Prologue

Living Realities

It is 5 May 1992. A Tuesday. I am working as a refugee lawyer at the Refugee Advice & Casework Service (RACS), a community legal centre in Melbourne. Our office is a windowless cubbyhole in a Migrant Resource Centre in a back street in the inner-city suburb of Prahran. It is a space we share with another community legal centre, social workers, English language teachers, and countless community groups, their religious gatherings, and their (mostly) delicious cooking smells. On a modest budget, and armed with state-of-the-art equipment including one computer, a typewriter that miraculously memorises the previous line so you can make corrections before it is committed to paper, and a mobile phone the size of a brick, we provide free advice and assistance to as many asylum seekers as we can manage.

As part of this work, we are responsible for the representation of 119 Cambodians among a cohort of 389 so-called 'boat people' who have arrived in Australia over the past few years, since November 1989. Their arrival triggered a public response bordering on hysteria encapsulated in the uncompromising unwelcome they received from then Prime Minister Bob Hawke:

> [W]e're not here with an open-door policy saying anyone who wants to come to Australia can come. These people are not political refugees. . . . What we make of it is that there is obviously a combination of economic refugeeism, if you like. People saying they don't like a particular regime or they don't like their economic circumstances, therefore they're going to up, pull up stumps, get in a boat and lob in Australia. Well that's not on. . . . [W]e have an orderly migration program. We're not going to allow people just to jump that queue by saying we'll jump into a boat, here we are, bugger the people who've been around the world.[1]

[1] Jana Wendt, Interview with Bob Hawke, Prime Minister (Nine Network, *A Current Affair*, Parliament House, 6 June 1990).

On another occasion, Hawke said,

> Now I'm simply saying: do not let any people, or any group of people, think that because Australia has that proud record, that all they've got to do is break the rules, jump the queue, lob here and Bob's your uncle. Bob is not your uncle on this issue other than in accordance with the appropriate rules. We will continue to be one of the most humanitarian countries in the world. I am not ambivalent about this matter. My compassion goes to those people who have been waiting for years in refugee camps to come to this country. And I am not going to see those with prior rights and prior claims upon our compassion overridden by people who take the law into their own hands.[2]

In April, a group of these Cambodians, many of whom were our clients, received decisions rejecting their applications for refugee status. They applied to the Federal Court of Australia ('the Federal Court') for judicial review of these decisions. The Minister for Immigration, Gerry Hand, has been quick to concede that the decision-making process was flawed; they have been denied natural justice. Their cases have been remitted by consent for a new decision.

The problem is that our clients are still in detention. They have been there for more than two years. They are already depressed and anxious, and this is going to prolong their detention even more. So we have amended their applications to the Court to seek their release from detention pending the outcome of their claims. The case, which will be heard by Justice O'Loughlin, is set down for hearing on Thursday morning, 7 May, the day after tomorrow.

It is the end of the day – a little before 6 PM – and I am sitting in our office preparing for the case. I get a call from a colleague in Sydney. What he tells me stuns me. A Bill has been introduced into Parliament around 4 PM and has already passed the lower House. It provides for the mandatory detention of our clients and has been specifically designed to stymie their case before Justice O'Loughlin. It has bipartisan support and is set to pass the Senate this evening. Following only three hours of debate in the Senate – stretched out by a spirited but powerless minority (the Australian Democrats and Independent Senator Brian Harradine) – the Bill becomes law.[3] The next day, despite the best efforts of my colleague, Anthony Krohn, who crafts a superb letter to the Governor-General, Bill Hayden, about why he should seriously consider not doing so, the Act is given Royal Assent.

The Act declares that 'boat people' (referred to as 'designated persons') *must* be detained and that they have no remedy of release through the Courts: 'A

[2] Glenn Milne and Tracey Aubin, 'Bob's Not Your Uncle PM Tells Boat People', *The Weekend Australian*, 21–22 July 1990, 3, quoting Bob Hawke, Prime Minister of Australia.

[3] *Migration Amendment Act 1992* (Cth).

court is not to order the release from custody of a designated person', says s 54R. These measures are, the Act declares, in "the national interest". Justice O'Loughlin's hands are tied.

As the enormity of what has happened sinks in, I try to explain the implications to our bewildered clients. A constitutional challenge is our only choice. I take instructions, and we secure the pro bono assistance of a leading law firm and senior counsel. The pyrrhic victory in the High Court of Australia seven months later, which validates mandatory detention but finds detention prior to May 1992 to have been unlawful, is little consolation.[4]

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The day-to-day work of representing asylum seekers is principally focused on conditions in their country of origin. This is the traditional turf of refugee law. Does the harm a client fears amount to persecution or not? Is her fear well-founded? Is her fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion?

Recognition as a refugee within the definition set out in the *Refugee Convention*[5] is vital for protection against *refoulement* – that is, forcible return of a person to a place where her life or freedom is threatened.[6] This principle of *non-refoulement* is the cornerstone of international refugee law.[7]

Determination of refugee status is a process that considers the past and then determines an asylum seeker's status through a prospective assessment of risk. But what of her present, her here and now? While meeting the challenges of this and similar migration processes, asylum seekers living in the community need a means of subsistence pending determination of their request for protection.

One of my clients at RACS was a young Sri Lankan Tamil man. He arrived with his wife and five-year-old daughter. He lodged his application for refugee status with a substantial amount of detail supporting his claims. I took statements from him, did the necessary country research, wrote

4 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

5 *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 1A(2).

6 Ibid art 33; see also *Migration Act 1958* (Cth) s 36(2)(a). Cf *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), inserting s 197C into the *Migration Act 1958* (Cth), which declares that *non-refoulement* obligations are irrelevant to the obligation to remove unlawful non-citizens under s 198.

7 See, eg, United Nations High Commissioner for Refugees, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/MMSP/2001/09 (16 January 2002) Preamble para 4.
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submissions in support of his case, and accompanied him to interviews and hearings. At the end of one of our appointments, I was closing his file. I was under pressure to move onto the next client, to meet another deadline. He stopped me. He needed to tell me something. He had no permission to work. He could not support his family. He could not have put it more simply, powerfully, devastatingly: "Madam, *I* can eat every second day, but I can't ask my daughter to."

In another case, a Kurdish couple we were assisting was homeless. No work. No social assistance. One afternoon they took me outside into the street to show me where they lived. It was the back of an old van, strewn with all they had: a few clothes, a bit of bedding, some vital papers, and an enormous jar full of brine with the last of their pickled cucumbers afloat in it. They showered in public swimming pools. They were at the end of their tether. In utter despair, the husband thumped the back window of their van. As it crumbled beneath his hands, he broke down.

Stories like these are not uncommon. However, the laws and policies that produce them are rarely subject to judicial scrutiny. On one occasion, a case on work rights came before the Federal Court. It settled, but rather than consigning it to the oblivion that is the destiny of cases that settle out of court, Justice Merkel took the unusual step of placing the circumstances that gave rise to it on the public record. He did so because, he said, "[o]ccasionally cases come before the Court that show that the law can be used as an instrument of injustice. The present is such a case."[8]

The case before Justice Merkel was of another Sri Lankan couple, this time with a young son. They were not asylum seekers. That they were unwelcome was nevertheless clear. They were subject to a mandatory 'no work' condition on their temporary processing visa (known as a bridging visa). With access only to limited support from their wider family, they relied on food vouchers from the Red Cross and other charities and begged for free food from convenience stores like McDonald's and Kentucky Fried Chicken. This led to what Justice Merkel described as

> the Kafkaesque situation in which the applicant, evidently under surveillance, was twice apprehended for working in order to provide for his wife and young child. Under the statutory regime that was an offence, and resulted in the cancellation of the applicant's bridging visa and his indefinite detention away from his wife and child.[9]

[8] *De Silva v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 350, 350.
[9] Ibid 351.

Drawing together the vignettes offered in this prologue, each of these living realities reflects law's capacity to legitimise – and to normalise – the Kafkaesque. Thinking about Justice Merkel's explanation for placing on the public record an example of law's capacity to be used as an instrument of injustice, we might ask how migration law has made these dehumanising realities possible. It is this question that animates this book.

1

Introduction

What men, what monsters, what inhuman race,
What laws, what barb'rous customs of the place,
Shut up a desert shore to drowning men,
And drive us to the cruel seas again![1]

1.1 INSTITUTIONAL RESPONSES TO UNSOLICITED MIGRATION

The spectre of vast hordes arriving on Australian shores in little fishing boats has long captured the public imagination. Ever since the exodus from Vietnam that began in 1975, the arrival of so-called 'boat people' has been met with growing hostility and increasingly harsh measures.[2] Since 1992, 'boat people' seeking Australia's protection have been subject to mandatory detention for months and often years without meaningful recourse to the courts. Described at the time as an "interim" measure,[3] the practice of mandatory detention has survived constitutional

[1] Virgil, *Aeneis* in John Dryden, *The Poetical Works of John Dryden, with the Life of Virgil* (Milner and Sowerby, 1864) 104.

[2] While numbers of 'boat people' arriving in Australia since this time have increased significantly, they remain modest in global terms: see United Nations High Commissioner for Refugees (UNHCR), *UNHCR Statistical Yearbook 2014* (UNHCR, 14th ed, 2015); Janet Phillips and Harriet Spinks, 'Boat Arrivals in Australia Since 1976' (Research Paper, Parliamentary Library, Parliament of Australia, first published 25 June 2009, statistical appendix updated 23 July 2013). For an overview of Australia's responses to unauthorised arrivals over the last quarter of the twentieth century, see Andreas Schloenhardt, 'Australia and the Boat People: 25 Years of Unauthorised Arrivals' (2000) 23(3) *University of New South Wales Law Journal* 33.

[3] Commonwealth, *Parliamentary Debates*, House of Representatives, 5 May 1992, 2370 (Gerry Hand, Minister for Immigration) (Commonwealth parliamentary debates are hereinafter referred to as 'CPD').

challenge,[4] been exported,[5] and, more than 25 years later, remains a central platform of contemporary migration law and policy both in Australia[6] and as part of Australia's offshore detention and processing policy.[7]

Between 1997 and 2009, many asylum seekers applying to remain in Australia had a 'no work' condition[8] imposed on their stay while they awaited the outcome of lawful immigration procedures. These procedures could take months and sometimes years to run their course. Although some of the harshest consequences of the no-work policies of this 12-year period[9] were mitigated by policy and regulatory changes from 2009,[10] the way in which they were framed and rationalised is of more than historical interest. This is because, notwithstanding the relaxation of the policy for some, work rights are still regarded as a privilege.[11] The regulatory framework for imposing the no-work condition remains in place,[12] and the risk of detention for breach of the no-work condition remains real.[13] In 2014, at least 19,000 asylum seekers

[4] See especially *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ('*Lim*'); *Al-Kateb v Godwin* (2004) 219 CLR 562 ('*Al-Kateb*'); *Plaintiff M76-2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 ('*Plaintiff M76*'); *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 ('*Manus Island Case*'); *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 ('*Plaintiff S4*'); *Plaintiff M96A/2016 v Commonwealth of Australia* [2017] HCA 16 (3 May 2017) ('*Plaintiff M96A*'); *Plaintiff S195/2016 v Minister for Immigration and Border Protection and Ors* [2017] HCA 31, 17 August 2017. See also Chapter 5.

[5] Although there have been some recent changes to the offshore detention regime established under memoranda of understanding between Australia and Nauru and Papua New Guinea, 'boat people' transferred from Australia to Nauru and Manus Island, Papua New Guinea, have been mandatorily detained for long periods and the validity of the regional processing scheme upheld: see *Manus Island Case* (2014) 254 CLR 28; *Plaintiff M68-2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 ('*Nauru Detention Case*'). Cf *Namah v Pato* [2016] PGSC 13; SC1497 (26 April 2016); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 ('*Malaysian Declaration Case*'). The relaxation of policy notwithstanding, the confinement of a person on an island may nevertheless constitute a deprivation of liberty: *Case of Guzzardi v Italy* (1980) 3 Eur Court HR (ser A, no 39) 533.

[6] See especially *Migration Act 1958* (Cth) divs 6–7 ('*Migration Act*').

[7] See, eg, *Manus Island Case* (2014) 254 CLR 28; *Nauru Detention Case* (2016) 257 CLR 42; *Namah v Pato* [2016] PGSC 13; SC1497 (26 April 2016).

[8] *Migration Regulations 1994* (Cth) reg 2.05(1), sch 8 reg 8101('*Migration Regulations*').

[9] See, eg, Grant Mitchell et al, 'Welfare Issues and Immigration Outcomes: Asylum Seekers Living in Australia on Bridging Visa E' (2003) 25(3) *Migration Action* 20.

[10] *Migration Amendment Regulations 2009 (No 6)* (Cth).

[11] Joint Standing Committee on Migration, Parliament of Australia, *Immigration Detention in Australia: Community-Based Alternatives to Detention – Second Report of the Inquiry into Immigration Detention in Australia* (2009) 139 [5.38].

[12] *Migration Regulations* sch 2.

[13] For example, since 14 December 2013, 'boat people' released into the community pending the determination of their status are also required to sign a code of conduct the breach of

lived in the Australian community without work rights,[14] and although (since that time) many of those asylum seekers have now been given work rights, pursuant to a deal brokered between then Immigration Minister Scott Morrison and minor-party senators,[15] the grant of such rights is still discretionary and subject to withdrawal.[16]

As well as the prospect of a no-work condition, many asylum seekers have also been, and indeed continue to be, denied access to any or adequate welfare support.[17] They have been left to depend on charity and forced into homelessness and begging.[18] As a result, many asylum seekers face

which risks reduction or cessation of welfare support or visa cancellation and return to immigration detention. Furthermore, breach of the code may lead to the refusal of further visa applications and, in certain circumstances, permanent exclusion from Australia. The terms of the code of behaviour include an expectation that asylum seekers will comply with all Australian laws including road laws: *Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013* (Cth); *Instrument IMMI 13/155: Code of Behaviour for Public Interest Criterion 4022* (Cth), signed on 12 December 2013, made under *Migration Regulations* sch 4 pt 4 cl 4.1. However, even without the Code of Behaviour, breach of the no-work condition can lead to visa cancellation and re-detention on the grounds of being an 'unlawful non-citizen': *Migration Act* ss 13, 14, 116(1)(b), 189. Note also that *Migration Amendment (Employer Sanctions) Act 2007* (Cth) amended the *Migration Act* to include both civil and criminal liability on employers for allowing a person to work in breach of the no-work condition: *Migration Act* ss 245AA–245AP.

[14] This was especially the case for a cohort of 'boat people' released from detention pursuant to a ministerial discretion and subject to a 'no advantage' policy recommended by an expert panel on asylum seekers in August 2012: Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Estimates 2013–2014 (Immigration and Border Protection)*, Canberra, 27 May 2014, 81 (Martin Bowles, Secretary, Department of Immigration and Border Protection (DIBP); Chris Bowen, Minister for Immigration and Citizenship, 'No Advantage Onshore for Boat Arrivals' (Media Release, 21 November 2012); *Instrument IMMI 12/114: Classes of Persons* (Cth), signed on 20 November 2012, made under *Migration Regulations* sch 2 regs 050.613A(1)(b), 051.611A(1)(c); Australian Human Rights Commission, Submission No 8 to Joint Committee on Human Rights, Parliament of Australia, *Examination of the Migration (Regional Processing) Package of Legislation*, January 2013, 47–9; Lisa Hartley and Caroline Fleay, 'Policy as Punishment: Asylum Seekers in the Community without the Right to Work' (Centre for Human Rights Education, Curtin University, 2014) 34; Peter Mares, 'Refuge without Work: "This is a Poison, a Poison for the Life of a Person"' (2014) 45 *Griffith Review* 103, 105. On the expert panel report, see below n 38.

[15] Morrison agreed to grant work rights and to exercise his discretion to release children from detention in exchange for the passage of controversial legislation enabling extraterritorial detention on the high seas: Scott Morrison, Minister for Immigration and Border Protection, Press Conference, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Coalition Government, Parliament House, Canberra, 5 December 2014.

[16] See Chapter 6, Section 6.2, 258–72. [17] Hartley and Fleay, above n 14, 34.

[18] Nadine Liddy, Sarah Sanders, and Caz Coleman, 'Australia's Hidden Homeless: Community-Based Options for Asylum Homelessness' (Hotham Mission Asylum Seeker Project, 2010).

destitution[19] or, for those denied work rights, risk detention for trying to mitigate their hardship – an effect that, as we saw in the prologue, has been described by a senior member of the judiciary as Kafkaesque.[20] The relaxation of the work rights policy notwithstanding, for many, the denial or piecemeal grant of work rights[21] and the denial of access to adequate welfare has fostered social and economic exclusion, with far-reaching and damaging effects.[22] This exclusion, coupled with the uncertainty of a precarious legal status that conditions access to protection procedures by 'boat people'[23] on a non-compellable 'public interest' discretion[24] and the imposition of arbitrary and unrealistic 'lodge or leave' deadlines,[25] has put asylum seekers under

[19] See, eg, Hartley and Fleay, above n 14, 34; Asylum Seekers Resource Centre (ASRC), 'Destitute and Uncertain: The Reality of Seeking Asylum in Australia' (October 2010).

[20] *De Silva v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 350, 351 (Merkel J).

[21] A practice has emerged of granting bridging visas with work rights for three-month periods. This creates an almost insurmountable practical barrier to securing work: Refugee Council of Australia (RCOA), 'State of the Nation: Refugees and People Seeking Asylum in Australia' (RCOA Report No 1/17, February 2017) 10 http://www.refugeecouncil.org.au/publications/reports/state-nation-2017/.

[22] See, eg, Jesuit Social Services, 'The Living Conditions of People Seeking Asylum in Australia' (Jesuit Social Services, 2015); see also Carolyn Webb and Cameron Houston, 'Springvale Bank Fire: Asylum Seekers' Lives Precarious, Say Advocates', *The Age* (online), 20 November 2016, www.theage.com.au/victoria/springvale-bank-fire-asylum-seekers-lives-precarious-say-advocates-20161120-gstexl.html.

[23] The cohort affected by these measures comprises some 30,923 'boat people' currently in Australia who are part of what has become known as the 'legacy caseload' – that is, 'boat people' who either arrived before 13 August 2012 and had not had their protection visa application finalised by 18 September 2013, or who arrived on or after 13 August 2012 and who are subject to a fast-track assessment process. The date 13 August 2012 signifies the date on which an expert panel on asylum seekers published a report recommending reinstatement of extraterritorial processing of asylum seekers: see below n 38. 18 September 2013 signifies the commencement date of the military-led campaign to 'Stop the Boats', codenamed Operation Sovereign Borders: Thea Cowie, 'Coalition Launches Operation Sovereign Borders' *SBS Radio* (online), 18 September 2013 www.sbs.com.au/news/article/2013/09/18/coalition-launches-operation-sovereign-borders. For a departmental description of the 'legacy caseload' and statistical data see DIBP, 'IMA Legacy Caseload: Report on Status and Processing Outcomes' (February 2017) <www.border.gov.au/ReportsandPublications/Documents/statistics/ima-legacy-caseload-feb-17.pdf>.

[24] *Migration Act* ss 46A(1), (2), and (7). Members of the 'legacy caseload' are prohibited from applying for permanent protection. They can only apply for a temporary protection visa if the Minister decides that it is in the 'public interest' to exercise his discretion to lift a legislative bar on making such an application. Even then, they are subject to a fast-track assessment process that makes access to merits review a matter of departmental discretion.

[25] A ministerial announcement in May 2017, setting a lodgment deadline of 1 October 2017, led to an explosion in demand for legal advice and assistance: RCOA, 'Recent Changes in Australian Refugee Policy' (RCOA Media Release, 8 June 2017) <www.refugeecouncil.org.au/publications/recent-changes-australian-refugee-policy/>; see also Amnesty International,

immense strain. Indeed, the administration of policy has heightened rather than diminished vulnerability to destitution, detention and ultimately the risk of *refoulement*. These conditions have been described by UNHCR's most senior protection official, Volker Türk, as a "social time bomb".[26]

Mandatory detention and planned destitution[27] can, as we can see, operate with dehumanising effects, separately or in combination. They are two of the most significant developments in Australian migration policy since the 1990s. Even today, as they seem to be overshadowed by increasingly strident responses to unsolicited migration – in particular the controversial policies of interception, boat turnbacks,[28] and extraterritorial detention and processing of asylum seekers[29] – mandatory detention and planned destitution remain central planks of current policy and continue to be viewed as both lawful and legitimate.

It is with this context in mind that this book aims to explain how policies such as the mandatory detention and planned destitution of certain foreigners[30] have come to be characterised as both lawful and legitimate institutional responses to unsolicited migration – policies that are central to, indeed underpin, Australia's contemporary responses to unsolicited migration. To do this, I unearth the juridical tradition in which migration law-making in Australia is embedded in order to show how certain kinds of

'Government Sets Impossible Deadlines for Asylum Applications', 13 March 2017 <www.amnesty.org.au/unrealistic-deadlines-imposed-on-people-seeking-asylum/>.

[26] Michael Gordon, '"Social Time Bomb": UNHCR's Warning on the Plight of 30,000 Asylum Seekers Already Living in Australia', *The Age* (online), 23 November 2016, quoting Volker Türk, UNHCR's Assistant High Commissioner for Refugees (Protection), <www.smh.com.au/federal-politics/political-news/social-time-bomb-unhcrs-warning-on-the-plight-of-30000-asylum-seekers-already-living-in-australia-20161122-gsuyk5.html>.

[27] In March 2008, then Minister for Immigration and Citizenship, Senator Chris Evans, characterised the policy of denying work rights and restricting access to welfare as planning for people to be destitute: CPD, Senate, 18 March 2008, 1090 (Chris Evans). Cholewinski describes similar practices in the United Kingdom as 'enforced destitution': Ryszard Cholewinski, 'Enforced Destitution of Asylum Seekers in the United Kingdom: The Denial of Fundamental Human Rights' (1998) 10(3) *International Journal of Refugee Law* 462.

[28] There have even been suggestions that effecting turnbacks may entail making government-sanctioned payments to people smugglers to do so: Jared Owens, 'Were Asylum Seeker Boats Paid to Turn Back?' *The Australian* (online), 14 June 2015 www.theaustralian.com.au/national-affairs/immigration/were-asylum-seeker-boats-paid-to-turn-back/news-story/f19bd5b8e14e590b31e0579a80b4c535 .

[29] See Section 1.2.2.1, 'Selection of the Case Studies', in this chapter. See also the epilogue, 'A Campaign to "Stop the Boats"', 292.

[30] In this book, I use the terms 'foreigner' and 'alien' more or less interchangeably, according to their usage in the particular texts with which I am working. However, as will become clear, my genealogical analysis of the figure of the foreigner in international law suggests the foreigner to be a figure with a more complex juridical history.