition that exalts the rule of law as its foundational principle. The phrase 'rule of law' has been employed in different circumstances. Prime Minister Julia Gillard has said that the rule of law means 'no one should have an unfair advantage and be able to subvert orderly migration programs.'⁸⁴ This formulation is neither helpful nor accurate. In its original Diceyan formulation, the central tenets of the rule of law are protection against the arbitrary use of power and equality before the law, including for the lawmakers.⁸⁵ This conception of the rule of law

⁷⁹ Crock and Berg, above n 71, 652.

⁸⁰ Among a number of considerations, Nauru is not a party to the *Refugees Convention*. Papua New Guinea is a party although with reservations.

⁸¹ See the recent High Court decision *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32.

⁸² Crock and Ghezelbash, above n 55, 103.

⁸³ 542 US 466 (2004).

⁸⁴ Michelle Foster, 'Book Review: Refugees, Asylum Seekers and the Rule of Law' (2011) 23 *International Journal of Refugee Law* 431, 431.

⁸⁵ A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 188–96.

emphasises the important role of judicial review in ensuring that the government acts according to law, entrenched in s 75(v) of the *Constitution*. This is especially important in the case of asylum seekers, since such people are ‘formally disenfranchised’.⁸⁶

The unanimous decision in *Plaintiff M61* was emphatic: the High Court is loath to relinquish its fundamental role as guardian of the rule of law, despite the ‘extraordinary and persistent lengths’⁸⁷ to which governments will go to keep asylum seekers beyond its reach. The decision in *Al-Kateb v Godwin*,⁸⁸ which held that indefinite executive detention was lawful, has been called an ‘embarrassing low point’⁸⁹ in Australian jurisprudence. Conversely, the day that the decision in *Plaintiff M61* was handed down was touted as a victory for the continuing relevance of the rule of law. Australia may not have a written list of rights and freedoms, but the combination of our Constitution and the common law can deliver the same results.

The decision also emphasised the counterproductive nature of governmental attempts to undermine the rule of law.⁹⁰ Such attempts often allow the court to affirm strongly the rights of those affected. Whether the government will attempt to avoid the scrutiny of the courts in setting up the Pacific Solution Mark II remains to be seen. While any prediction is fraught with difficulty, especially considering the current lack of detail surrounding any possible regime, the High Court’s unanimous decision in *Plaintiff M61* at least leaves open the possibility of judicial review. The clear message from the High Court is that it will not lightly allow the government to treat asylum seekers as out of sight, out of mind, and outside of Australian jurisdiction.

⁸⁶ Audrey Macklin, ‘Asylum and the Rule of Law in Canada: Hearing the Other (Side)’ in Susan Kneebone (ed) *Refugees, Asylum Seekers and the Rule of Law* (Cambridge University Press, 2009) 78, 84.

⁸⁷ Susan Kneebone, ‘The Australian Story: Asylum Seekers Outside the Law’ in Kneebone, above n 85, 171, 226.

⁸⁸ (2004) 219 CLR 562.

⁸⁹ David Marr, ‘As One, Judges Show They Safeguard Liberty’, *Sydney Morning Herald* (Sydney), 12 November 2010.

⁹⁰ Crock and Ghezelbash, above n 55, 112.

