CHAPTER 3 - AUSTRALIA'S REFUGEE LAW

Australia's response to its international obligations

When it signed the Refugee Convention and Protocol, Australia agreed to be bound by all of its provisions. Australia agreed to protect asylum seekers who can show that they have a well founded fear of persecution on the basis of their race, religion, nationality, membership of a particular social group, or their political opinion.

However, over the last decade, Australia has passed legislation to make it more difficult for asylum seekers to qualify for asylum as refugees under the Migration Act. This means that refugees who may qualify for protection under the Refugee Convention may be turned away. Australia also treats some refugees differently from others, depending on factors such as how or where they arrived in Australia.

Australia has also moved to limit access to the courts for review of administrative decisions on refugee status as well as to legal advice for asylum seekers.

Changing the meaning of 'persecution'

In 2001, the Federal Parliament passed legislation which narrowed the definition of 'persecution'.[1] The new provisions of the Migration Act say that the reasons for persecution set out in the Refugee Convention will not apply unless:

- the reason is the essential and significant reason for the persecution, and
- the persecution involves serious harm to the person; and
- the persecution involves systematic and discriminatory conduct.

It is undesirable to prescriptively define a term that must be able to respond and evolve according to changed circumstances of the person or reference country and developments in human rights law.

As the High Court has observed:

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[1] Migration Legislation Amendment Act (No. 6) 2001 (Cth), section 5.

> 'Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society.' [2]

And again:

> 'I am now inclined to see more clearly than before the dangers in the use of dictionary definitions of the word "persecuted" in the Convention definition. At least, I see such dangers unless there is an acceptance of the need for adjustments appropriate to the context. … [T]he word "persecuted" appears here in an international treaty which is not as susceptible to exposition by reference to Australian or even English standard dictionaries as is a word appearing in a local legal instrument. It is by use of dictionaries that concepts such as enmity and malignity have been imported to the notion of persecution which are neither mentioned in the text of the Convention, nor necessary to the context. Such a feature of the definition now seems to have been abandoned in Australia it being recognised that some persecution is performed by people who think that they are doing their victims a favour.'[3]

The Refugee Convention, while prohibiting state parties from altering the definition of 'refugee,' does not define the term 'persecution', thus leaving it sufficiently flexible to accommodate future types of persecution that could not be envisaged when the Refugee Convention was first drafted. However, state parties are still required by the Vienna Convention to interpret this term in good faith. Australia's definition of 'persecution' gives it a restrictive meaning, inconsistent with the intention of the founders of the Refugee Convention. It greatly expands the risk of genuine refugees being returned to the country where they have a well founded fear of persecution.

Some interpretative guidance may be obtained from the accompanying Explanatory Memorandum. For example, although not included in the s91R list of examples of what will amount to 'serious harm,' the Explanatory Memorandum notes that 'serious mental harm' is not excluded. But fear of 'discrimination or disadvantage' in comparison with opportunities or treatment which could be expected in Australia should not be considered 'serious harm.' The Explanatory Memorandum does recognise that serious harm can arise from "a number of acts which, when taken cumulatively, amount to serious harm of the individual".

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2 per McHugh J in "Applicant A" & Anor v Minister for Immigration and Ethnic Affairs & Anor [1997] 190 CLR 225

3 per Kirby J in Minister for Immigration and Multicultural Affairs v Khawar [2002] HCA 14 [108]

Differential treatment of asylum seekers

One of the legal obligations under the Refugee Convention is the prohibition against discrimination against asylum seekers as a class of people, *and* between different categories of asylum seekers.

This section shows how Australia's laws create, and discriminate between, different categories of asylum seeker depending on their manner of arrival in Australia or their method of application for protection.

As explained above, Australia's refugee program is comprised of an offshore component and an onshore component. Until recently, there was no real distinction between the class of visa, and the conditions attached to the visa, granted to a refugee under either component. Both entitled the visa holder to permanent residence in Australia and access to the same entitlements and services as other Australian permanent residents.

It is still the case that refugees who enter Australia through the traditional offshore program are entitled to a visa which gives them permanent residence. However, a number of recent legislative changes have radically altered the position for onshore asylum seekers and others who, but for recent legislative changes, would have been entitled to apply for a protection visa through the onshore program.

The key changes include what has euphemistically been called the 'Pacific Solution' and the creation of a number of visa sub-classes which entitle particular 'classes' of refugee to temporary residence only and limited access to the entitlements and services available to permanent residents and citizens.

These restrictions apply to these 'classes' of refugee even although the person:

- is a 'genuine refugees' under the Refugee Convention and fits the revised definition of refugee in the Migration Act;
- has an identical claim to protection as other asylum seekers who arrive by other means; and
- had little or no control over the circumstances of their arrival to Australia.

Another significant change introduced in September 2001 prevents individuals from applying for protection where they have previously been included in a family application. As outlined below, this can lead to unfair outcomes and place individuals at risk of persecution on return to their home country.

The 'Pacific Solution'

On 1 September 2001, the Australian Government announced the 'Pacific Solution' in response to the MV Tampa incident.

Tampa

On 26 August 2001, a Norwegian container vessel called the *MV Tampa* was directed by the Australian coastguard to rescue 433 people from a sinking fishing boat in international waters off near Christmas Island. The rescuees were asylum-seekers who had engaged the services of a people smuggling syndicate to transport them to Australia. Although the Australian authorities denied the *MV Tampa* authority to land the rescuees on Christmas Island, its crew was concerned about the medical condition of some of the rescuees and, as a result, the vessel entered Australian territorial waters on 29 August 2002 and anchored 4 nautical miles from Christmas Island.

Before outlining what the 'Pacific Solution' involves, it is important to understand the geographical meaning of 'Australia' and the terms 'territorial sea' and 'migration zone.'

'Australia' means the Commonwealth of Australia - which includes the states and internal territories and the external territories of Christmas Island, Cocos (Keeling) Islands, Ashmore and Coral Sea Islands. It also includes the territorial sea of Australia within 12 nautical miles of the coastline.

The 'migration zone' is made up of the land area of all the states and territories of Australia and the waters of proclaimed ports within those states and territories. The land area starts at the mean low water mark. The migration zone does not include the territorial sea that is off the coast of the Australian states and territories.

The purpose of the migration zone is to define the area of Australia where a non-citizen must hold a visa in order to legally enter and remain in Australia. Anyone who enters the migration zone, including Australian citizens, must present themselves for immigration clearance.

The 'Pacific Solution' involves:

- a series of governmental agreements with Nauru and New Zealand for those countries to accept the asylum-seekers and to determine whether any of them were entitled to protection under the Refugee Convention;

- excision of certain territories (meaning that for the purposes of the *Migration Act*, excised territories are no longer deemed by law to be part of the migration zone where one could seek asylum in Australia – effectively these areas are no longer part of Australia) - Christmas Island, Cocos (Keeling) Islands, Ashmore and Coral Sea Islands, Australian sea installations and Australian resources installations - from the Australia Migration Zone (see map);
- the detention and removal of unauthorised arrivals in the excision zone and powers to remove a person to another country where their claims, if any, for refugee status may be handled;.
- a prohibition on people who arrive in an area excised from the migration zone applying for any class of visa (unless the Minister exercises his discretionary power); and
- where asylum seekers who arrive in the area marked on the map are permitted to apply for a visa following the exercise of the Minister's discretionary powers, they will only ever qualify for a temporary protection visa (3 years). These people must reapply for a temporary visa every 3 years and may be deported on each occasion. If they leave Australia, they have no automatic right of return.[4]

It will be seen that these legislative amendments have the effect, among others, of differentiating between asylum seekers who 'arrive' by boat and land on one of the excised territories and those who arrive by plane.

The map at the end of this chapter shows the 'excised territories' created by legislation in September 2001.

Temporary Protection

The concept of temporary protection was introduced by regulation changes on 20 October 1999. Prior to then all refugees in Australia had immediate access to a protection visa which provided permanent residence and immediate access to the comprehensive settlement support arrangements provided to refugees resettled from overseas.

Under the 1999 regulations, unauthorised arrivals found to be refugees only have access to a three year temporary visa, in the first instance and have no rights to:

- bring their families into Australia;
- return if they leave Australia;

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[4] Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001

- access settlement services; or

- access the mainstream social welfare system to obtain pensions and *Newstart* allowance.

However, TPV holders are:

- able to work and receive Job Matching from Centrelink;

- eligible for Special Benefit, Rent Assistance, Family Tax Benefit, Child Care Benefit, Double Orphan Pension, Maternity Allowance and Maternity Immunisation Allowance. (Any Special Benefit entitlement is stringently means-tested and is reviewed every 13 weeks);

- able to gain access to Medicare benefits;

- eligible for referral to the early health assessment and intervention program;

- eligible for torture and trauma counselling; and

- able to apply for a permanent Protection visa which may be granted after a period of 30 months, or a shorter period specified by the Minister, if there is a continuing need for protection.

Changes to migration legislation, which came into effect on 27 September 2001, further restricted the conditions attached to temporary protection visas for asylum seekers who were unauthorised arrivals and who, since leaving their home country, have resided for at least seven days in a country where they could have sought and obtained effective protection. This group may apply for further protection visas if they have a need for continuing protection, but will only have access to further three year temporary protection visas and not a permanent protection visa. This stipulation acts as a sort of penalty provision.

Unauthorised arrival who are granted a temporary protection visa and who **did not** reside for at least seven days in a country where they could have sought and obtained effective protection, will continue to have access to the permanent protection visa after 30 months, if they are assessed as still in need of protection. (These changes affect only visa applications lodged **after** commencement of the legislation).

See Fact Sheet No. 1 for details of the differing criteria and conditions relating to the nine classes of refugee visa

People who arrive with family members

Asylum seekers who arrive with family members can either apply for a visa individually, or be included in a family visa application. Following the September 2001 legislative changes however, the outcomes for the individuals involved and the family as a whole can be very different depending on which option is taken.

Many asylum seekers make their visa applications as a family but there are risks with this approach.

A family application often focuses solely on the claims of *one* of the family members. One family member, such as a daughter, may be the subject of persecution in the family's home country. Logically, she should make the claim. That way, she can be protected and enjoy asylum in Australia with the support of her family. Often what happens in practice is that a parent, or uncle, as the head of the family, will make the application, even though another family member may have a stronger claim to protection. Once a family application has been made, the family members cannot make their own individual applications, regardless of whether they have a stronger claim to protection or had no opportunity to make an individual application in the first place.

If a family application is successful, every person included in the application are entitled to protection. So, if a family application that focuses on the claims of a child is successful, the child's parents will be entitled to the same protection if they are included in the application.

If a child's parents are not included in the family application, or the child makes an individual visa application, the child's parents are *not* allowed to come to, or to stay in, Australia unless:

- the child is granted a permanent protection visa which entitles him or her to family reunification; or

- the child's parents make their own visa applications and succeed solely on the basis of their own claims (noting however that the September 2001 provisions of the Migration Act prohibit parents and other family members from claiming protection on the basis that their children or other family members have been granted protection in Australia).

Safe third countries

The Migration Act allows particular countries to be prescribed as being "safe third countries."[5] People who have come from "safe third countries" cannot make an application for a protection visa. For example, the People's Republic of China is a "safe third country" in relation to Vietnamese refugees and their familles.

If a non-citizen has a right to enter and reside in a prescribed "safe third country," and they have previously resided in that country for a continuous period of more than seven days, then that person cannot make an application for a protection visa in Australia, unless the Minister exercises his or her personal and non-compellable discretion to allow the application.

The Migration Act says that Australia has no protection obligations towards a person who has a "right to enter and reside" temporarily or permanently in a third country. The person is required to have taken all possible steps to avail themselves of that third country's protection.[6]

Recent court decisions have differed on the issue of effective protection in a third country. In *NAGV* [7] the Full Federal Court agreed that the leading decision for the principle of effective protection - *Minister for Immigration and Multicultural Affairs v Thiyagarajah* [8] - was wrong. The High Court gave special leave to appeal *NAGV* on the basis that the issue needed to be settled. By the end of November 2004 the appeal had been heard but not decided. [9]

A person may also become a refugee due to his or her actions *after* leaving their country; for example, by expressing political views which the authorities in their home country do not support. In some circumstances, the very act of fleeing one's own country and seeking asylum in another country may give rise to such a claim (a 'sur place' claim).

But the Migration Act now says that if a 'sur place' claim is based on actions or conduct in Australia, the applicant must show that the conduct was not engaged in for the purpose

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[5] In determining if a country should be declared a 'safe third country' consultation may be had with the UNHCR.

[6] See *Minister for Immigration and Multicultural Affairs v Applicant C* [2001] FCA 1332, (18 September 2001)). Sect 36(3)-(5) of the Migration Act - introduced in December 1999 - excludes claimants who have effective protection in a third country: see *WAGH v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 194 (27 August 2003) at [28]).

[7] *NAGV* v *Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 202 ALR 1.

[8] (1997) 80 FCR 543.

[9] see www.austlii.edu.au/au/cases/cth/HCA/ for an update

of 'strengthening' a claim for refugee status. Previously, a person's motive for relevant conduct was irrelevant[10].

Access to the courts

The review of governmental administrative decisions by the courts (**judicial review**) is an important subset of administrative law which in turn is an important check on the exercise of government power. Administrative law helps to ensure that government officials, like other members of the society, are subject to the Rule of Law.

Administrative decision-makers can make mistakes. That is why Australia has a scheme for the courts to review administrative decisions, including decisions about visas. The ability of an asylum seeker to access the courts ensures that administrative decisions on refugee status are being conducted fairly and consistently with legislation.

Australian citizens and permanent residents who are subject to the administrative decisions of the Commonwealth (for example, decisions relating to tax assessments and social security entitlements) can expect to have those decisions reviewed by the Courts where they believe a decision is wrong in law, made unfairly or does not take appropriate factors into account. The central piece of legislation governing judicial review at the Commonwealth level is the Administrative Decision (Judicial Review) Act 1979 (Cth) (**ADJR Act**) which was designed to codify the common law grounds of judicial review of the actions of administrators and simplify the procedure for gaining review at the federal level.

Prior to 1994, people who were subject to decisions under the Migration Act could also expect to have those decisions reviewed by the Courts under ADJR Act.

Despite judicial review being particularly crucial in immigration matters, where visa decisions may literally be a question of life or death, and the prohibition in the Refugees Convention on discriminating against refugees as a class of persons, the Commonwealth has progressively amended the Migration Act and other legislation to limit the role of the courts in interpreting the Migration Act and to severely restrict access to the courts by asylum seekers for review of protection visa decisions.

The most recent measure was the insertion of a new section 474 – the so called 'privative clause' – into the Migration Act. The privative clause was intended to give decision makers wider lawful operation for their decisions and thereby narrow the basis on which

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[10] Sect 91R(3) of the Migration Act. See *SAAS v Minister for Immigration & Multicultural Affairs* [2002] FCA 726 (11 June 2002).

those decisions can be challenged in the Federal Magistrates Court, Federal Court and the High Court.

The effect of the privative clause was recently considered by the *High Court in Plaintiff S157/2002 v Commonwealth of Australia.*[11] The Court found that the privative clause does not protect an error which has resulted in a failure to exercise jurisdiction or in the decision- maker exceeding his or her jurisdiction. In coming to this finding the Court reasoned that:

- the terms of s474 do not purport to prevent review of decisions affected by jurisdictional error and which are therefore 'regarded in law as no decision at all;[12]'

- if s474 precluded review of unauthorised conduct by officers of the Commonwealth then it would be 'in direct conflict with s75(v) of the Constitution … and thus invalid'[13]; and

- if s474 precluded review of unauthorised conduct by officers of the Commonwealth then it would allow non-judicial decision-makers 'to determine conclusively the limits of [their] jurisdiction' and thus infringe the separation of powers impliedly required by Chapter III of the Constitution[14].

This then leaves the question as what constitutes jurisdictional error sufficient to found judicial review. The majority judgement said:

> 'Although s 474 does not purport to effect a repeal of statutory limitations or restraints, it should be noted that it may be that, by reference to the words of s 474, some procedural or other requirements laid down in the Act are to be construed as essential to the validity of the decision. However, that is a matter that can only be determined by reference to the requirements in issue in a particular case.'[15]

Gleeson CJ argued that:

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11 Plaintiff S157/2002v Commonwealth of Australia (2003) 195 ALR 24

12 Ibid [76]

13 Ibid [75]

14 Ibid [75]

15 Ibid [69]

> 'People whose fundamental rights are at stake are ordinarily entitled to expect more than good faith. They are ordinarily entitled to expect fairness. If Parliament intends to provide that decisions of the Tribunal, although reached by an unfair procedure, are valid and binding, and that the law does not require fairness on the part of the Tribunal in order for its decisions to be effective under the Act, then s 474 does not suffice to manifest such an intention'.[16]

What constitutes 'jurisdictional error' is not defined in the Migration Act, but the High Court has indicated that it can include the decision maker identifying a wrong issue, asking itself a wrong question, ignoring relevant material, relying on irrelevant material or, in some circumstances, making an erroneous finding or reaching a mistaken conclusion[17]. An erroneous finding of fact will, however, only give access to judicial review if there was no evidence on which the finding could be based.[18]

See Fact Sheet No. 2 which describes the major legislative and regulatory changes affecting the rights of asylum seekers and refugees

Access to legal advice

From this overview of some of Australia's current laws about the determination of who should be granted protection as a refugee in this country, it is clear that Australia's visa system is complex. A person seeking asylum needs legal advice about their status, how to apply for protection and their prospects of success.

However, legal advice is not routinely provided to asylum seekers who arrive in Australia and make an application for asylum. People who are detained in immigration detention are not provided with legal advice unless they specifically ask for it or raise claims which prima facie may engage Australia's protection obligations. Migration officers are not obliged to advise these asylum seekers of the rights to apply to a visa, or of the consequences of their detention for the visas they may be granted.

Many asylum seekers who arrive in Australia do not understand the Australian visa system well enough to know how to make an application for protection. If they do not make their applications soon after arrival, the Australian government can send them back to where they came from. This means that asylum seekers may not be given an opportunity to apply for a visa, either because they do not understand what they need to

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[16] *Ibid* [37]

[17] See *Craig v The State of SA* [1994-1995] 184 CLR 163.

[18] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-356 and 359-360 ; *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231 at [19].

ask for or they do not specifically ask to see a lawyer. This can occur even though the asylum seeker may:

- fit within the definition of 'refugee' at international law *as well as* the new definition under the Migration Act; and

- come within the quota Australia has agreed to accept under the humanitarian program; *and*

- be entitled to apply for either a permanent or temporary protection visa under the Migration Act.

OTHER ISSUES

Detention of asylum seekers

Under Australian law, all people who are not Australian citizens and who do not have a valid visa must be detained. The majority of people in detention centres in Australia are asylum seekers who have arrived by boat. This means that people may be detained *even though* they may be refugees under the Refugee Convention *and* refugees according to the Australian definition *and* fall within Australia's yearly quota. The Refugee Convention and the UNHCR say that asylum seekers should not be detained unless it is absolutely necessary. Even then, asylum seekers should only be detained for as long as is necessary to process their claims. Some people have been detained in Australia's immigration detention centres for as long as three years.

A Working Group on Arbitrary Detention was established by the Human Rights Commission of the United Nations in 1991 with a mandate to:

- Investigate cases of detention imposed arbitrarily or otherwise inconsistently with relevant international standards set forth in the Universal Declaration of Human Rights;

- Seek and receive information from Government and intergovernmental and non-governmental organizations, and receive information from the individuals concerned, their families or their representatives;

Present a comprehensive report to the Commission at its annual session.

The Working Group regards deprivation of liberty as arbitrary in the following instances:

- where there is no legal reason for the detention – an example of this would be detaining someone without charging them with any crime, or keeping them in prison after their sentence has been served;

- where a person is detained under a valid law but is kept in detention for an unreasonable and disproportionate time; and

- where the person has not been given a fair trial.

In two cases under the First Optional Protocol to the International Covenant on Civil and Political Rights the UN Human Rights Committee found that Australia's current detention policy amounted to arbitrary detention: *A v Australia* (No. 560/1993) and *Mr C v Australia* (No. 900/1999).

In 1992, the High Court of Australia said that detention of the asylum seekers was not illegal under the Australian Constitution (*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[19]). However, in making this decision, the High Court did not consider several important aspects of our detention policy, including:

- whether continued detention of refugees is lawful when the Australian government has suspended processing their visa applications;

- whether it is lawful to detain people on a continual basis for very long periods of time; and

- whether it is lawful to detain unsuccessful protection visa applicants who cannot be returned to their home countries, either because their home countries will not take them back or because they are stateless.

- whether the conditions of detention can be such that the detention was unconstitutional.

In August 2004, the High Court upheld the constitutional validity of mandatory detention pursuant to the Migration Act, even where it results in indefinite incarceration.[20] The Court said that the power of the Federal Parliament to detain can only be incidental to its Constitutional power to make laws with respect to aliens (s51(xix)) and immigration (s51

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[19] (1992) 176 CLR 1

[20] *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* [2004] 78 ALJR 1056; *Al-Kateb v Godwin* [2004] 78 ALJR 1096; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] ALJR 1156.

(xxvii)). It considered whether there is a point beyond which detention becomes punitive and thus a matter that is only for the judicial power.

In the cases of *Al-Kateb* and *Al-Khafaji* the claimants - who had made written requests to be removed from Australia - faced indefinite detention. Both were unsuccessful protection visa applicants who had no state to where they could be returned.

In *Al-Kateb* a majority[21] held that ss 189, 196 and 198 of the *Migration Act* authorises the indefinite detention of asylum applicants who are designated 'unlawful non-citizens'. Detention under the *Migration Act* is said to not be punishment for an offence; it is incidental to the 'aliens' and 'immigration' constitutional powers, being for the purpose of exclusion of a non-citizen from the Australian community.[22]

In *Behrooz*, the appellant argued that the conditions at Woomera detention centre were so bad that detention was not constitutionally valid and thus he could not be prosecuted for escaping from 'immigration detention'. The High Court said that the detention was constitutionally valid irrespective of the conditions imposed[23] as Mr Behrouz could still use civil remedies and the criminal law if he was subjected to inhumane conditions or assault.[24]

The Full Federal Court has held that the likelihood of torture or even death is not a consideration in the removal of unlawful non-citizens pursuant to subs 198(6) of the Migration Act.[25] The Court held that the requirement in the subsection that removal be "as soon as reasonably practicable" does not mean that an officer has to take into account what is likely, or even virtually certain, to happen to the unlawful non-citizen after they have been admitted into the receiving country.[26]

The issue of children being held in immigration detention is the subject of much controversy in Australia, and has been damned as a practice by the international community. The final report of the Human Rights and Equal Opportunity Commission into children in immigration detention (tabled in May 2004), recommended the release of all children from detention centres and residential housing projects. The report found Australia's current system of detention was "fundamentally inconsistent" with the UN's

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[21] Hayne, McHugh, Callinan, Heydon JJ.
[22] Hayne J at [256], [261]-[263].
[23] Hayne J at [175]-176].
[24] See Gleeson CJ at [21], and McHugh, Gummow, Heydon JJ at [50]-[53].
[25] *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 292; Wilcox, Lindgren and Bennett JJ; 16 December 2003.
[26] The court followed its decision in *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 290.

Convention on the Rights of the Child (CROC), and that children who were detained for long periods were at "high risk of serious mental harm".

In the case of *B and B; Children in Immigration Detention*[27], the Full Court of the Family Court determined that the Family Court of Australia had jurisdiction to make orders in respect of non-citizen children held in immigration detention as part of a general discretionary welfare over all children. Importantly, it was decided that the Migration Act should not be interpreted as permitting the indefinite detention of children in circumstances where there is no real likelihood or prospect in the reasonably foreseeable future of the children being removed from detention. However, on appeal the High Court overturned the Full Court's decision.

This case highlights the extent to which Australia is in breach of its human rights obligations under the CROC, which it ratified in 1990. Article 37(b) of the CROC states that the detention of children must only be as a measure of last resort and for the shortest appropriate period of time. Article 3 requires Australia to ensure that in all actions concerning children, the best interests of the child shall be a primary consideration. Further, Australia must "undertake to ensure the child such protection and care as is necessary for his or her well-being." Clearly the nature and effects of the indefinite detention of children in immigration centres cannot be reconciled with Australia's obligations under the CROC.

In November 2003, the UN Human Rights Committee released its findings on a communication taken to it by Mr Bakhtiyari, the father of the children who appeared in *B and B*, under the ICCPR, against Australia.[28] The Committee found that:

> …detention should not continue beyond the period for which a State party can provide appropriate justification…while the children remained in immigration detention for two years and eight months until their release on interim orders of the Family Court. Whatever justification there may have been for an initial detention for the purposes of ascertaining identity and other issues, the State party has not, in the Committee's view, demonstrated that their detention was justified for such an extended period.

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[27] *B & B & Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FamCA 451 (19 June 2003)
[28] Communication No. 1069/2002, Bakhtiyari v Australia

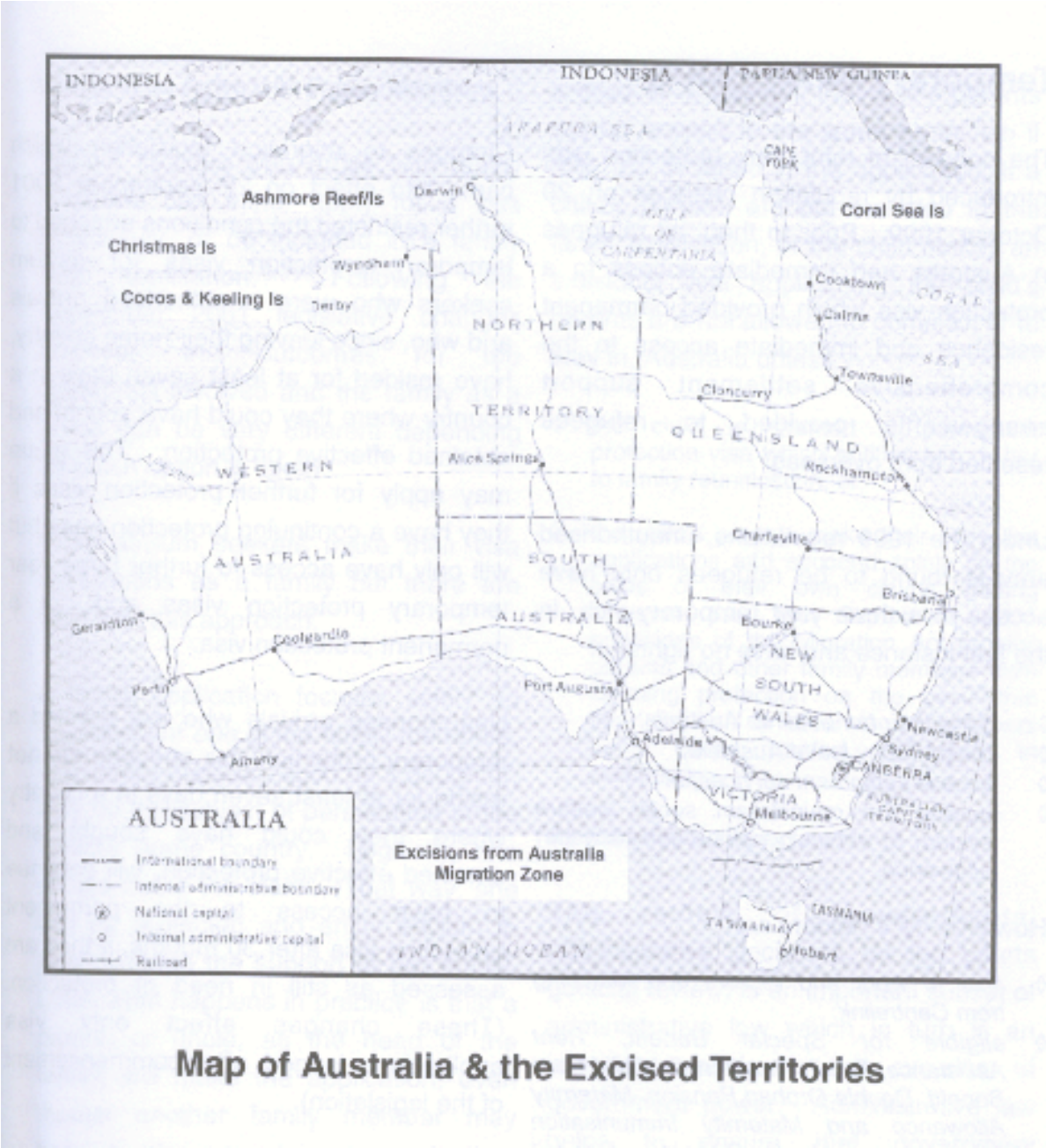
Further, the Committee observed that:

> …in this case [the] children have suffered demonstrable, documented and on-going adverse effects of detention… As a result, the Committee considers that the measures taken by the State party had not, until the Full Bench of the Family Court determined it had welfare jurisdiction with respect to the children, been guided by the best interests of the children, and thus revealed a violation of … the children's right to such measures of protection as required by their status as minors…

See Fact Sheet No. 3 for UNHCR's Guidelines on applicable Criteria and Standards relating to the Detention of Asylum Seekers.

THE 'EXCISED TERRITORIES' CREATED BY LEGISLATION IN SEPTEMBER 2001, INCLUDING:

- **ASHMORE REEF AND ISLANDS**
- **CHRISTMAS ISLAND**
- **COCOS & KEELING ISLANDS**
- **CORAL SEA ISLANDS**



Map of Australia & the Excised Territories