

DARK JUSTICE: AUSTRALIA’S INDEFINITE DETENTION OF REFUGEES ON SECURITY GROUNDS UNDER INTERNATIONAL HUMAN RIGHTS LAW

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This article examines Australia’s security assessment and related detention of refugees in the light of international human rights law. The current domestic legal process typically denies refugees any or adequate notice of the allegations and evidence against them, precludes merits review by an independent administrative tribunal and fails to provide genuine and effective judicial review of security assessments or detention (including a sufficient degree of procedural fairness and disclosure of essential evidence). The result is often indefinite detention of recognised refugees who cannot be removed from Australia and thus remain in a legal black hole where security decisions are immune from scrutiny. The current regime results in systematic violations of Australia’s obligations under arts 9(1), 9(2) and 9(4) of the International Covenant on Civil and Political Rights. These violations are not remedied by the High Court of Australia’s fairly narrow, technical decision in the 2012 case, Plaintiff M47/2012 v Director-General of Security, or by the creation of the non-binding Independent Reviewer of ASIO assessments.

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I INTRODUCTION

During and after the vicious end of the protracted civil war in Sri Lanka in May 2009, large numbers of Tamils fled abroad, with the United Nations High Commissioner for Refugees ('UNHCR') estimating that 140 000 Tamils were displaced in 65 countries as of mid-2012.¹ In that period, a small number of Tamil asylum seekers — around 1600 — travelled irregularly by boat to claim refugee protection in Australia.² Some had spent time in transit countries (such as Malaysia or Indonesia) and had been recognised as refugees by the UNHCR, though none were accorded permanent protection or resettled elsewhere. On arrival in Australia they were mandatorily detained as 'offshore entry persons' and processed under a discretionary 'offshore' refugee determination system with reduced procedural rights. Many were eventually recognised as refugees by the Department of Immigration and Citizenship ('DIAC').³

After their recognition as refugees, they were subjected to an individual security assessment by the Australian Security Intelligence Organisation ('ASIO'), which applied a national security test under domestic law. Between January 2010 and November 2011, ASIO had issued 54 adverse security assessments to offshore entry persons (out of 7000 cases considered);⁴ in contrast, not a single adverse assessment was issued to an 'onshore' refugee between mid-2008 and mid-2011.⁵ These refugees were not given copies of their assessments directly by ASIO but only learned of them when notified by DIAC

¹ Ben Doherty, 'Tamils Lured with Promise of Citizenship', *Sydney Morning Herald* (Sydney), 15 June 2012, 1.

² Systems, Program Evidence and Knowledge Section, 'Asylum Statistics — Australia: Quarterly Tables — March Quarter 2012' (Department of Immigration and Citizenship, March 2012) 11.

³ *Ibid* 12, 14.

⁴ Evidence to Senate Joint Select Committee on Australia's Immigration Detention Network, Senate, Parliament of Australia, Canberra, 22 November 2011, 24 (David Irvine, Director-General, Australian Security Intelligence Organisation ('ASIO')), quoted in Senate Joint Select Committee on Australia's Immigration Detention Network, Parliament of Australia, *Final Report* (2012) 161.

⁵ Evidence to Senate Joint Select Committee on Australia's Immigration Detention Network, Senate, Parliament of Australia, Canberra, 22 November 2011, 24 (David Irvine, Director-General, ASIO), quoted in Senate Joint Select Committee on Australia's Immigration Detention Network, above n 4, 154.

that the ASIO assessments rendered them ineligible for protection visas to remain permanently in Australia.⁶

The refugees were also not given a statement or summary of reasons explaining why the adverse assessments had been made, nor provided with formal disclosure of evidence or summaries of evidence substantiating ASIO's assertion.⁷ At most, ASIO put certain assertions to some refugees during their interviews. No merits review tribunal was available to contest the accuracy of the assessments. Judicial review was practically unavailable because of the statutory and common law diminution of procedural fairness; and the trump of public interest immunity could prevent disclosure of relevant materials in court and shield the administrative decision from genuine review even on narrow grounds of errors of law.

As a result, the refugees continued to be held in detention, ostensibly pending their removal from Australia in the absence of a valid visa. One problem, however, was that they could not be returned to their countries of origin because Australia had recognised them as refugees and accepted that they were at risk of persecution. Australia had not excluded them from refugee status under art 1F of the *Convention relating to the Status of Refugees* ('*Refugee Convention*'),⁸ nor invoked the exception to *non-refoulement* under art 33(2) of the *Refugee Convention*, instead applying its own idiosyncratic national security test (which cannot authorise return to persecution under international law).⁹ A further problem was that Australia had not identified any other safe third countries to which removal was feasible.¹⁰ Removal was highly unlikely in the face of an assessment by ASIO that the refugees were security threats.

The consequence has been the protracted and potentially indefinite administrative detention of the refugees. Most of the refugees had already spent between one and a half and two years in immigration detention before being notified of their adverse security assessments.¹¹ By mid-2012, different refugees had spent between one and over two years in detention *after* receiving their adverse assessments, with most detained for a year and a half or more.¹² The total periods in immigration detention from arrival in Australia to mid-2012

⁶ 'Communication to the United Nations Human Rights Committee', Communication to the Human Rights Committee, 28 August 2011, 14 <<https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=229128ab-d97b-4dab-9b97-bcf31229b81c>>.

⁷ Ibid.

⁸ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('*Refugee Convention*') as modified by the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 257 (entered into force 4 October 1967).

⁹ As defined by the *Australian Security Intelligence Act 1979* (Cth) s 4 ('*ASIO Act*'). See also at s 37.

¹⁰ 'Communication to the United Nations Human Rights Committee', Communication to the Human Rights Committee, 28 August 2011, 17, 35 <<https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=229128ab-d97b-4dab-9b97-bcf31229b81c>>. On the safe third country concept, see generally United Nations High Commissioner for Refugees, 'UNHCR Note on the Principle of *Non-Refoulement*' (Prepared for the EU Seminar on the Implementation of the 1995 EU Resolution on Minimum Guarantees for Asylum Seekers, Luxembourg, 4–5 November 1997).

¹¹ 'Communication to the United Nations Human Rights Committee', Communication to the Human Rights Committee, 28 August 2011, 18 <<https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=229128ab-d97b-4dab-9b97-bcf31229b81c>>.

¹² Ibid.

ranged between two and three years,¹³ with no realistic prospect of imminent removal on the horizon. Most of the refugees are Tamils of Sri Lankan origin, while a handful are of other nationalities (such as Rohingya from Myanmar, Afghan Hazara or Kuwaiti Bedouin).¹⁴ Three of the detainees are dependent minor children of refugee parents, whose development has been seriously disrupted by protracted detention. One child was born in detention and has spent his whole life of more than two years there.¹⁵

The unfairness of the ASIO security assessment process generally has been previously brought to the fore by Federal Court proceedings,¹⁶ the Australian Law Reform Commission ('ALRC') (which called for an inquiry in 2004)¹⁷ and the Law Council of Australia.¹⁸ The pernicious consequence of indefinite detention in recent refugee cases has attracted renewed criticism, including from the Australian Human Rights Commission ('AHRC'),¹⁹ a Senate Joint Select Committee on Australia's Immigration Detention Network²⁰ and a UNHCR expert roundtable.²¹ The Australian Labor Party conference in 2011 suggested referring an inquiry to the Independent National Security Legislation Monitor but that had not occurred by late 2012.²² An Australian Greens Bill of October 2012 to comprehensively reform the ASIO process and eliminate indefinite detention was not supported by the Parliament.²³

Legal challenges to the unfairness of the process continue. Since September 2011, 51 of the refugees have lodged complaints against Australia with the UN Human Rights Committee ('UNHRC')²⁴ under the *Optional Protocol to the*

¹³ Ibid.

¹⁴ Ibid annex A (confidential, on file with author).

¹⁵ 'Communication to the United Nations Human Rights Committee', Communication to the Human Rights Committee, 28 August 2011, 10 <<https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=229128ab-d97b-4dab-9b97-bcf31229b81c>>.

¹⁶ See, eg, *SBEG v Secretary, Department of Immigration and Citizenship* [2012] FCA 277 (23 March 2012) ('*SBEG*'); *Sagar v O'Sullivan* (2011) 193 FCR 311 ('*Sagar*'); *Soh v Commonwealth* (2008) 101 ALD 310; *Parkin v O'Sullivan* (2009) 260 ALR 503 ('*Parkin*'); *Leghaei v Director-General of Security* (2007) 97 ALD 516 ('*Leghaei Appeal*'); *Kaddari v Minister for Immigration and Multicultural Affairs* (2000) 98 FCR 597; *Director General Security v Sultan* (1998) 90 FCR 334.

¹⁷ Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98 (2004) 408.

¹⁸ Ibid 407.

¹⁹ Australian Human Rights Commission, Submission to *Independent Review of the Intelligence Community*, April 2011.

²⁰ Senate Joint Select Committee on Australia's Immigration Detention Network, Parliament of Australia, above n 4.

²¹ United Nations High Commissioner for Refugees, 'Expert Roundtable on National Security Assessments for Refugees, Asylum Seekers and Stateless Persons in Australia' (Chair's Summary, 3 May 2012).

²² Australian Labor Party, *National Platform* (Australian Labor, 2011) 173–4 [161].

²³ Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012 (Cth).

²⁴ 'Communication to the United Nations Human Rights Committee', Communication to the Human Rights Committee, 28 August 2011 <<https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=229128ab-d97b-4dab-9b97-bcf31229b81c>>; 'Communication to the United Nations Human Rights Committee', Communication to the Human Rights Committee, 21 March 2012; 'Communication to the United Nations Human Rights Committee', Communication to the Human Rights Committee, 3 December 2012. The first complaint should be decided by the Human Rights Committee by the end of 2012.

International Covenant on Civil and Political Rights ('Optional Protocol').²⁵ A High Court of Australia decision of October 2012, and a second High Court case pending (as of December 2012) have raised specific domestic legal issues about the invalidity of the migration regulation which empowers ASIO to make security assessments; the interpretation of the detention provisions of the *Migration Act 1958* (Cth) ('*Migration Act*') as they apply to refugees; and the constitutionality of denying procedural fairness in detention cases.²⁶ While arguments about international human rights law as such are not central to those cases, aspects of the first High Court decision will be discussed where relevant to the international human rights issues.

This article first sets out the domestic legal regimes governing detention, refugee determination, security assessment and removal — including the availability and quality of merits and judicial review of these administrative decisions. The core of the article then analyses the compatibility of these regimes with Australia's obligations under arts 9(1), (2) and (4) of the *International Covenant on Civil and Political Rights* ('*ICCPR*')²⁷ (rather than from a domestic administrative, migration or constitutional law perspective), and how they interact with international refugee law.

Problems with mandatory detention from an international human rights law perspective are well-known. There has also been recent scholarly attention to human rights concerns with ASIO's security assessments generally and, particularly, as applied to non-refugees lawfully present in Australia and not in detention (including controversies such as that of Sheikh Mansour Leghaei and American peace activist Scott Parkin).²⁸

This article builds on the existing scholarship by examining the special situation of recognised refugees who are detained after receiving adverse security assessments. The lawfulness of their detention is affected by both their status as recognised refugees and the nature of the security assessment procedure (including the quality of review) which underlies it. As such, their legal situation under the *ICCPR* is significantly different from both non-refugees not in detention (who may be governed instead by art 13 of the *ICCPR* concerning expulsion), and refugees in detention but not subject to security assessments (whose position under art 9 is not affected by security procedures and decisions).

²⁵ *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

²⁶ *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243 ('*Plaintiff M47*'); Transcript of Proceedings, *Plaintiff S138/2012 v Australian Security Intelligence Organisation* [2012] HCATrans 128 (30 May 2012). On the wider question of whether the *Australian Constitution* entrenches procedural fairness, see as a starting point Will Bateman, 'Procedural Due Process under the *Australian Constitution*' (2009) 31 *Sydney Law Review* 411.

²⁷ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

²⁸ See, eg, Ben Saul, 'The Kafka-esque Case of Sheikh Mansour Leghaei: The Denial of the International Human Right to a Fair Hearing in National Security Assessments and Migration Proceedings in Australia' (2010) 33 *University of New South Wales Law Journal* 629; Keiran Hardy, 'ASIO, Adverse Security Assessments, and a Denial of Procedural Fairness' (2009) 17 *Australian Journal of Administrative Law* 39; Caroline Bush, 'National Security and Natural Justice' (2008) 57 *Australian Institute of Administrative Law Forum* 78.

As will be seen, the article argues that the present system is inconsistent with the *ICCPR* in key respects. More than this, the current regime is a perfect storm of procedural disabilities which creates a legal black hole for these refugees. The system strikes at the core of elementary conceptions of the rule of law: the right to know the case against oneself; the right to effectively challenge it; the right of a court to control highly invasive administrative action; and, ultimately, accountability for the proper exercise of public power. This remains true notwithstanding that the refugees are non-citizens, or entered Australia irregularly or may be security risks. Every person has a right to be treated fairly, not peremptorily or summarily, by Australian legal processes — even if there is seemingly little appetite amongst politicians to stick their necks out for those stigmatised as ‘illegal entrants’, ‘Asian foreigners’ and ‘terrorists’.

II THE DOMESTIC LEGAL SITUATION

A *Detention and Asylum*

The bulk of refugees who received adverse security assessments entered Australian territorial waters by boats from March 2009 onwards. Most did not have valid visas to enter Australia and none were Australian citizens or permanent residents. As a result of their irregular migration status, the refugees were detained in various immigration detention facilities on arrival.²⁹ One of the refugees was a child born in detention in Australia and was separately detained as an ‘unlawful non-citizen’ in the migration zone.³⁰

The refugees sought to apply for refugee ‘protection’ visas in Australia to allow them to remain permanently. Many had already been recognised by the UNHCR elsewhere (such as in Malaysia or Indonesia) as persons in need of protection and possessed UNHCR documentation.³¹ None had been found by the UNHCR to be excluded from refugee protection under art 1F of the *Refugee Convention*, which requires the exclusion of people suspected of certain serious international crimes or conduct contrary to UN principles or purposes.

²⁹ *Migration Act 1958* (Cth) (*‘Migration Act’*) s 189(3) provides that the authorities ‘must detain’ a person who is an ‘unlawful non-citizen’ in an ‘excised offshore place’. An ‘excised offshore place’ includes listed Australian islands and territories, sea installations and resources installations, and areas prescribed by regulations: at s 5(1). The term ‘unlawful non-citizen’ is defined as ‘a non-citizen in the migration zone who is not a lawful non-citizen’: at ss 5(1) and 14(1). A lawful non-citizen is defined as a non-citizen holding a valid visa in the migration zone: at s 13. The ‘migration zone’ is defined as certain Australian land areas and sea installations, but not including the territorial sea: at s 5(1). Sections 189(2) and (4) alternatively require the detention of persons in Australia, but outside Australia’s (legislatively defined) ‘migration zone’, suspected of seeking to enter that zone or an ‘excised offshore place’, and who would be ‘unlawful non-citizens’ if in the migration zone.

³⁰ *Migration Act* s 189(1).

³¹ ‘Communication to the United Nations Human Rights Committee’, Communication to the Human Rights Committee, 28 August 2011, 11 <<https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=229128ab-d97b-4dab-9b97-bcf31229b81c>>.

However, as ‘offshore entry persons’ under domestic law,³² they were subject not to Australia’s regular onshore refugee determination procedure under the *Migration Act* (which includes a right to merits review before the Refugee Review Tribunal (‘RRT’)), but to a special regime established by executive power under s 61 of the *Australian Constitution*.³³ In essence, the scheme barred the asylum seekers from exercising a legally enforceable right to claim refugee status, but vested a non-compellable discretionary power in the Minister for Immigration and Citizenship (‘Minister’) to waive the statutory bar and permit an application for a protection visa.³⁴ DIAC officials conducted a Refugee Status Assessment (‘RSA’),³⁵ applying the refugee definition from the *Refugee Convention* (as modified under Australian law), prior to any consideration by the Minister, and an Independent Merits Review (‘IMR’) was available to unsuccessful applicants at that stage.³⁶

A High Court decision in 2010 confirmed that the decisions at first instance and on review were exercises of statutory power under the *Migration Act*,³⁷ which required adherence to precedent and procedural fairness³⁸ but were not subject to merits review before any administrative tribunal.

If Australia owed protection obligations to the person, a security check was conducted,³⁹ and if cleared, the Minister exercised his/her discretion and a protection visa would be issued. If the person was found not to be owed protection, the person became subject to removal from Australia as soon as practicable.⁴⁰

A small number of refugees who arrived in 2009 were subject to a different legal regime. Some who attempted to reach Australia by boat in October 2009 were intercepted at sea by an Australian customs vessel, the *MV Oceanic Viking*, which attempted to offload them at the Indonesian port of Bintan in November 2009.⁴¹ After a stand-off during which the refugees refused to disembark, Australia agreed with Indonesia that it would receive them into Australia on

³² *Migration Act* s 5(1) (definition of ‘offshore entry person’):

means a person who:

- (a) has, at any time, entered Australia at an excised offshore place after the excision time for that offshore place; and
- (b) became an unlawful non-citizen because of that entry.

³³ John McMillan, ‘Regulating Migration Litigation after *Plaintiff M61*’ (Report to the Minister for Immigration and Citizenship, 2011) 6. The process operated until 1 March 2011 and remains the relevant process for the 54 refugees in this article who arrived before that date.

³⁴ *Migration Act* s 46A.

³⁵ Within the meaning of the *Refugee Convention*, and incorporated into Australian law by *Migration Act* s 36(2)(a).

³⁶ Department of Immigration and Citizenship, *Guidelines for the Independent Merits Review of Refugee Status Applications* (March 2009) (on file with author).

³⁷ *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 349–51.

³⁸ *Ibid* 351–2, 355–6, 358.

³⁹ See below Part II(B).

⁴⁰ *Migration Act* s 198(2).

⁴¹ ‘Communication to the United Nations Human Rights Committee’, Communication to the Human Rights Committee, 28 August 2011, 10 <<https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=229128ab-d97b-4dab-9b97-bcf31229b81c>>.

29 December 2009 on 'special purpose' visas.⁴² Those visas expired on entry to Australia, at which point the refugees were detained at Christmas Island.⁴³ The refugees were informed by DIAC that they had been found to be refugees, but did not meet the requirements for resettlement in Australia and thus would be taken to and detained at Christmas Island pending resolution of their cases, potentially leading to resettlement elsewhere.

By earlier application to the UNHCR while overseas, these refugees had been recognised as refugees by the UNHCR, and none of them were found by the UNHCR to be excludable under art 1F of the *Refugee Convention*.⁴⁴ Because the refugees were not technically offshore entry persons, in principle they were entitled to apply for protection visas as part of the 'regular' onshore visa application process. Some applied while others did not, the latter because they believed Australia's undertaking to them that they were already recognised as refugees entitled them to resettlement.⁴⁵ Any such formal application was also thought to be futile following the issue of their adverse security assessments, which precluded the grant of a protection visa.

B Adverse Security Assessments

While many of the refugees were recognised by DIAC as refugees, such recognition did not automatically result in the issue of a protection visa to remain in Australia. All of the refugees were subject to 'adverse security assessments' issued by ASIO from 2009 to mid-2012.⁴⁶ Many of the assessments were issued after refugees had spent long periods in detention pending their refugee determination, followed by further lengthy periods while the security assessment process was underway (including interviews by ASIO).⁴⁷ Most had spent between one and a half and two years in detention between their arrival and receiving an adverse security assessment.⁴⁸

Before a person could be granted a protection visa 'Public Interest Criterion 4002' had to be satisfied,⁴⁹ which required that '[t]he applicant [was] not assessed by the Australian Security Intelligence Organisation to be directly or

⁴² 'Communication to the United Nations Human Rights Committee', Communication to the Human Rights Committee, 7 October 2011 (confidential, on file with the author). The visas were issued under *Migration Act* s 33(2)(b)(i).

⁴³ 'Communication to the United Nations Human Rights Committee', Communication to the Human Rights Committee, 7 October 2011 (confidential, on file with the author). They fell within s 189(1) of the *Migration Act* on expiry of their visas, as they then became 'unlawful non-citizens' in the 'migration zone' (but did not enter at an 'excised offshore place').

⁴⁴ 'Communication to the United Nations Human Rights Committee', Communication to the Human Rights Committee, 7 October 2011 (confidential, on file with the author).

⁴⁵ *Ibid.*

⁴⁶ 'Communication to the United Nations Human Rights Committee', Communication to the Human Rights Committee, 28 August 2011, 14 <<https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=229128ab-d97b-4dab-9b97-bcf31229b81c>>; 'Communication to the United Nations Human Rights Committee', Communication to the Human Rights Committee, 28 August 2011, annex A (confidential, on file with author).

⁴⁷ *Ibid.* 18.

⁴⁸ *Ibid.*

⁴⁹ Section 36 of the *Migration Act* creates 'protection visas' and s 65(1)(a)(ii) provides that, after considering a valid application for a visa, the Minister must refuse to grant a visa if he/she is not satisfied that a person meets 'the other criteria for it prescribed by this Act or the regulations'.

indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*,⁵⁰ for a protection visa to be granted. ASIO is empowered to make security assessments, which may result in a non-prejudicial finding (where there are no security concerns), a qualified assessment (where there may be some concerns but no action is recommended), or an adverse security assessment (where ASIO recommends that prescribed administrative action such as under the *Migration Act* be taken or not be taken) in respect of a person.⁵¹

ASIO applies a wide definition of security under the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*'), which includes protecting Australia and its people from domestic or external

- (i) espionage;
- (ii) sabotage;
- (iii) politically motivated violence;
- (iv) promotion of communal violence;
- (v) attacks on Australia's defence system; or
- (vi) acts of foreign interference.⁵²

The definition also refers to 'the carrying out of Australia's responsibilities to any foreign country' in relation to any of the foregoing threats,⁵³ and after a recent amendment, to 'the protection of Australia's territorial and border integrity from serious threats'.⁵⁴ There is also no requirement on ASIO to apply any conventional standard of proof such as the civil standard on the balance of probabilities.

The detained refugees did not receive a copy of their adverse assessments directly from ASIO, but were instead notified in letters from DIAC that they did not meet the security requirements for the grant of a protection visa, as a result of ASIO's assessment. The letters were cast in similar 'template' or 'boiler-plate' terms: 'ASIO assesses [person's name] to be directly (or indirectly) a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*'.⁵⁵ No further details, allegations, particulars of evidence or reasons for such conclusions were provided to the refugees in their letters.

While the *ASIO Act* particularises the various grounds of security threats, none of the refugees were notified in their letters of any specific ground which purportedly applied to them. Most of the refugees or their lawyers were not given advance notice of the allegations before an assessment was made, a statement of reasons by ASIO or DIAC once the assessment was made or any evidence substantiating the basis of the assessment during the process.

At most, some refugees may have been made aware of certain allegations during questioning by ASIO, as was the case on the facts in the High Court case

⁵⁰ *Migration Regulations 1994* (Cth) sch 4 ('*Public Interest Criteria and Related Provisions*') reg 4002.

⁵¹ *ASIO Act* s 35.

⁵² *Ibid* s 4 (definition of 'security' para (a)).

⁵³ *Ibid* (definition of 'security' para (b)).

⁵⁴ *Ibid* (definition of 'security' para (aa)).

⁵⁵ 'Communication to the United Nations Human Rights Committee', Communication to the Human Rights Committee, 28 August 2011, 25 <<https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=229128ab-d97b-4dab-9b97-bcf31229b81c>>.

of *Plaintiff M47/2012 v Director General of Security* ('*Plaintiff M47*').⁵⁶ But not all refugees were interviewed by ASIO, and some of those interviewed were not notified with adequate particularity of the substance of the case against them, so as to enable them to effectively respond.

Section 36 of the *ASIO Act* provides that the procedural fairness protections of pt IV of the *ASIO Act*, including a statement of reasons and merits review before the Administrative Appeals Tribunal ('AAT'),⁵⁷ do not apply to a person who is not an Australian citizen, permanent resident or special purpose visa holder. The *ASIO Act* thus does not *require* the statutory provision of a statement of reasons to the refugees — but nor does it prohibit the giving of reasons (or advance notice of allegations) should ASIO wish to provide them.

The difference in treatment between different categories of person stems from a scantily reasoned policy view expressed by the Royal Commission on Intelligence and Security in 1976, which suggested simply that '[t]he claim of non-citizens who are not permanent residents but who are in Australia to be entitled to such appeal is difficult to justify, particularly as they have no general appeal'.⁵⁸ The distinction appears to rest on an intuition that those with a stronger citizenship or migration status connection to Australia deserve stronger procedural protections.

That policy intuition is flawed for two reasons. First, the idea of a fair hearing aims not only to do justice to the individual concerned but also to ensure the accuracy and accountability of public decision-making by allowing the executive's allegations to be tested and scrutinised. Secondly, contemporary notions of the rule of law and human rights assume that the law should provide equal treatment of like situations, absent exceptional considerations.

Thus, if the concern of security assessments is to identify and quarantine security risks, there is no compelling justification for according higher protections to Australians who may present equally serious security risks as foreigners. Australians too can be terrorists, spies, saboteurs and so forth. Ironically, the policy is also incoherent because it can operate as a distinction without difference: the statutory guarantees accorded to Australian citizens and permanent residents can also be virtually eliminated by other statutory means where national security is at risk.⁵⁹

In addition to the statutory exclusion of the AAT's jurisdiction, as offshore entry persons, most of the refugees were not entitled to seek merits review in the RRT. The RRT only has power to review 'a decision to refuse to grant a protection visa',⁶⁰ and in the offshore processing regime, where the Minister did not consider exercising his/her discretionary power to allow a person to make a valid visa application, there was no relevant reviewable 'decision' under the *Migration Act*. Further, ASIO issued adverse security assessments *after* the

⁵⁶ (2012) 292 ALR 243.

⁵⁷ *ASIO Act* s 54.

⁵⁸ Commonwealth of Australia, Royal Commission on Intelligence and Security, *Fourth Report* (1976) vol 1, 154.

⁵⁹ See, eg, *ASIO Act* ss 37(2) (ASIO must disclose all information it relies upon 'other than information the inclusion of which would, in the opinion of the Director-General, be contrary to the requirements of security'), 38 (the Attorney-General can withhold notice of the assessment or disclosure of its grounds where necessary to protect security).

⁶⁰ *Migration Act* s 411(1)(c).

offshore determination process was completed — that is, after the RSAs and IMRs were conducted.⁶¹ There was thus no special offshore review process in which the merits of the adverse security assessments themselves could be reviewed as part of the asylum determination process.

The AHRC has strongly criticised the exclusion of review as ‘contrary to basic principles of due process and natural justice’.⁶² Various official bodies have called for the AAT to be given merits review jurisdiction over people who are not citizens or holders of either a valid permanent visa or a special purpose visa, including the AHRC, Inspector-General of Intelligence and Security and the Joint Parliamentary Committee on Australia’s Immigration Detention Network.⁶³

From October 2012, a new ‘Independent Reviewer’, a retired Federal Court judge, will conduct an ‘advisory’ review of ASIO security assessments of refugees.⁶⁴ The Independent Reviewer will have access to all material relied on by ASIO to determine whether the assessment is an ‘appropriate outcome’ and will provide her opinion and reasons to the person. Unclassified written reasons will also be provided by ASIO when a person seeks review, but only to the extent not prejudicing security. The Independent Reviewer will periodically review adverse assessments every 12 months in conjunction with ASIO’s own reconsideration.

While this is an improvement, it remains procedurally inadequate. Unlike AAT review, the Independent Reviewer’s findings are not binding but only recommendations to ASIO. While disclosure to a person may be improved in some cases, there remains no minimum content of disclosure in all cases, limiting a refugee’s ability to effectively respond. In a given case, ASIO may determine that it is not possible to disclose any meaningful reasons to a person and this will also prevent further disclosure by the Independent Reviewer. Refugees also continue to receive no notice of allegations prior to decisions being made.

The only limited avenue of review available is judicial review. The federal courts have jurisdiction to review migration decisions on limited legal grounds of ‘error of law’ or ‘jurisdictional error’,⁶⁵ which may include the denial of procedural fairness,⁶⁶ including where decisions involve ASIO assessments.

⁶¹ ‘Communication to the United Nations Human Rights Committee’, Communication to the Human Rights Committee, 28 August 2011, 16 <<https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=229128ab-d97b-4dab-9b97-bcf31229b81c>>.

⁶² Australian Human Rights Commission, Submission to *Independent Review of the Intelligence Community*, above n 19, 6.

⁶³ Ibid; Inspector-General of Intelligence and Security, *Annual Report 2006–2007* (2007) 12; Inspector-General of Intelligence and Security, *Annual Report 1998–1999* (1999) [89]–[91]; Senate Joint Select Committee on Australia’s Immigration Detention Network, above n 4, 173–5.

⁶⁴ Attorney-General’s Department, *Independent Review Function – Terms of Reference* (16 October 2012) <<http://www.attorneygeneral.gov.au/Media-releases/Documents/IndependentReviewFunction-TermsOfReference.pdf>>.

⁶⁵ The High Court has original jurisdiction under s 75 of the *Australian Constitution*. The Federal Magistrates’ Court is given the same jurisdiction as the High Court to review ‘migration decisions’ under s 476 of the *Migration Act*. On the scope of review, see McMillan, above n 33, 16–18.

⁶⁶ See below Part III(C)(3).

ASIO decisions themselves are also judicially reviewable.⁶⁷ However, such review is not a de novo ‘merits’ review of the factual and evidentiary basis of the ASIO decision, but is limited to the question of whether there has been an error of law (or ‘jurisdictional error’).

Problematically, where the person has not been given any or adequate reasons, or evidence, they usually cannot identify any errors of law to legitimately commence proceedings and avoid the risk of costs orders for filing speculatively. Even if a person gets into court, in security assessment cases the Full Court of the Federal Court has accepted that while procedural fairness persists at common law, the content of procedural fairness can be reduced to ‘nothingness’ where the ASIO Director-General determines that disclosure would prejudice security.⁶⁸ On the facts of particular cases individual refugees may be given more than this, for instance where ASIO puts specific allegations to a person in an interview,⁶⁹ but zero disclosure remains possible and lawful in other cases. In *Plaintiff M47*, the High Court did not overturn the Full Court of the Federal Court’s finding in *Leghaei v Director-General of Security* (*‘Leghaei Appeal’*)⁷⁰ that procedural fairness may be reduced to nothingness.⁷¹

In addition to the diminution of procedural fairness, public interest immunity may also be invoked to preclude the disclosure of sensitive information to a person and its admission in court,⁷² impeding the person’s ability to respond to prejudicial material upon which non-disclosed security sensitive information is based. While it is technically possible for a person’s lawyers to be given confidential access to information through various existing legal mechanisms,⁷³ as has happened in non-refugee cases,⁷⁴ none of the detained refugees’ lawyers were given such access, even when occasionally sought through the courts.⁷⁵

C Detention Pending Removal

Having received adverse security assessments which they were unable to genuinely challenge, the refugees became subject to continuing immigration detention on the basis that they were being held pending removal from Australia

⁶⁷ ASIO decisions are excluded from review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 1, but are reviewable by the Federal Court under s 39B of the *Judiciary Act 1903* (Cth) and under the original jurisdiction of the High Court under s 75 of the *Australian Constitution*.

⁶⁸ *Leghaei v Director-General of Security* [2005] FCA 1576 (10 November 2005) [83]–[88] (*‘Leghaei’*), affd (2007) 97 ALD 516, 521–2 (*‘Leghaei Appeal’*).

⁶⁹ See, eg, *Plaintiff M47* (2012) 292 ALR 243.

⁷⁰ (2007) 97 ALD 516.

⁷¹ (2012) 292 ALR 243.

⁷² *Sagar* (2011) 193 FCR 311, 325.

⁷³ See, eg, *Administrative Appeals Tribunal Act 1975* (Cth) ss 39A, 39B (in the exercise of inherent judicial power). See also *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

⁷⁴ See, eg, *Leghaei* [2005] FCA 1576 (10 November 2005).

⁷⁵ See, eg, *SBEG* [2012] FCA 277 (23 March 2012).

'as soon as reasonably practicable' under the *Migration Act*.⁷⁶ In practice DIAC has treated the existence of an ASIO assessment as determinative of a need for detention, despite ASIO itself not expressing a view on the necessity of detention or any law so directing detention upon the making of an assessment.

Despite their detention pending removal, DIAC did not inform most of the refugees of the identity of any particular country to which they were to be removed or with which active negotiations for resettlement were on foot.⁷⁷ The refugees found themselves inadmissible to Australia, but un-removable to their countries of nationality, where they faced the prospect of persecution (because Australia had accepted that they were refugees). None of the refugees wished to voluntarily return to their (unsafe) country of origin, despite offers from Australia to facilitate it. Safe third countries were also unlikely to accept them, given that they had received adverse security assessments, and most did not have the necessary family connections in resettlement countries.

By mid-2012, most of the 54 refugees in detention had been there between two and more than three years since they first arrived in 2009. The High Court previously held in *Al-Kateb v Godwin* ('*Al-Kateb*') that there are no time limits on the power to detain a person pending removal,⁷⁸ in contrast to the case law in Europe and the United States presumptively limiting such detention to reasonably short periods such as six months.⁷⁹ It is well accepted that protracted or indefinite detention often aggravates or inflicts mental harm on refugees, manifesting in depression, post-traumatic stress disorder and self-harm.⁸⁰ At least four refugees had tried to kill themselves in detention by 2012.

D Reversion to Detention Pending Processing

The High Court was asked to reconsider its decision in *Al-Kateb* in a challenge decided in October 2012.⁸¹ In *Plaintiff M47*, the High Court avoided answering whether indefinite detention is unlawful. Instead, the High Court decided the case on one narrow technical issue, while upholding the lawfulness of the plaintiff's detention on the facts. By a 4:3 majority the High Court found that the regulation empowering ASIO to conduct security assessments (via

⁷⁶ Under s 196(1) of the *Migration Act*, a person who has qualified for immigration detention must be kept there until the person is:

- (a) he or she is removed from Australia under section 198 or 199; or ...
- (b) he or she is deported under section 200; or
- (c) he or she is granted a visa.

None of the refugees was informed that they were subject to deportation, and none had received or were eligible for visas. The refugees were therefore held under s 198. Section 198(2) provides that an officer must remove from Australia 'as soon as reasonably practicable' an unlawful non-citizen who has not been immigration cleared, and who has not made a valid visa application or whose valid visa application has been finally determined.

⁷⁷ 'Communication to the United Nations Human Rights Committee', Communication to the Human Rights Committee, 28 August 2011, 17, 32 <<https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=229128ab-d97b-4dab-9b97-bcf31229b81c>>.

⁷⁸ *Al-Kateb v Godwin* (2004) 219 CLR 562 ('*Al-Kateb*').

⁷⁹ See further below Part III(A)(5).

⁸⁰ Derrick Silove, Patricia Austin and Zachary Steel, 'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia' (2007) 4 *Transcultural Psychiatry* 359.

⁸¹ *Plaintiff M47* (2012) 292 ALR 243.

Public Interest Criterion 4002) was inconsistent with the *Migration Act*.⁸² The regulation impermissibly subsumed the Minister's own statutory powers to exclude refugees for security reasons, which were based on arts 32 and 33 of the *Refugee Convention*. The Minister's powers were also subject to AAT merits review and greater accountability than the ASIO process.

In the absence of a valid ASIO security assessment, the plaintiff's application for a protection visa became incomplete and the refugee was no longer subject to removal and detention pending removal. However, detention was still authorised under the *Migration Act* because the refugee had not yet received a visa, irrespective of the lengthy period already spent in detention.

The plaintiff in *Plaintiff M47* was a refugee from the *MV Oceanic Viking* and, having come lawfully to Australia, was entitled to, and had applied for, a protection visa. In contrast, most of the 54 refugees with adverse assessments had entered Australia unlawfully and were barred from so applying. The High Court did not address whether ASIO assessments of those offshore entry persons were likewise invalid. In December 2012, the Government stated its view that *Plaintiff M47* does not apply to them,⁸³ an interpretation to be challenged (along with indefinite detention) in another High Court proceeding, *Plaintiff S138*,⁸⁴ in 2013. The Independent Reviewer of ASIO assessments also wrote to most of the refugees in December 2012 to commence her reviews, implying that she too considered the assessments to be valid.

If the bulk of the refugees' assessments are ultimately found to be invalid, their detention would remain lawful (putting aside the reopening of *Al Kateb*) on the similar basis that they are awaiting the completion of decisions as to whether to lift the bar to allow them to apply for protection visas. On the other hand, if their assessments remain valid their detention would continue to be lawful for the purpose of their removal from Australia.

In response to *Plaintiff M47*, the Government did not release any refugees into the community (including those from the *MV Oceanic Viking*). Nor did the Minister apply any of the statutory security exclusion powers emphasised by the High Court,⁸⁵ which would have rendered decisions vulnerable to AAT review. It is unclear whether the Government will seek to amend the *Migration Act* in Parliament, to reconstitute the ASIO regulation as a statutory procedure for the refugees from the *MV Oceanic Viking*. The Government offered no support for the extensive reforms proposed by the Australian Greens' Bill of October 2012, which would require periodic review of assessments, merits review, a right to reasons, a Special Advocate and community release on security conditions.⁸⁶ The announcement of an Independent Reviewer of ASIO assessments, while couched

⁸² Ibid. The majority was formed by Hayne J (French CJ, Crennan and Kiefel JJ agreeing).

⁸³ Harriet Alexander, 'Refugee Lawyers Challenge Indefinite Detention Rule', *Sydney Morning Herald* (online), 12 December 2012 <<http://www.smh.com.au/opinion/political-news/refugee-lawyers-challenge-indefinite-detention-rule-20121211-2b7lr.html>>.

⁸⁴ [2012] HCATrans 128 (30 May 2012)

⁸⁵ Including the powers implementing arts 32 and 33 of the *Refugee Convention* or the 'bar character' provisions in s 501 of the *Migration Act*.

⁸⁶ Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012 (Cth). See also Ben Saul, "'Fair Shake of the Sauce Bottle': Reform Options for Making ASIO Security Assessments of Refugees Fairer' (2012) 37 *Alternative Law Journal* (forthcoming).

not as a response to *Plaintiff M47*,⁸⁷ nonetheless signals the Government's determination to maintain ASIO's central role in the security assessment of refugees. There is no indication that the Government will introduce binding merits review or end indefinite detention.

III INCONSISTENCY WITH INTERNATIONAL HUMAN RIGHTS LAW

Australia's treatment of the refugees raises a number of inconsistencies with Australia's international human rights law obligations. The key concerns arise under various aspects of art 9 of the *ICCPR* which prohibit arbitrary or unlawful detention and require meaningful judicial supervision of detention.

A Article 9(1) — Arbitrary or Unlawful Detention on Arrival

In the first place, the refugees' detention on arrival is fairly easy to characterise. It was likely arbitrary or unlawful under art 9(1) of the *ICCPR* because Australia did not demonstrate the necessity of their detention, so as to override the ordinary presumption of liberty under art 9 (art 12 of the *ICCPR* concerning freedom of movement does not apply because the refugees were not 'lawfully present' in Australia due to their unauthorised entry by boat).⁸⁸ The UNHRC's previous *Views* in numerous individual communications against Australia under the *Optional Protocol* have determined that Australia's application of mandatory immigration detention to 'unlawful' entrants can violate art 9(1) of the *ICCPR*.⁸⁹ In the leading case of *A v Australia*, the UNHRC accepted that it is not per se arbitrary to detain asylum seekers.⁹⁰ The UNHRC observed however that

every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such

⁸⁷ Attorney-General's Department, 'Independent Reviewer for Adverse Security Assessments' (Media Release, 16 October 2012) <<http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/Fourth%20Quarter/16-October-2012---Independent-Reviewer-for-Adverse-Security-Assessments.aspx>>.

⁸⁸ Human Rights Committee, *Views: Communication No 456/1991*, 51st sess, UN Doc CCPR/C/51/D/456/1991 (2 August 1994) ('*Celepli v Sweden*') is distinguishable because the individual subject to expulsion was lawfully present in Sweden prior to his expulsion order and thereafter was still lawfully present in domestic law, on condition of certain residency restrictions (which were found to be valid limitations on his freedom of movement).

⁸⁹ See, eg, Human Rights Committee, *Views: Communication No 1324/2004*, 88th sess, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006) [7.2]–[7.3] ('*Shafiq v Australia*'); Human Rights Committee, *Views: Communication Nos 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004*, 90th sess, UN Doc CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004 (11 September 2007) [7.2] ('*Shams v Australia*'); Human Rights Committee, *Views: Communication No 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) [8.2] ('*C v Australia*'); Human Rights Committee, *Views: Communication No 1014/2001*, 78th sess, UN Doc CCPR/C/78/D/1014/2001 (18 September 2003) [7.2] ('*Baban v Australia*'); Human Rights Committee, *Views: Communication No 1069/2002*, 79th sess, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003) [9.3] ('*Bakhtiyari v Australia*').

⁹⁰ Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) [9.3] ('*A v Australia*').

as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.⁹¹

In its 2009 *Concluding Observations* on Australia, the UNHRC criticised Australia's mandatory use of detention in all cases of illegal entry, the retention of the excised migration zone — as well as the non-statutory decision-making process for people who arrive by boat — and called for the abolition of mandatory detention.⁹² Despite the numerous *Views* of the UNHRC finding breaches of art 9, Australia has maintained mandatory detention and even challenged the Committee's interpretation of the *ICCPR*,⁹³ hardly in keeping with the object of UN supervision of the treaty.

It may be accepted in principle that administrative detention for security purposes may be justifiable and lawful in certain circumstances. However, Australia did not provide or demonstrate any lawful, individualised justification, evidence or even allegations for the necessity for detaining the refugees upon arrival. The mere fact that a person has come from a conflict zone is not sufficient to trigger personal suspicion. Australia did not convey to them a bare assertion that they were *prima facie* assessed as security risks; they were simply detained under a blanket policy. All were automatically detained under the mandatory detention law merely because they were 'unlawful non-citizens' in an 'excised offshore place'.⁹⁴

In fact, DIAC did not have (and still does not have) any procedures in place to individually screen refugees upon arrival to determine whether each refugee personally presented a *prima facie* security threat or presented a risk of absconding or lack of cooperation such as to justify detention pending further investigation into such concerns. The automatic detention of all arrivals signals the manifestly indiscriminate operation of the law.

The refugees were then held in detention throughout the processing of both their refugee claims and their security assessments. In consequence, not only was the initial decision to detain the refugees arbitrary for failure to individually substantiate the need for detention, the continuation of detention was also arbitrary because it did not derive from an ongoing assessment of the nature and degree of risk posed by individual refugees at any given time.

The result is that refugees were held in protracted detention pending the determination of their refugee status (some for up to two years), and further protracted detention after recognition as refugees pending their security assessment (some for up to two and a half years). ASIO still has no statutory requirement to complete security assessments within a specified time, contrary to the AHRC's recommendation.⁹⁵

⁹¹ Ibid [9.4].

⁹² Human Rights Committee, *Concluding Observations: Australia*, 95th sess, Agenda Item 8, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) 5–6 [23].

⁹³ Human Rights Law Centre, 'Australia's Compliance with the *International Covenant on Civil and Political Rights*', Submission to Human Rights Committee on List of Issues prior to Reporting, 1 August 2012, 24 <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/HRLC_Australia106.pdf>.

⁹⁴ *Migration Act* s 189(3).

⁹⁵ Australian Human Rights Commission, Submission to *Independent Review of the Intelligence Community*, above n 19, 3–4.

An inadequate level of resourcing dedicated by ASIO (given the spike in the number of irregular maritime arrivals) also contributed to processing delays — despite the exponential increases between 2001 and 2011 in ASIO's staff (from 584 to 1769) and budget (from \$64 million to \$385 million).⁹⁶

Changes in the sequencing of the process have since ameliorated delays for future arrivals. Until December 2010, refugee determinations and security assessments were conducted in parallel for all offshore arrivals. Since then, security assessments have only been conducted after detainees were recognised as refugees, which removed the need to assess those not entitled to remain as refugees and thus reduced waiting times.⁹⁷

Between December 2010 and June 2011, once a person was recognised as a refugee, DIAC conducted a preliminary 'triaging process' to identify people for referral to ASIO — according to (secret) criteria set by ASIO. Around 15–20 per cent of triaged cases were referred by DIAC to ASIO for a full security assessment.⁹⁸ Since June 2011, all triaging is performed by ASIO not DIAC. ASIO reports that 80 per cent of full assessments are completed in less than a week, but the remaining 20 per cent involving complex cases can take many months.⁹⁹

Despite these improvements, it is still not standard practice to release detainees into the community for either the duration of their refugee determination or the subsequent security assessment. 'Triaging' is a device for prioritising and accelerating security assessments, but does not trigger release into the community where no security concerns are raised. This is despite the fact that where DIAC does propose to release a person into the community, ASIO can, and does, perform a shorter preliminary assessment within 24 hours so that DIAC can be informed of any concerns prior to their release.¹⁰⁰ A full security assessment is then conducted by ASIO while released persons are in the community.

It would clearly be possible for a preliminary screening process to take place as soon as a person is detained on arrival — not after the refugee determination is completed — and for a person to be released into the community where no *prima facie* security concerns arise. Any further detailed security assessment could take place while such a person is in the community,¹⁰¹ or where persons remain in detention after being assessed as a possible risk.

In the absence of substantiation of any *prima facie* security case against the refugees, it could be inferred that Australia's detention of them pursued other, illegitimate, objectives: a group-based classification that all 'boat people' from Sri Lanka may be potential 'terrorists'; a generalised fear of absconding which is not personal to each refugee; a broader policy or political aim of punishing

⁹⁶ Increasing to \$403 million in 2011–12 and 1860 staff by 2012–13; Australian Security Intelligence Organisation, *ASIO Report to Parliament 2010–11: Annual Report (2011) XVII*, 9, 84; Australian Security Intelligence Organisation, *ASIO Report to Parliament 2000–01: Annual Report (2001) 68, 100.*

⁹⁷ Joint Select Committee on Australia's Immigration Detention Network, above n 4, 154.

⁹⁸ *Ibid* 155–6.

⁹⁹ *Ibid* 158–9.

¹⁰⁰ *Ibid* 157.

¹⁰¹ Australian Human Rights Commission, Submission to *Independent Review of the Intelligence Community*, above n 19, 3.

unlawful arrivals (contrary to art 31 of the *Refugee Convention*)¹⁰² or deterring future unlawful arrivals; or the bureaucratic convenience of having persons readily available for processing. None of these is a legitimate justification for detention under art 9(1), which presumptively favours individual liberty unless strong and personal grounds for detention exist.

1 *No Substantiation of Security Grounds upon Assessment*

After ASIO issues an adverse security assessment, it is reasonable to conclude that there is then an individualised basis for suspecting that a person is a security risk, and further that such risk might justify detention. Even so, merely *asserting* security concerns to justify detention is not sufficient to discharge Australia's obligations under art 9(1) of the *ICCPR*. Article 9(1) also requires *substantiation, by evidence in a fair process*, of the necessity of detention. A mere claim by a state that a person is a security risk, without any particularisation of it, cannot be sufficient to enable a proper assessment to be made (by a court under art 9(4) of the *ICCPR*, or the UNHRC under the *Optional Protocol*) of the arbitrariness of detention under art 9(1). Otherwise a state could simply invoke unscrutinised and un-testable concerns to mask arbitrary or indiscriminate detention. Nothing in the *ICCPR* validates the proposition that invoking 'security' *alone* justifies detention.

It is well established that detention may also be arbitrary under art 9(1) of the *ICCPR* not only where it is against the law, but where it involves elements of inappropriateness, injustice, lack of predictability or due process of law.¹⁰³ Australia's failure to disclose the *essential substance* of any security concerns it may have had about any refugee denied that refugee 'due process' of law (in the sense of a fair hearing) was unjust; and was, therefore, additionally arbitrary or unlawful under art 9(1). Mere questioning in interviews of the refugees by ASIO was often not sufficient to put them on adequate notice of the allegations.

As noted earlier, the basis of the refugees' continuing detention after the refusal to grant them protection visas is that their removal from Australia is pending. In principle, detention for the purpose of removal may constitute a lawful justification for detention under art 9(1), though even then it must be necessary and cannot be automatic. However, the mere fact of being classified under domestic law as subject to removal is not sufficient to justify detention for this purpose under art 9(1). Rather, the substantive basis of their liability to be removed — the security concerns justifying the detention — must be demonstrated.

As mentioned above, Australia has not disclosed the substantive reasons or evidence behind the refugees' adverse security assessments which provide the basis for refusing protection visas and trigger their liability for removal. The

¹⁰² See further below Part III(A)(9).

¹⁰³ *A v Australia*, UN Doc CCPR/C/59/D/569/1993, [9.2]; Human Rights Committee, *Views: Communication No 1134/2002*, 83rd sess, UN Doc CCPR/C/83/D/1134/2002 (10 May 2005) [5.1] (*Gorji-Dinka v Cameroon*); Human Rights Committee, *Views: Communication No 305/1988*, 39th sess, UN Doc CCPR/C/D/305/1988 (15 August 1990) [5.8] (*van Alphen v Netherlands*); Human Rights Committee, *Views: Communication No 458/1991*, 51st sess, UN Doc CCPR/C/51/D/458/1991 (10 August 1994) [9.8] (*Mukong v Cameroon*). See also Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel, 2nd revised ed, 2005) 172.

failure to provide reasons (or a redacted summary of reasons) to an affected person must be regarded as a failure to substantiate the necessity of detention, and is not merely an incidental or dispensable procedural defect. If a person is not told why they are considered to be a security risk, they cannot contest that assertion, and there can be no confidence that the assertion is substantiated in light of all the relevant evidence.

Even if, however, it is argued that detention can be necessary where a person is not personally informed of the reasons why they are detained, the Australian regime still fails to satisfy art 9(1) of the *ICCPR*. No independent merits tribunal is available to test Australia's claim that a person is a security risk. The courts too are not automatically involved in independently determining the necessity of detention in every case. Rather, only limited judicial review for an error of law is possible — and then only on the initiative of the person (assuming grounds for review are available), where procedural fairness is likely reduced to 'nothingness' and public interest immunity may preclude relevant evidence.¹⁰⁴

In these circumstances there will exist only a bare, unsubstantiated assertion by the executive that a person not only poses a security risk, but also that such risk is sufficient to justify detention. Such an assertion cannot satisfy the requirement of art 9(1) — that detention be *necessary* in the sense of an *objective* international legal standard, not as a wholly subjective, secret and un-testable impression of a national security agency. The lack of any meaningful disclosure of reasons to the person, or otherwise any fair special procedure in which to test the security case, makes it impossible for any independent arbiter (whether a merits tribunal, federal court or the UNHRC) to evaluate the accuracy of Australia's claim that detention is necessary, or to have confidence that domestic procedures are an adequate safeguard.

Here again it is worth recalling that detention may be arbitrary under art 9(1) not only where it is against the law, but where it involves elements of inappropriateness, injustice, lack of predictability or due process of law.¹⁰⁵ Australia's failure to disclose the essential substance of any security concerns it had about the refugees denied them 'due process' of law, was unjust, and was consequently additionally arbitrary and unlawful under art 9(1).

2 *Australia Has Not Shown that Less Invasive Means Would Be Ineffective*

In justifying the necessity of detention under art 9(1), the UNHRC has observed that a state party must demonstrate that, 'in the light of each authors' particular circumstances, there were no less invasive means of achieving the same ends'.¹⁰⁶ These may include, in an immigration context, 'the imposition of reporting obligations, sureties or other conditions'.¹⁰⁷ Thus, even if Australia's adverse security assessment of a refugee is factually accurate, the prohibition on arbitrary detention further requires that less invasive means must first be exhausted or shown to be ineffective before a person is detained.

¹⁰⁴ See below Part III(C)(4).

¹⁰⁵ See sources cited at above n 103.

¹⁰⁶ *Shams v Australia*, UN Doc CCPR/C/90/D/1255,1256,1259,1260,1266,1270&1280/2004, [7.2].

¹⁰⁷ *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001, [7.2].

Australia did not utilise alternative means, or demonstrate that such means would be inadequate or inappropriate, in meeting its security concerns about the refugees. As noted earlier, detention on arrival, while awaiting security assessment and pending removal, is automatic.¹⁰⁸ The statutory framework does not require consideration of alternatives to detention before resorting to it. Nor did DIAC demonstrate that it gave genuine consideration to alternatives to detention for each refugee personally before resorting to it. Alternative means in the context of security concerns raise special legal considerations under the *ICCPR* not previously dealt with in Australia.

Alternatives to detention under existing Australian legal frameworks which are capable of addressing security concerns include administrative 'residence determinations' by the Minister that a person reside in 'community' detention, subject to any specified 'conditions'.¹⁰⁹ Such conditions are not enumerated in the *Migration Act* and, apart from residing in certain locations, could conceivably include: regular reporting to DIAC or law enforcement authorities; restrictions on communication and association; payment of bonds, assurances, or guarantees, to be forfeited on breach; or even wearing GPS-tracking bracelets; and so on.

Conditions such as these are preferable to indefinite detention, although as administrative conditions they are not subject to the same kinds of procedural protections found in some other areas of national security law. For instance, anti-terrorism control orders entail judicial safeguards not found in the administrative regime of community detention. Control orders are a protective security mechanism available on application to a court by the Australian Federal Police.¹¹⁰ If greater use is to be made of discretionary administrative alternatives to detention, further thought would need to be given to the attendant protections necessary to preserve the basic rights of those subject to such measures.

Criminal prosecution may also be available given that Australian law now contains extensive offences of extraterritorial application which would apply to conduct committed prior to entry to Australia, as well as to any acts of preparation for crime in Australia. These include offences relating to war crimes in armed conflicts (including non-international conflicts); crimes against humanity; and torture.¹¹¹ There are also extensive offences relating to terrorist acts and terrorist organisations, including inchoate, preparatory and organisational offences, which apply in both peace and war.¹¹²

Most of the refugees are Sri Lankan nationals of Tamil origin, who fled Sri Lanka during or after the Sri Lankan civil war. If Australia possesses good evidence to suspect that any of the refugees has committed a crime in that context — whether in the course of the non-international armed conflict in Sri Lanka, or by association with a 'terrorist' organisation such as the Tamil Tigers ('LTTE') — such crimes can be prosecuted under Australian law.

¹⁰⁸ Australia has had a policy of mandatory detention for unlawful non-citizens since 1992. See Department of Immigration and Citizenship, 'Immigration Detention' (Fact Sheet No 82, Department of Immigration and Citizenship, May 2012) <<http://www.immi.gov.au/media/fact-sheets/82detention.htm>>.

¹⁰⁹ *Migration Act* s 198AB (known as a 'residence determination').

¹¹⁰ *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*') div 104.

¹¹¹ *Ibid* div 268.

¹¹² *Ibid* div 101.

Prolonged administrative detention should not be used as a substitute for criminal prosecution where there is evidence of criminal wrongdoing that falls within the jurisdiction of the domestic courts. The requirement to exhaust alternatives to detention includes an obligation to pursue criminal prosecution where possible, since the higher due process safeguards of a criminal proceeding and the strong judicial protections involved are ‘less invasive’ than protracted administrative detention without such safeguards.

States may be tempted to utilise administrative detention precisely because it circumvents these protections, including where the authorities do not have evidence that would meet the criminal standard of proof (‘beyond a reasonable doubt’) or which they do not wish to disclose for operational reasons. Further, since administrative detention may have no ultimate time limit, it is potentially more invasive than criminal sentences imposing a finite punishment (including a definite period of detention). Administrative detention is not a long-term solution, unless a state accepts indefinite detention in contravention of human rights law. For this reason, the UNHCR, the AHRC and the Senate Joint Select Committee on Australia’s Immigration Detention Network have recommended that alternative solutions should be found for such refugees.¹¹³

It should also be noted that Australia does *not* administratively detain Australian citizens or permanent residents whom it believes are a threat to national security, *and indeed there is no law authorising indefinite or protracted detention without a criminal conviction*.¹¹⁴ This strongly suggests that Australia accepts that the suite of existing security measures available under Australian law — from surveillance to control orders to criminal prosecution — are adequate to meet even the most exceptional security concerns, including where citizens are ‘terrorists’.

Unlike the United Kingdom (between 2001–05),¹¹⁵ Australia has not declared a public emergency so as to derogate from its obligation under art 9 of the *ICCPR* to guarantee freedom from arbitrary detention.¹¹⁶ Article 9 of the *Refugee Convention*, permitting exceptional measures of national security in time of ‘war or other grave and exceptional circumstances’, is also inapplicable because the very high threshold of that provision has not been met. There is no cogent reason for subjecting ‘offshore entry persons’ to a regime of more invasive security measures than that which ordinarily governs security risks in Australia.

¹¹³ United Nations High Commissioner for Refugees, above n 21, [29]–[34]; Australian Human Rights Commission, ‘2011 Immigration Detention at Villawood: Summary of Observations from Visit to Immigration Detention Facilities at Villawood’ (Australian Human Rights Commission, 2011) 30; Senate Joint Select Committee on Australia’s Immigration Detention Network, above n 4, 77–120.

¹¹⁴ At most, there are anti-terrorism preventive detention powers enjoyed by ASIO and the Australian Federal Police which are strictly time-limited to short periods and subject to judicial safeguards.

¹¹⁵ *Multilateral Treaties Deposited with the Secretary-General: International Covenant on Civil and Political Rights*, 65 <<http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf>>.

¹¹⁶ Which the UK thought necessary to justify indefinite detention of suspected foreign terrorists after the 11 September 2001 attacks: *A v Secretary of State for the Home Department* [2005] 2 AC 68.

3 *The Means Adopted Are Not Tailored to Any Objectively Established Risk*

The assessment of whether less invasive alternatives to detention are available must necessarily be tailored to the nature of the security threat posed by a person. Australia has not provided any details of the nature of the security risk posed by any refugee. All that is known is that an 'adverse security assessment' by law relates primarily to *Australia's* national security ('the protection of, and of the people of, the Commonwealth and the several States and Territories'), or to certain of Australia's responsibilities towards foreign states (which may include international law obligations to suppress terrorism).¹¹⁷

It must be assumed that the refugees' adverse security assessments relate to their suspected conduct committed prior to entry to Australia, given that this is the presumptive basis of their detention for assessment and later pending removal. For most of the refugees, it may then be speculated that the assessments relate to events in Sri Lanka (and for a few refugees, conflicts in Afghanistan or Myanmar) and, particularly, the former non-international armed conflict involving the LTTE. The conflict there ceased in May 2009 with the defeat of the LTTE, which is now largely defunct worldwide.

In this factual context, Australia bears a heavy burden to demonstrate that detaining the refugees is necessary to protect the *Australian* community. Any prior activities of the refugees in Sri Lanka, concerning a concluded armed conflict or a defunct non-state organisation, cannot easily establish that the refugees are a current risk to the Australian community so as to justify detention over the various alternatives to detention. If anything, there ought to be a presumption that the risk has abated, unless strong evidence suggests otherwise in the case of a particular refugee.

Relevantly, the Australian Government never listed the LTTE as a prohibited 'terrorist organisation' under Australian law, implying that Australia never considered the LTTE as a sufficient terrorist risk to Australia to warrant proscription. Further, the UNHCR has urged states to be cautious about excluding people from refugee status for involvement with the LTTE in Sri Lanka.¹¹⁸ The UNHCR warns that there is a lack of information about the association of individuals with the LTTE during the war, that civilians performed a wide range of (non-excludable) activities for the LTTE in LTTE-controlled areas, and that many people were coerced into assisting the LTTE or were forcibly recruited to its cause.¹¹⁹

In their asylum applications, for instance, some of the refugees explained the limited ways in which they were involved with the LTTE, in terms which would not be regarded as sufficiently serious by the UNHCR to prejudice their refugee status. For example, one refugee is vision-impaired and assisted the LTTE in preparing and decorating for festivals, helped in the kitchen and in digging civilian bunkers and his support was motivated by witnessing the Sri Lankan Army kill his father. At no time did he receive military training, or train for or

¹¹⁷ *ASIO Act* s 4 (definition of 'security' paras (a), (b)).

¹¹⁸ United Nations High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka* (April 2009) 37–8.

¹¹⁹ *Ibid.*

participate in terrorist activities.¹²⁰ Another refugee was a civilian lawyer for the LTTE administration in the north of Sri Lanka, which operated as the de facto civil government.¹²¹

Even if any refugees were involved in active fighting for the LTTE, it does not follow that they are a national security risk to Australia, or that they are ‘terrorists’ excludable from refugee status under international law. The LTTE was a non-state armed group in a non-international armed conflict under Common Article 3 of the four 1949 *Geneva Conventions*.¹²² International humanitarian law does not criminalise participation by members of non-state armed groups in hostilities against government military personnel or military objectives where civilians and civilian objects are not unlawfully targeted.

Many LTTE fighters only took part in hostilities against Sri Lankan national armed forces. Where such fighters did not unlawfully target civilians, there may be no reason to believe that they pose any threat to Australia’s security, or are otherwise excludable as ‘war criminals’. Australia has not produced evidence that any of the refugees were involved in unlawful activities against civilians and for that reason pose a current risk to Australia.

A further reason to be cautious is that the provenance of evidence or information about the refugees may be unreliable. There is simply little public information available about the activities of people in closed areas of north or east Sri Lanka under the LTTE and particularly during the intense final phase of the conflict. It is certain that the Sri Lankan authorities have shared intelligence or law enforcement information about Tamil asylum seekers with their Australian counterparts — Sri Lanka’s High Commissioner to Australia publicly confirmed as much in August 2012.¹²³

The credibility of that evidence and any Australian reliance on it must, however, be seriously questioned. In 2011 the UN Secretary-General’s Panel of Experts on Accountability in Sri Lanka found that the Sri Lankan Government’s version of events (concerning the final stages of the war) was ‘very different’ from the ‘credible allegations’ of serious violations of international law from other sources,¹²⁴ and the Panel was unable to accept the Government’s account.¹²⁵ ASIO naturally has its own well-developed procedures in place for

¹²⁰ ‘Communication to the United Nations Human Rights Committee’, Communication to the Human Rights Committee, 28 August 2011, 28 <<https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=229128ab-d97b-4dab-9b97-bcf31229b81c>>.

¹²¹ International Crisis Group, ‘Sri Lanka’s North I: The Denial of Minority Rights’ (Asia Report No 219, International Crisis Group, 16 March 2012) 1.

¹²² *Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (collectively, ‘*Geneva Conventions*’).

¹²³ ABC TV, ‘Tamils Speak Out against ASIO Security Rulings’ *Lateline*, 13 August 2012, (Thisara Samarasinghe) <<http://www.abc.net.au/lateline/content/2012/s3567008.htm>>.

¹²⁴ United Nations Secretary-General, ‘Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka’ (Report, 31 March 2011) 48.

¹²⁵ *Ibid* 49.

verifying the provenance and assessing the reliability of information, but there must be serious doubts about the veracity of information provided by Sri Lanka and the motives behind its sharing of it, given the track record of that Government including its use of torture in interrogation.¹²⁶ Previous cases have exposed failures by ASIO in relying on inconsistent reports by foreign intelligence services or not corroborating such reports.¹²⁷ That the refugees have not had an effective opportunity to contest the allegations and evidence against them throws inevitable doubt on the case against them.

4 *The Refugees' Indefinite Detention Is Not Subject to Periodic Review*

The UNHRC has noted that art 9 also requires that 'every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed'.¹²⁸ Thus, even if detention may be initially justified on security grounds, art 9 requires periodic review of such grounds and precludes indefinite detention flowing automatically from them. Periodic review is a vital safeguard of individual liberty against arbitrary executive detention.

The necessity of periodic review implies that art 9 requires time limits on individual periods of administrative detention, which are only authorised until periodic review occurs. Upon review, detention can be terminated or renewed as appropriate, depending upon whether the grounds justifying detention persist. This approach is supported by state practice. Under equivalent provisions of the *European Convention on Human Rights* ('ECHR'),¹²⁹ the European Court of Human Rights ('ECtHR') has found that the absence of time limits for the review of the lawfulness of detention renders detention (pending expulsion) de facto indefinite and unlawful.¹³⁰ A lack of clear legal provisions establishing the procedure for ordering, extending or terminating detention, and setting time-limits for it, can render arbitrary what was lawful.¹³¹

While the UNHRC has not elaborated on the point, there are potentially different ways of implementing periodic review. For instance, detention could automatically lapse after an expired period so that the onus is on the authorities to justify afresh the security case. Alternatively, a less protective approach is to

¹²⁶ United States Department of State, 'Country Reports on Human Rights Practices for 2011: Sri Lanka' (Human Rights Reports, United States Department of State, 24 May 2012) 1; International Crisis Group, 'Sri Lanka: Government Promises, Ground Realities' (Media Release, 1 March 2012) <<http://www.crisisgroup.org/en/publication-type/media-releases/2012/asia/sri-lanka-government-promises-ground-reality.aspx>>.

¹²⁷ Australian Law Reform Commission, above n 17, 406, citing *Director-General Security v Sultan* (1998) 90 FCR 334. See Inspector-General of Intelligence and Security, *Annual Report 1999-2000* (2000) 159.

¹²⁸ *A v Australia*, UN Doc CCPR/C/59/D/560/1993, [9.4]. See also *Shafiq v Australia*, UN Doc CCPR/C/88/D/1324/2004, [7.2].

¹²⁹ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009) ('ECHR').

¹³⁰ *Sultanov v Russia* (European Court of Human Rights, Application No 15303/09, 4 November 2010) [86]; *Yuldashev v Russia* (European Court of Human Rights, Application No 1248/09, 8 July 2010) [98].

¹³¹ *ZNS v Turkey* (2012) 55 EHRR 301 [56].

place the onus on the affected person to challenge the continuation of detention in a periodic review process. Detention would only lapse if the authorities changed their position or the person demonstrated that detention was no longer justified.

In Australia, the duration of the refugees' detention has not been subject to periodic review of the continuing existence of any grounds justifying detention. ASIO has no policy of periodically or automatically reviewing adverse security assessments once made unless new information comes to light. This is plainly inadequate because it means that once a person has been found to pose a security risk, in legal terms they remain a security risk for the rest of their lives unless the assessment is later removed. Such a process is excessive and over broad, and means ASIO is not limiting its assessments only to those who continue to remain a security risk. DIAC too does not review a refugee's detention status independently of the persisting, underlying ASIO security assessment and nor is there periodic review by a tribunal or court.

While the Independent Reviewer process of October 2012 will include 12 monthly periodic reviews of security assessments and concurrent reviews by ASIO,¹³² such reviews are non-binding. Australian law thus does not provide any legally enforceable mechanism for the periodic review of the grounds of detention or of alternatives to detention. Detention simply persists until a person receives a visa or is removed from Australia. Australian law does not specify any maximum individual period of detention, the expiry of which would trigger a periodic review and a fresh assessment of whether a further, time-limited period of detention is justified. Australian law therefore permits indefinite detention where a person is ineligible for a visa and is not (or cannot be) removed.

5 *Detention Becomes Arbitrary Where There Is No Reasonable Prospect of Removal*

Even where grounds for detention are properly made out in respect of a person, the UNHRC has also indicated that initially lawful detention may become arbitrary under art 9 where a 'reasonable prospect' or likelihood of expelling a person no longer exists and detention is not terminated.¹³³ While the UNHRC has not gone so far as to declare that a person must always be released when their removal is not feasible, nor has it defined the circumstances in which indefinite administrative detention would be permissible, it is hard to see how indefinite detention, even under continuous review, could be compatible with the object and purpose of art 9.

State practice confirms the presumption in favour of liberty and against protracted immigration detention pending removal. In notifying its derogation from art 9 of the *ICCPR* in 2001, the UK stated that protracted detention may be inconsistent with art 9 where a person cannot be promptly removed:

¹³² Attorney-General's Department, above n 64.

¹³³ Human Rights Committee, *Views: Communication No 794/1998*, 74th sess, UN Doc CCPR/C/74/D/794/1998 (15 April 2002) [8.2] ('*Jalloh v Netherlands*'). See also *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001, [7.2] (where the Human Rights Committee affirmed that detention should not continue beyond the period for which the state party can provide appropriate justification).

If no alternative destination is immediately available then removal or deportation [on national security grounds] may not, for the time being, be possible even though the ultimate intention remains to remove or deport the person once satisfactory arrangements can be made.¹³⁴

In consequence, the UK derogated from art 9 (from 2001 to 2005) to prevent the exercise of an extended detention power under UK law from being inconsistent with the *ICCPR*. Article 5(1)(f) of the *ECHR*, which provides for detention pending removal equivalent to art 9 of the *ICCPR*,¹³⁵ is similarly interpreted. The ECtHR has found that a person can only be detained pending expulsion where ‘action is being taken with a view’ to expulsion¹³⁶ and where expulsion proceedings are ‘in progress’.¹³⁷ A state must pursue expulsion proceedings actively and with due diligence.¹³⁸ A person cannot continue to be lawfully detained where there is no ‘realistic prospect of their being expelled’ and it is insufficient that a state is keeping the possibility of expulsion ‘under active review’.¹³⁹

National laws in various states (such as the US and the UK) support this approach.¹⁴⁰ The US Supreme Court, for instance, has imposed a presumptive six-month limit on detention pending removal¹⁴¹ to preclude indefinite detention where removal is not ‘reasonably foreseeable’.¹⁴² The International Law Commission (‘ILC’) also supports this approach in its current draft articles on protection of the human rights of persons who have been or are being expelled, by suggesting that ‘[t]he duration of detention may not be unrestricted. It must be limited to such period of time as is reasonably necessary for the expulsion decision to be carried out. All detention of excessive duration is prohibited’.¹⁴³

In contrast, the High Court confirmed the validity of indefinite detention in *Al-Kateb*,¹⁴⁴ which involved the same statutory provisions under which these refugees are detained.¹⁴⁵ In another case, *Re Woolley; Ex parte Applicants M276/2003*, McHugh J stated that the apparent incompatibility of Australia’s mandatory detention regime under the *ICCPR*, the *Convention on the Rights of*

¹³⁴ *Multilateral Treaties Deposited with the Secretary-General: International Covenant on Civil and Political Rights*, 65 <<http://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20IV/IV-4.en.pdf>>. Britain withdrew its notification on 14 March 2005, after the House of Lords decision in *A v Secretary of State for the Home Department* [2005] 2 AC 68 (which found that Britain’s indefinite detention of foreign suspected terrorists was unlawfully discriminatory under human rights law).

¹³⁵ Article 5(1)(f) of the *ECHR* authorises detention of ‘a person against whom action is being taken with a view to deportation or extradition’.

¹³⁶ *Chahal v United Kingdom* [1996] V Eur Court HR 1831, 1862 [112].

¹³⁷ *Ibid* 1863 [113].

¹³⁸ *Ibid*.

¹³⁹ *A v United Kingdom* (2009) 49 EHRR 625, 631.

¹⁴⁰ *Zadvydas v Davis*, 533 US 678 (2001); *R v Governor of Durham Prison; Ex parte Singh* [1984] 1 All ER 983.

¹⁴¹ *Zadvydas v Davis*, 533 US 678, 701 (2001) (Breyer J).

¹⁴² *Clark v Martinez*, 543 US 371 (2005).

¹⁴³ International Law Commission, *Report of the International Law Commission: Sixty-Second Session*, UN GAOR, 65th sess, Supp No 10, UN Doc A/65/10 (2010) 279 n 1259. (2004) 219 CLR 562.

¹⁴⁵ *Migration Act* ss 196, 198.

the Child,¹⁴⁶ and the *Refugee Convention* does not affect its constitutional validity.¹⁴⁷ His Honour appeared to accept that international law (as interpreted by the UNHRC) requires periodic judicial review of the need for detention, a defined period of detention, and the absence of less restrictive means of achieving the purpose served by detention.¹⁴⁸

The many refugees with adverse security assessments who are presently detained do not enjoy realistic prospects of removal within a reasonably foreseeable period, such that their detention can no longer be justified under art 9 for the genuine purpose of removal. In *Plaintiff M47*, for instance, the High Court itself accepted that 'it is unlikely that a country will be found willing to accept the plaintiff within the foreseeable future' in that case.¹⁴⁹ In recognising them as refugees, Australia accepts that they are at risk of persecution in their home countries and cannot be safely returned. Some of the refugees may be at additional risk of torture or inhumane or degrading treatment and enjoy further 'complementary protection' against return.¹⁵⁰

Further, none of the refugees have expressed a wish to voluntarily return to their country of origin. Australia has not informed any of the refugees that it intends to forcibly return any of them there. Nor has Australia invoked the exclusion clauses under art 1F or the exception to *non-refoulement* under art 33(2) of the *Refugee Convention*, which would be necessary in order for Australia to lawfully return them to a place of persecution (by contrast, return to torture is always prohibited).¹⁵¹

Most of the refugees possess the sole nationality of their country of origin, so no other state is obligated to admit them under international law. Some of the refugees were invited by the Australian authorities to discuss possibilities of removal to some other country. However, none of the refugees have been informed that a safe third country has agreed to accept them, and most have not been informed that active negotiations for such a purpose are underway with any specific third countries, or that there exists any time frame or procedure governing such negotiations.

It is highly improbable that any third country would agree to accept the refugees when they have been assessed by Australia as a risk to security for activities prior to entering Australia: such concerns would likely apply to varying degrees in other resettlement countries. The UNHCR has also stated that it is hamstrung from assisting Australia to find resettlement countries because it too does not have access to the information about the individuals concerned.¹⁵²

Consequently, since there is little genuine prospect of prompt removal, Australia cannot lawfully detain the refugees for the purpose of (active) removal under art 9. Unlike the UK, Australia has not declared or notified the existence of

¹⁴⁶ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

¹⁴⁷ (2004) 225 CLR 1, 46–7.

¹⁴⁸ *Ibid.*

¹⁴⁹ (2012) 292 ALR 243, 247 [7].

¹⁵⁰ ICCPR art 7; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 3 ('CAT').

¹⁵¹ CAT art 3.

¹⁵² United Nations High Commissioner for Refugees, above n 21, 7 [30(a)].

a public emergency threatening the life of the nation under art 4 of the *ICCPR*. As such, Australia has not lawfully suspended the protection under art 9 against the continuation of detention which is no longer genuinely for the purpose of active and realistic expulsion proceedings.¹⁵³ The influx of larger than usual numbers of irregular maritime arrivals, including from former conflict zones such as Sri Lanka, is an insufficient reason to declare a public emergency: many hundreds of thousands of ‘boat people’ might be, but not a few thousand. At law they should be prosecuted, dealt with under other security laws or released.¹⁵⁴

6 *The True Purpose of the Refugees’ Detention Is Not Authorised by Law*

Where detention is not justified by active, timely removal procedures, it is arguable that the true purpose of the refugees’ continuing detention is administrative or preventive security-based detention. Australia appears to be misusing its statutory ‘detention pending removal’ power as a disguised or de facto administrative, security detention power. Alternatively, a point comes where initially valid detention pending removal transforms into continuing security detention, when the prospect of removal becomes increasingly unreal.

If this is the true purpose of the refugees’ detention, it would have to be *specifically* authorised by domestic law to be lawful under art 9(1). Article 9(1) relevantly provides: ‘No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law’. The basis for detention must thus ‘be specifically authorised and sufficiently circumscribed by law’.¹⁵⁵ Any such detention would raise a host of legal issues, including the point up to which art 9 can justify it or whether derogation would be necessary to overcome the restrictive protections of art 9.

Australia has not invoked any other domestic legal power to justify their detention on security grounds in terms consistent with art 9. As noted earlier, Australia does not, for instance, purport to detain the refugees under a security detention power of the kind authorised in the UK in relation to its derogation from art 9 in 2001, or under the anti-terrorism ‘preventive detention’ powers given to the Australian Federal Police after the 11 September 2001 terrorist attacks.¹⁵⁶ Instead, Australia seems to be utilising immigration detention powers for the improper purpose of preventive security detention, where that ulterior purpose is not specifically authorised by law in terms. Such detention likely further violates art 9(1) of the *ICCPR*.

¹⁵³ See *A v Secretary of State for the Home Department* [2005] 2 AC 68.

¹⁵⁴ European Council on Refugees and Exiles, ‘Position on Exclusion from Refugee Status: The European Council on Refugees and Exiles’ (2004) 16 *International Journal of Refugee Law* 257, [11], 283 [60]; Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) 231–2.

¹⁵⁵ Sarah Joseph et al, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 2nd ed, 2004) 308, citing Yoram Dinstein, ‘Right to Life, Physical Integrity and Liberty’ in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, 1981) 130.

¹⁵⁶ *Criminal Code* div 105.

7 *The Unlawfulness of Detention after Plaintiff M47 in October 2012*

After the High Court decision in *Plaintiff M47* the *MV Oceanic Viking* refugees were no longer subject to valid security assessments nor thus to detention pending removal under the *Migration Act*. As noted earlier, formally under Australian law the basis of their detention reverted to detention pending the grant of a visa, that is, while their claims awaited fresh assessment and completion, including under whatever replacement security assessment scheme the Government chooses to implement.

At this point, those refugees' detention remained unlawful under art 9 of the *ICCPR*. They were no longer subject to any lawfully made security assessments, such as might justify detention. There remained: no substantiation of the security risk any refugee may have posed, including by adequate disclosure of adverse evidence; no genuine opportunity to challenge adverse evidence; no periodic merits review to guarantee that the basis of continuing detention remained sound; and limited possibility to effectively (as opposed to formally) judicially review detention. As shown already, their detention on arrival and after security assessment was also unlawful. By October 2012, they had spent between two and three years in detention, rendering the period as wholly excessive and, further, arbitrary under art 9. For the bulk of the offshore entry refugees, their continuing detention pending removal remained unlawful for the reasons given earlier.

8 *International Refugee Law Is Relevant as Lex Specialis*

So far the focus has been on how Australia's treatment of security-detained refugees is inconsistent with its 'pure' international human rights law obligations under art 9(1). However, given that most of the detainees were recognised as refugees, additional international legal considerations apply. Australia is a party to the *Refugee Convention* and a question arises as to how it interacts with the *ICCPR* in determining the scope of Australia's human rights obligations — quite apart from any direct application or breach of the *Refugee Convention* itself.

The best way to articulate the relationship between these two branches of law is by reference to the *lex specialis* principle. According to the ILC, the maxim *lex specialis derogat legi generali* 'suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific'.¹⁵⁷

That does not mean, however, that the more specific law normally *extinguishes* the general law.¹⁵⁸ As the ILC makes clear: 'A particular rule may be considered an *application* of a general standard in a given circumstance. ... Or it may be considered as a *modification*, *overruling* or a *setting aside* of the latter'.¹⁵⁹ Both are species of *lex specialis*,¹⁶⁰ such that special and general law

¹⁵⁷ International Law Commission, *Report of the International Law Commission: Fifty-Eighth Session*, UN GAOR, 61st sess, Supp No 10, UN Doc A/61/10 (2006) 408 ('*ILC Report*').

¹⁵⁸ *Ibid* 409.

¹⁵⁹ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN GAOR, 58th sess, UN Doc A/CN.4/L.682 (13 April 2006) 49 (emphasis in original) ('*Fragmentation of International Law*').

¹⁶⁰ *Ibid* 53.

can apply concurrently,¹⁶¹ with the special law operating as ‘an application, updating or development of, or ... as a supplement, a provider of instructions on what a general rule requires in some particular case’.¹⁶²

This is precisely the ‘weak’ sense of *lex specialis* invoked by the International Court of Justice (‘ICJ’) in the *Legality of the Threat or Use of Nuclear Weapons*,¹⁶³ where international human rights law (the general law) applied to complement international humanitarian law (the special law) in armed conflict. According to the ICJ, the special law defined the application of the general law:

The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities ... [cannot be] deduced from the terms of the *Covenant* itself.¹⁶⁴

The ICJ’s approach can be analogously applied to explain relevant aspects of the relationship between international human rights law and international refugee law. So far as the detention of refugees is concerned, human rights law applies as the background general law governing the detention of any person (including refugees), whereas refugee law is additionally relevant as the special law for refugees. At the same time, the *Refugee Convention* does not exhaustively govern the lawfulness of detention nor purport to extinguish the application of the general law. Rather, what constitutes the ‘arbitrary’ detention of a refugee under art 9 of the *ICCPR* must be interpreted in the light of whatever refugee law also has to say about the lawfulness of such detention.

The relationship between the branches matters for two reasons, one normative and one procedural (or remedial). First, the proper scope of Australia’s obligations under the *ICCPR* cannot be accurately determined unless the relevant aspects of refugee law, as the special law, are taken into account. Secondly, international human rights law brings with it procedurally binding international supervision mechanisms, namely, state reporting and individual complaints before the UNHRC, whereas there is no comparable procedure under international refugee law.¹⁶⁵ Incorporating refugee law into the international human rights law analysis thus gives traction to refugee law which it may not autonomously enjoy.

While the UNHRC is wary of considering international treaties or laws other than the *ICCPR*,¹⁶⁶ it already accepts that both humanitarian law and international criminal law may be relevant in interpreting the *ICCPR*.¹⁶⁷

¹⁶¹ Ibid 50.

¹⁶² Ibid 54. The principle of harmonisation of norms is also relevant here: *ILC Report*, UN Doc A/61/10.

¹⁶³ (*Advisory Opinion*) [1996] ICJ Rep 226.

¹⁶⁴ Ibid 240. Koskeniemi notes that this statement is actually an example of concurrent application of both fields of law as well as a ‘setting aside’ of the *ICCPR* by humanitarian law: International Law Commission, *Fragmentation of International Law*, UN Doc A/CN.4/L.682 (13 April 2006) 53.

¹⁶⁵ The UNHCR and its Executive Committee do not have comparable procedures for assessing the conduct of individual states.

¹⁶⁶ ‘[I]t is not the function of the Human Rights Committee to review the conduct of a State party under other treaties’: Human Rights Committee, *General Comment No 29: States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) 4 [10].

¹⁶⁷ Ibid 2 [3], 5 [12].

Similarly, in future the UNHRC will likely be called upon to work out its approach to the relationship between international refugee and international human rights law.

9 *Detention Is an Impermissible ‘Penalty’ under the Refugee Convention*

While detention is not prohibited under international refugee law, limitations are imposed on it. Article 31 of the *Refugee Convention* deals with refugees ‘unlawfully’ in the country of refuge ‘on account of their illegal entry or presence’. The assumption is that refugees’ entry or presence can be unlawful where they enter ‘without authorisation’ under domestic law (for instance, for lack of a visa to enter or remain, as was the case with refugee ‘boat people’ in Australia). In such cases, art 31(2) of the *Refugee Convention* permits only ‘necessary’ restrictions on their freedom of movement,¹⁶⁸ and only for such time until the refugees’ status in the country is regularised or they obtain admission to another state.

Thus, where detention is justifiably necessary (for example, on security grounds) and the host state refuses to regularise their status, detention is conceivably lawful *until the person obtains admission to another state*. In this regard, art 31(2) requires the host state to give refugees ‘a reasonable period’ and ‘all the necessary facilities’ to obtain admission elsewhere. It otherwise says nothing about the maximum period of detention in which a refugee pending removal may be held,¹⁶⁹ which arguably falls to the residual general rules of human rights law to be determined (including, for example, periodic review of detention and a presumption of release where removal is not feasible within a reasonable period).

On the other hand, a different limit on detention under refugee law is pertinent. It is arguable that the refugees’ detention is ‘arbitrary’ under art 9(1) of the *ICCPR* because it separately violates art 31(1) of the *Refugee Convention*. Article 31(1) of the *Refugee Convention* prohibits the imposition of ‘penalties’ on account of the unlawful mode of entry to a state, as long as they ‘present themselves without delay to the authorities and show good cause for their illegal entry or presence’. The term ‘penalty’ is undefined but is not expressly limited to, for instance, criminal penalties. It is clear that administrative detention is not always a ‘penalty’ and may be lawful in certain circumstances.

However, administrative detention may *become* a ‘penalty’ where it is unnecessary, unreasonable, arbitrary or discriminatory, lacking in basic safeguards (including as regards conditions, duration and review) or otherwise in breach of human rights law (where the general law ‘fills the gaps’ in the special law).¹⁷⁰ As Goodwin-Gill and McAdam observe: ‘[a]n overly formal or

¹⁶⁸ Freedom of movement of refugees is also protected by art 26 of the *Refugee Convention*, and complementarily governed by art 12 of the *ICCPR*, in relation to which refugee law is the *lex specialis*.

¹⁶⁹ Unless a literal interpretation is taken that detention is permissible until such time as admission elsewhere is obtained, regardless of how long that takes; but that would be inconsistent with the treaty’s protective purpose.

¹⁷⁰ Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 266. There is circularity involved here as regards *lex specialis*: refugee law cannot define whether detention is arbitrary under international human rights law if it refers itself back to international human rights law.

restrictive approach [to the notion of a penalty] is inappropriate, since it may circumvent the fundamental protection intended'.¹⁷¹

There are two steps to an argument that Australia penalised the refugees and violated art 31(1) of the *Refugee Convention*. First, its detention of the refugees was arbitrary and unreasonable because the grounds of detention were not substantiated and thus did not justify it, and the procedure was unfairly defective, as this article has argued. Secondly, the refugees were mandatorily detained because of their illegal entry to Australia, yet non-citizens who enter Australia lawfully, apply for asylum and pose security risks are not mandatorily detained.¹⁷²

The refugees were accordingly treated less favourably than similarly situated refugees and there was no objective justification for the differential treatment. As a result, the decision to mandatorily detain them constituted a 'penalty' prohibited by art 31(1). Where their detention constitutes a prohibited penalty under refugee law, such unlawfulness directs the interpretation of what is 'arbitrary' or 'unlawful' detention under art 9 of the *ICCPR* and grounds a breach of it.

10 *Potential Inconsistency with the Exceptional Measures under Refugee Law*

Detention for the purpose of removing a refugee will only be lawful under art 9(1) if the basis of removal is itself lawful under international refugee law. The question thus arises whether the security grounds asserted by Australia for denying protection to the refugees are consistent with international refugee law. Australia has not indicated to the refugees any destination countries to which they will be removed. Their removal destination is unknown and thus could include their country of origin (*refoulement*), a third unsafe country where 'chain *refoulement*' to their country of origin could occur or a genuinely safe third country.

The *Refugee Convention* contains three provisions concerning security threats (arts 1F, 32, 33(2)), which define the circumstances in which states can lawfully remove persons (and thus lawfully detain them pending removal). Since most of the refugees (except those from the *MV Oceanic Viking*) were not 'lawfully' in Australia (due to their irregular or 'illegal' arrival) as required by art 32, that provision on the expulsion of *lawfully resident* refugees to a safe third country does not apply in most cases.

Article 33(2) exceptionally allows a refugee to be returned to persecution where there are reasonable grounds for regarding him or her as a danger to the security of the country of asylum.¹⁷³ If Australia sought to forcibly return the

¹⁷¹ Ibid.

¹⁷² The *Migration Act* does not provide for the mandatory detention of non-citizens who enter Australia with permission and subsequently apply for protection as refugees, even though such persons may equally present risks of absconding, which Australia claims justifies detaining unlawful arrivals.

¹⁷³ *Refugee Convention* art 33(1) provides:

The benefit of the present provision [*non-refoulement*] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

refugees to countries of persecution, it would have to comply with the requirements of this article. UNHCR guidelines note that art 33(2) requires that a person pose an 'extremely serious' or 'exceptional' threat which can only be countered by expulsion as a 'measure of last resort'.¹⁷⁴

Accordingly, if Australia sought to return the refugees to persecution in their country of origin (such as Sri Lanka or Myanmar), it would need to demonstrate that there are 'reasonable grounds' for regarding the refugees as 'an extremely serious', 'exceptional', or 'major actual or future' threat to Australia, and that their removal is necessary as a 'last resort' to counter that threat. It would not be sufficient for Australia to establish that the refugees posed security threats in the past, or in another country (such as Sri Lanka or Myanmar). It must demonstrate that they seriously threaten Australia now or in the future.

Australia has not provided any evidence or substantiation that the refugees are such an 'extremely serious threat' as to necessitate their removal from Australia to protect the community, or that less invasive means for protecting the community are unavailable. Moreover, if Australia intends to expel the refugees to a country other than their country of origin, Australia would also need to demonstrate that such a country does not present a risk of 'chain *refoulement*' (including due to unsafe diplomatic assurances) to their countries of origin and is, in fact, a safe third country.

Article 1F of the *Refugee Convention* separately requires a state to exclude from refugee status a person suspected of certain international crimes, serious non-political crimes, or acts contrary to UN principles or purposes (potentially including some acts of terrorism).¹⁷⁵ Such a person could then be lawfully returned either to persecution (as not being a refugee) or to some other state that would accept them. As noted earlier, Australia has recognised the refugees as *refugees*. By definition it has therefore not applied the 'exclusion clauses' of art 1F of the *Refugee Convention* to them, for instance because they were suspected of war crimes or terrorism. As such, art 1F cannot ground the basis of their removal and detention pending removal in Australia.¹⁷⁶

In this regard, Australia's 'security assessment' under domestic law is arguably incompatible with international refugee law. Australia's security assessment under the *ASIO Act* operates as an additional, unilateral ground for excluding refugees from protection in Australia, which is not authorised under the *Refugee Convention*. Australia has substituted or overlaid its own 'national security' test for the exclusion of refugees instead of applying art 1F or art 33(2), *which should ideally operate as an exhaustive package of exceptions*.¹⁷⁷ Exclusion ought to be limited to the serious circumstances under those

¹⁷⁴ United Nations High Commissioner for Refugees, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (Background Note, 4 September 2003) 5.

¹⁷⁵ See Ben Saul, 'Protecting Refugees in the Global "War on Terror"' (2008) 1 *Indian Juridical Review* 13.

¹⁷⁶ Also argued in the plaintiff's submissions in Transcript of Proceedings, *Plaintiff M47/2012 v Director General of Security* [2012] HCATrans 127 (28 May 2012) (R M Niall SC).

¹⁷⁷ The point has not been definitively determined as a matter of international law. The *Refugee Convention* does not explicitly rule out removal of refugees to safe third countries, including for national security reasons extending beyond the *Convention's* provisions.

provisions because of the paramount importance of refugee protection and of preventing unilateral exclusion by states where the refugee's conduct is not sufficiently serious to warrant it.

Where Australia has not established the grounds for the refugees' removal — under art 1F — or return — under art 33(2) — their detention pending removal cannot be justified pursuant to those provisions. Thus they are simply refugees entitled to protection and a durable solution, ordinarily achieved by a grant of permanent residency status.

The operating assumption of the *Refugee Convention* is that once a person is recognised as a refugee in a national determination system, protection in the place of recognition is implicit unless the *Refugee Convention* allows *refoulement* or exclusion. It is not designed to permit recognised refugees to be shunted even to safe third countries merely on the basis that a state prefers to apply a parochial national security test outside of the *Refugee Convention*. The situation may be different in cases of genuine burden sharing, where the country of asylum is overwhelmed by the scale of a particular mass influx and requires assistance from safe third states in facilitating durable solutions, but that is different from Australia's invocation of a more pedestrian security exception outside the framework of the *Refugee Convention*. In *Plaintiff M47*, the existence of statutory ministerial powers giving effect to arts 32 and 33 of the *Refugee Convention* were part of the reason why the High Court found the ASIO regulation to be invalid.¹⁷⁸

B Article 9(2) — No Notice of Reasons for Detention

Having established various routes by which Australia has acted inconsistently with art 9(1) of the *ICCPR*, two other aspects of art 9 become relevant. The failure of Australia to provide reasons for detention to the refugees involves a distinct violation of art 9(2) of the *ICCPR*, which provides that '[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him'.

The first part of art 9(2) ('[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest') applies not only to a *criminal* 'arrest', but to any deprivation of liberty by detention. The UNHRC's *General Comment No 8* confirms this interpretation,¹⁷⁹ as does the eminent jurist Manfred Nowak¹⁸⁰ and state practice concerning the equivalent provision of the *ECHR*.¹⁸¹

¹⁷⁸ (2012) 292 ALR 243.

¹⁷⁹ Human Rights Committee, *CCPR General Comment No 8: Right to Liberty and Security of Persons (Article 9)*, 16th sess (30 June 1982) (emphasis added):

It is true that some of the provisions of article 9 (*part of* para 2 and the whole of para 3) are only applicable to persons against whom criminal charges are brought. *But the rest*, and in particular the important guarantee laid down in para 4, ie the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention.

¹⁸⁰ Nowak, above n 103, 228.

¹⁸¹ *ECHR* art 5(2) provides a right to know the reasons for arrest, and is interpreted to apply to civil as well as criminal powers (*van der Leer v Netherlands* (1990) 170-A Eur Court HR (ser A) 27–8) including detention of asylum seekers (*Saadi v United Kingdom* (2007) 44 EHRR 1005).

As regards the content of the information which must be provided to a person upon their detention, the UNHRC held in *Caldas v Uruguay* that a person must be informed of the ‘substance’ of the reasons for their detention, and it is not sufficient to simply inform a person that they are being held under unspecified ‘security measures’.¹⁸² A person must be informed ‘sufficiently’ of the reasons for detention, so that the person can take immediate steps to secure release if they believe ‘the reasons given are invalid or unfounded’.¹⁸³

Most of the refugees were never ‘sufficiently’ informed by Australia of the ‘substance’ of the reasons for their detention. At most, they were made aware that they were detained because they were ‘offshore entry persons’ and ‘unlawful non-citizens’ who were liable to continuing detention under the *Migration Act* because they had received adverse security assessments, the substantive reasons for which were undisclosed to them. Later they were informed that they were detained pending removal but the underlying security grounds leading to that result were not usually adequately disclosed for reasons explained earlier.

At most, some of the refugees were notified of certain allegations during their interviews by ASIO, but many were not. Those that did received widely varying degrees of disclosure, some specific but some so general that they were incapable of reasonably alerting the person to the nature of the case against them. Even specific assertions made by ASIO in interviews did not necessarily give fair notice to refugees of the provenance, quality or reliability of the adverse evidence against them, making it difficult to answer or challenge such assertions.

C Article 9(4) — No Effective Judicial Review of Detention

1 Judicial Review of Detention Is Not Available

Article 9(4) of the *ICCPR* requires a state to guarantee the substantive judicial review of the necessity of detention. Numerous UNHRC decisions have found that the nature of judicial review available to immigration detainees generally in Australia does not meet the requirements of art 9(4). In *A v Australia* it was held that judicial review of detention must be ‘real’ and not limited to a ‘merely formal’ assessment of whether a person falls into a self-evident factual category under domestic law; the court must also be empowered to order the release of a person.¹⁸⁴ The UNHRC found that Australian courts were indeed ‘limited to a formal assessment of the self-evident fact’ of whether a person was a ‘designated person’ under the domestic legislation, but had no power to review detention or to order a person’s release. Such limited grounds of review did not satisfy art 9(4).

In subsequent communications, following amendments to Australian law, similar *Views* have been adopted by the UNHRC in relation to judicial review remaining limited to a formal determination of whether a person is an ‘unlawful

¹⁸² Human Rights Committee, *Views: Communication No 43/1979*, 19th sess, UN Doc CCPR/C/OP/2 (1990) [13.2] (*‘Caldas v Uruguay’*).

¹⁸³ *Ibid.*

¹⁸⁴ *A v Australia*, UN Doc CCPR/C/59/D/560/1993, [9.5].

non-citizen'.¹⁸⁵ The courts were found to be unable to make 'a substantive assessment of whether there are substantive grounds justifying detention in the circumstances of the case'.¹⁸⁶ The UNHRC has maintained its jurisprudence on this issue despite a continuing 'respectful' refusal by Australia to accept, in good faith, the UNHRC's interpretation of the *ICCPR* as the authoritative body entrusted to do so under international treaty law.¹⁸⁷

The legal situation concerning the unavailability of judicial review of detention in Australia remains incompatible with art 9(4) of the *ICCPR*, for the reasons previously stated by the UNHRC. In fact, the legal situation under domestic law has deteriorated since the UNHRC's previous *Views*. As regards the grounds of the refugees' initial detention, Australian law now expressly prohibits proceedings being brought in the courts relating to the status of a person as an 'offshore entry person' or the lawfulness of their detention.¹⁸⁸ The refugees are therefore barred by statute from challenging even their formal or self-evident factual designation as offshore entry persons subject to detention, though the original constitutional review jurisdiction of the High Court remains.

Further, as regards the refugees' continuing detention, Australian law also expressly prohibits the courts from releasing an unlawful non-citizen from detention, except for removal or where the person has been granted a visa.¹⁸⁹ The courts are therefore explicitly precluded from reviewing the substantive necessity of detention as required by art 9(4), including by reference to any personal risk factors. The only review available concerns the purely formal determination of whether a person is subject to removal or has been granted a visa.

2 *Effective Judicial Review of the Underlying Adverse Security Assessments Is Not Available*

Where detention pending removal is purportedly justified on security grounds, the requirement of substantive judicial review of the grounds of detention under art 9(4) necessarily requires a judicial inquiry into the information upon which the security assessment is based. Without access to such evidence, a court is not in a position to effectively review it.

At a minimum, such judicial inquiry requires disclosure to the court of all relevant evidence which the state relied upon in making an adverse security assessment. It may be accepted that in appropriate cases, certain information may be provided confidentially to the court to protect intelligence sources or otherwise safeguard essential security interests. There may also be some argument in international law about the precise degree of disclosure which must be afforded to the refugee personally. But it would not be compatible with art

¹⁸⁵ *C v Australia*, UN Doc CCPR/C/76/D/900/1999, [7.4]; *Shafiq v Australia*, UN Doc CCPR/C/88/D/1324/2004, [7.3]–[7.4]; *Shams v Australia*, UN Doc CCPR/C/90/D/1255,1256,1259,1260,1266,1268,1270&1288/2004, [7.3]; *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001, [7.2]. These *Views* also set out the relevant legislation.

¹⁸⁶ *C v Australia*, UN Doc CCPR/C/76/D/900/1999, [7.4]. See also *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001, [7.2].

¹⁸⁷ Human Rights Committee, *General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 94th sess, UN Doc CCPR/C/GC/33 (25 June 2009) [11]–[15].

¹⁸⁸ *Migration Act* s 494AA(1).

¹⁸⁹ *Migration Act* s 196(3).

9(4) for a state to withhold relevant evidence upon which the state seeks to rely from the court itself.

As regards the standard of review, the UNHRC found in *Ahani v Canada* ('*Ahani*') that a mandatory judicial review of the 'reasonableness' of a state's security assessment, including its 'evidentiary foundation' conducted 'promptly after the commencement of mandatory detention' (within one week of its commencement), is 'in principle' sufficient to satisfy art 9(4).¹⁹⁰ The UNHRC appeared to accept that a full 'merits' review of detention by a court, for instance, to determine its factual 'correctness' as opposed to its legal 'reasonableness', is not necessarily required. Nonetheless, the content of the 'reasonableness' standard applied in *Ahani* provided a high level of protection to a detainee, such that the UNHRC did not believe it was unfair to the refugee. As the UNHRC observed:

the author was provided by the Court with a summary redacted for security concerns reasonably informing him of the claims made against him. The Committee notes that the Federal Court was conscious of the 'heavy burden' upon it to assure through this process the author's ability appropriately to be aware of and respond to the case made against him, and the author was able to, and did, present his own case and cross-examine witnesses [including two Canadian security service officers].¹⁹¹

The approach in *Ahani* may not necessarily be the only means by which a state may satisfy art 9(4), but it provides strong indications of the minimum requirements. Judicial review of the substantive justification for immigration security detention under art 9(4) at least requires a minimum degree of disclosure of evidence to the detainee personally, and an opportunity to effectively challenge that evidence in an adversarial court proceeding.¹⁹²

The above approach is supported by wider state practice amongst almost 50 states in the European human rights system, as the ECtHR case below suggests. Article 5(4) of the *ECHR* is functionally equivalent to art 9(4) of the *ICCPR* and is comparably interpreted. The procedural requirements of art 5(4) of the *ECHR* (governing detention) are less stringent than fair trial guarantees in criminal cases under art 6(1) of the *ECHR*;¹⁹³ and rights under art 6 cannot be *directly* applied in art 5(4) (detention) cases.¹⁹⁴ Yet the more protracted the detention, the greater the rights that have been accorded in the European jurisprudence.

Thus, the ECtHR has found that art 5(4) must 'provide guarantees appropriate to the kind of deprivation of liberty in question', particularly as regards

¹⁹⁰ Human Rights Committee, *Views: Communication No 1051/2002*, 80th sess, UN Doc CCPR/C/80/D/1051/2002 (15 June 2004) [10.2]–[10.3] ('*Ahani v Canada*').

¹⁹¹ *Ibid* [10.5].

¹⁹² Such procedural rights under art 9(4) exist independently of the rights under art 13 reserved for lawfully present aliens, which have raised separate issues in other Australian proceedings: Mansour Leghaei et al, 'Communication to the United Nations Human Rights Committee', Communication to the Human Rights Committee in *Laghaei v Australia*, 16 April 2010 <http://sydney.edu.au/law/scil/documents/2010/UN_Complaint_%20Sheikh_Mansour_Leghaei.pdf>.

¹⁹³ Cf *ICCPR* art 14.

¹⁹⁴ *Reinprecht v Austria* (2007) 44 EHRR 797, 803–4 [39]–[40].

long-term detention.¹⁹⁵ Further, such guarantees ‘are derived from the right to an adversarial trial as laid down in Article 6’.¹⁹⁶ In *A v United Kingdom*,¹⁹⁷ the Grand Chamber of the ECtHR held that the ‘dramatic impact’ of lengthy and potentially indefinite administrative detention of non-citizen suspected terrorists, not capable of removal, demanded the importation of ‘substantially the same fair trial guarantees’ of a criminal trial (under art 6 of the *ECHR*, equivalent to art 14 of the *ICCPR*) into proceedings challenging the lawfulness of detention.

In particular, such guarantees were found to include a minimum degree of disclosure *personally* to a detainee. While the protection of classified information may be justified to protect national security, the ECtHR held that it must be balanced against the requirements of a fair hearing.¹⁹⁸ The starting point is that it is ‘essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others’.¹⁹⁹ Where ‘full disclosure’ is not possible, however, a person must still enjoy ‘the possibility effectively to challenge the allegations against him’.²⁰⁰

Further, ‘where all or most of the underlying evidence remained undisclosed’, ‘sufficiently specific’ allegations must be disclosed to the affected person to enable that person to effectively provide his/her representatives (including security-cleared counsel) ‘with information with which to refute them’.²⁰¹ The provision of purely ‘general assertions’ to a person, where the decision made is based ‘solely or to a decisive degree on closed material’ will not satisfy the procedural requirements of a fair hearing.²⁰² On the facts, the ECtHR held that the affected person’s hearing had been unfair because the case against him was largely in closed material and the open case was insubstantial. This case suggests that a greater degree of procedural protection, including minimum disclosure, is essential where a person is administratively detained for protracted periods, even if not facing a criminal trial.²⁰³

Earlier immigration security detention cases are also relevant state practice. In the seminal case of *Chahal v United Kingdom* the ECtHR found a violation of art 5(4) of the *ECHR* (equivalent to art 9(4) of the *ICCPR*) where the domestic courts were not able to review a decision to detain a person on security grounds.²⁰⁴ In that case, only a non-judicial procedure was available, which

¹⁹⁵ Ibid 802 [31]. See also *Assenov v Bulgaria* (1999) 28 EHRR 652, 713 [162]; *Megyeri v Germany* (1992) 237-A Eur Court HR (ser A) 22.

¹⁹⁶ *Garcia Alva v Germany* (2003) 37 EHRR 335, 352 [39].

¹⁹⁷ (2009) 49 EHRR 625. A similar approach has been taken in ‘control order’ cases, where the more stringent standard of fairness applicable in criminal trials was applied even though such proceedings did not involve a criminal penalty: *Secretary of State for the Home Department v AF* [2010] 2 AC 269, 353 [57].

¹⁹⁸ *A v United Kingdom* (2009) 49 EHRR 625, 636 [217]–[218].

¹⁹⁹ Ibid 636 [218].

²⁰⁰ Ibid.

²⁰¹ Ibid 637 [220].

²⁰² Ibid.

²⁰³ In contrast, it is notable that in *Celepli v Sweden*, the Human Rights Committee did not accept the argument that residential restrictions, compromising freedom of movement under art 12 of the *ICCPR*, were sufficiently serious to engage the protection of art 9 of the *ICCPR* (concerning review of detention): *Celepli v Sweden*, UN Doc CCPR/C/51/D/456/1991, [9.2].

²⁰⁴ [1996] V Eur Court HR 1831, 1866–7 [129]–[132].

denied the affected person a right to legal representation, only provided an 'outline' of the grounds for deportation and involved no power of decision to bind the relevant minister. The ECtHR preferred a procedure which better balanced security concerns and individual rights:

The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved ...

The Court attaches significance to the fact that ... in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice.²⁰⁵

In the later immigration security detention case of *Al-Nashif v Bulgaria*²⁰⁶ the ECtHR found a violation of art 5(4) where a minister's decision concerning national security was not subject to judicial review, the reasons for the decision were not published and the detainee was not given access to a lawyer.²⁰⁷ The ECtHR reiterated that to ensure the protection of individuals against arbitrariness, '[n]ational authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved'.²⁰⁸ It also emphasised that 'there are means which can be employed which both accommodate legitimate national security concerns and yet accord the individual a substantial measure of procedural justice'.²⁰⁹ The ECtHR relevantly stated:

Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information ...

The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of 'national security' that is unlawful or contrary to common sense and arbitrary. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the *Convention*.²¹⁰

The above minimum procedural requirements under art 9(4), as interpreted by the UNHRC and in light of other pertinent practice, are not available to the

²⁰⁵ Ibid 1866–7 [131].

²⁰⁶ (2003) 36 EHRR 655.

²⁰⁷ Ibid 678 [94].

²⁰⁸ Ibid.

²⁰⁹ Ibid 678 [97].

²¹⁰ Ibid 684–5 [123]–[124].

refugees under Australian law. First, there is no opportunity for merits review of adverse security assessments in any Australian quasi-judicial tribunal (such as the AAT) or court. As the Federal Court of Australia stated in *Leghaei v Director-General of Security* ('*Leghaei*'), 'the merits and validity of ASIO's assessment that the applicant is a risk to Australia's national security are not a matter that, in a judicial review proceeding like this, are for the court to pass upon'.²¹¹

Secondly, unlike in *Ahani*, the refugees were detained for protracted periods *before* any adverse security assessments were issued. For the duration of such detention, there was no opportunity for judicial review of any purported security suspicion on which their detention was predicated, where such decisions had not been made or communicated to them. There simply was no *prima facie* assessment or preliminary screening of their security status.

Thirdly, unlike in *Ahani*, once adverse security assessments were issued, there was no automatic or prompt judicial review of them. As noted earlier, no administrative tribunals or Australian courts are empowered to review the merits of an assessment and there is no requirement that every detention decision is independently reviewed. Limited judicial review of security assessments is available to the refugees should they choose to commence proceedings. However, such review is substantially less protective than the 'reasonableness' review in *Ahani* and does not satisfy the requirements of art 9(4).

In *Ahani*, the affected person was provided with a redacted summary of information reasonably informing him of the claims made against him, and the court was conscious of the 'heavy burden' upon it to ensure throughout this process the refugee's ability appropriately to be aware of and respond to the case against him.²¹² The refugee was also able to, and did, present his case and cross-examine witnesses in the light of the known allegations. In contrast, Australian judicial review is far less protective of the refugees. The reasons are threefold.

First, judicial review proceedings can only be commenced if the refugees are able to identify a probable error of law or 'jurisdictional error'. Because Australia has usually not disclosed the reasons for the adverse security assessments, or the evidence or information upon which they are based, it is virtually impossible for the refugees to identify whether any errors of law have been made by ASIO. The Federal Court itself has acknowledged that '[w]ithout knowing what reasons led the [ASIO] Director-General to form his adverse judgments, the applicants cannot point to direct evidence of error', nor 'can error be inferred by reasons of the failure of the Director-General to provide his reasons to the applicant or to the Court'.²¹³ Any proceedings commenced by the refugees would accordingly be speculative, potentially an abuse of the court's process, likely to fail and also incur heavy costs orders.

²¹¹ [2005] FCA 1576 (10 November 2005) 28–9 [91].

²¹² *Ahani v Canada*, UN Doc CCPR/C/80/D/1051/2002, [2.3], [4.14], [10.5].

²¹³ *Sagar* (2011) 193 FCR 311, 323 [69].

3 *Nominal Procedural Fairness Renders Judicial Review Formal and Ineffective*

Secondly, even if the refugees were able to commence judicial review proceedings, the content of procedural fairness available to them is so diminished as to preclude any meaningful challenge to, or review of, their assessments. One leading decision is the Federal Court of Australia case of *Leghaei*,²¹⁴ upheld on appeal in the Full Court of the Federal Court.²¹⁵ In these judgments it was noted that people who are not Australian citizens, permanent residents or special purpose visa holders are statutorily precluded from receiving notification of, a statement of reasons for, a right to review of, or procedural fairness rights in respect of, an adverse security assessments under the *ASIO Act*.²¹⁶

The common law still independently provides a degree of procedural fairness to such persons, albeit coloured by the statutory responsibilities of ASIO. However, there is only a duty to afford 'such degree of procedural fairness as the circumstances could bear, consistent with a lack of prejudice to national security'.²¹⁷ The Federal Court of Australia found that such obligation will be 'discharged by evidence of the fact and content of such genuine consideration by the [ASIO] Director-General personally'.²¹⁸

Where the ASIO Director-General determines that no disclosure whatsoever is consistent with a lack of prejudice to security, no disclosure need be made. The Court also noted that the courts 'are ill-equipped to evaluate intelligence'²¹⁹ and are generally not in a position to contradict the ASIO Director-General. In consequence, in a given case it may be that 'the content of procedural fairness is reduced, in practical terms, to nothingness'.²²⁰

In *Plaintiff M47*, the High Court found that the plaintiff on the facts of that case had been afforded adequate procedural fairness because he had been alerted to specific allegations during his interview by ASIO.²²¹ But the High Court did not overrule *Leghaei* by suggesting that procedural fairness would be denied if a person were not interviewed, or allegations were not put to the person during interview, or that highly generalised allegations in an interview would be insufficient to reasonably inform a person of the case against them. The Court did not overturn the Full Court of the Federal Court's earlier finding in *Leghaei Appeal* that, in an appropriate case, procedural fairness could be reduced to 'nothingness'. All the High Court held was that on the facts of this case, the particular allegations made in that particular interview accorded procedural fairness to that refugee. Sheikh Mansour Leghaei too had received some disclosure of the case against him, yet the Full Court of the Federal Court still observed that it may be permissible in security cases to reduce its content to nothingness.²²²

²¹⁴ [2005] FCA 1576 (10 November 2005).

²¹⁵ *Leghaei Appeal* (2007) 97 ALD 516.

²¹⁶ *Leghaei* [2005] FCA 1576 (10 November 2005) 21–2 [70]–[71].

²¹⁷ *Ibid* 26 [83].

²¹⁸ *Ibid* 27 [86].

²¹⁹ *Ibid* 26–7 [84], 27 [87].

²²⁰ *Ibid* 27–8 [88], *affd* (2007) 97 ALD 516, 521–2.

²²¹ (2012) 292 ALR 243.

²²² *Leghaei Appeal* (2007) 97 ALD 516, 521.

Some refugees were not interviewed at all and thus received no notice of any allegations, with ASIO relying on either secret intelligence or the refugees' own asylum applications. Those who were interviewed were not necessarily informed of specific allegations and the evidentiary basis of any specific or general allegations was rarely, if ever, disclosed, making it extremely difficult for the refugees to contest the provenance or reliability of the case against them. As such, oral assertions by interview, absent a more complete statement or summary of allegations or reasons, and a redacted summary of the evidence substantiating such allegations or reasons still falls short of the minimum standard of disclosure in detention cases required by international human rights law.

In these circumstances, it would be futile for most of the refugees to seek to challenge their security assessments in the courts. ASIO has not provided many of the refugees with any reasons, evidence or information on which their adverse security assessments are based. They have no reason to believe that ASIO's position would change in court proceedings. It is obvious that the existing non-disclosure to them is based on the view of the ASIO Director-General that it would prejudice national security to disclose anything to them. There would be little real possibility of successfully seeking further disclosure in court.

The Australian legal position is thus entirely different from the situation in *Ahani*, where the affected person was informed of the essence of the case and had an opportunity to effectively challenge it (on a reasonableness standard, though not on the merits).²²³ By contrast, Australian proceedings would not provide effective judicial review of the grounds of the detention as required by art 9(4).

While all reasons, information and evidence can be withheld from the refugees, it may still be possible for certain information or evidence to be disclosed to the court and/or the refugees' counsel (if security-cleared) on judicial review (as occurred in *Leghaei*).²²⁴ However, such process would still not satisfy art 9(4). As noted above, the courts have accepted that they lack the expertise to evaluate security information,²²⁵ such that their review of the evidence in such cases remains largely formal and is ineffective in determining whether the evidence supports the security case justifying detention.

In addition, even if the refugees' counsel were provided with more evidence than the refugees, such procedure would not satisfy art 9(4). Counsel would be unable to disclose the substance of any secret information to the refugees, such that the refugees not know the case against them and would be unable to instruct their counsel on dealing with the evidence (including challenges to its accuracy or reliability, or to provide explanations for it). Moreover, ASIO still retains the discretion whether to disclose anything to the refugees' counsel, who cannot legally compel any minimum level of disclosure by ASIO (such as the essence of the case against a refugee).

The Australian process is thus fundamentally less fair and protective than in *Ahani*. It also contrasts with the approach in detention cases under European human rights law, where an irreducible minimum disclosure of the security case

²²³ *Ahani v Canada*, UN Doc CCPR/C/80/D/1051/2002.

²²⁴ [2005] FCA 1576 (10 November 2005).

²²⁵ See also *SBEG* [2012] FCA 277 (23 March 2012) 13 [34].

against a person is necessary to guarantee proper judicial review of detention.²²⁶ The Australian courts have explicitly distinguished Australian law from the approach to disclosure under European law above.²²⁷

When measured against the European test, the refugees were not provided by Australia with an irreducible minimum of disclosure of the essential cases against them to enable effective challenge, but instead were only provided with purely general or abstract assertions. Further, Australia did not provide any other special procedure for enabling effective judicial review of the reasons for the decisions and the evidence (such as the ‘special advocate’ procedure in Britain, Canada and New Zealand),²²⁸ to reconcile the refugees’ rights to effective review with security concerns. Merits review was also wholly unavailable, and the decisions of the new Independent Reviewer would be non-binding and could not compel further disclosure. In consequence, Australia did away with effective control of the lawfulness and non-arbitrariness of the refugees’ detention by simply asserting that security is at stake.

4 Public Interest Immunity Renders Judicial Review Nominal and Ineffective

Third and finally, even if the refugees could commence judicial review proceedings, ASIO could claim ‘public interest immunity’ to preclude the refugees from challenging any adverse security evidence in court. The test for public interest immunity was set out by the High Court in *Church of Scientology v Woodward*:

discovery would not be given against the Director-General [of ASIO] save in a most exceptional case. The secrecy of the work of an intelligence organization which is to counter espionage, sabotage, etc is essential to national security, and the public interest in national security will seldom yield to the public interest in the administration of civil justice ...²²⁹

The effect of a successful public interest immunity claim is to preclude the admission of the information into evidence in a judicial review proceeding.²³⁰ It is thus not only unavailable to the affected person, but also cannot be relied upon by the court itself in conducting its own review of secret material. Such a claim is additional to the likely reduction of procedural fairness detailed above, which also operates to preclude disclosure and an effective challenge.

The immunity has been successfully claimed by ASIO in recent adverse security assessment cases,²³¹ in combination with the issue of ministerial

²²⁶ *A v United Kingdom* (2009) 49 EHRR 625, 636 [217]–[218].

²²⁷ *Parkin* (2009) 260 ALR 503, 514 [43] (distinguishing *Secretary of State for the Home Department v AF* [2010] 2 AC 269).

²²⁸ *Special Immigration Appeals Commission Act 1997* (UK) c 68, s 6; *Immigration and Refugee Protection Act*, SC 2001, c 27, s 85; *Immigration Act 2009* (NZ) s 263. Such advocates assist an immigration tribunal or court in determining what information can be safely disclosed to a person, and in testing secret information which is not disclosed.

²²⁹ (1982) 154 CLR 25, 76 (Brennan J).

²³⁰ *Gypsy Jokers Inc v Commissioner of Police* (2008) 234 CLR 532, 556. See also *Parkin* (2009) 260 ALR 503, 511 [32].

²³¹ See, eg, *SBEG* [2012] FCA 277 (23 March 2012); *Sagar* (2011) 193 FCR 311; *Parkin* (2009) 260 ALR 503.

certificates.²³² While the legal test requires the courts to weigh the competing interests at stake,²³³ it may ultimately resolve them wholly in favour of national security and to the effective extinguishment of fairness to an affected person. There is no minimum floor of disclosure to an affected person, who may not be given notice, reasons, evidence or access to documents sustaining the conclusion that a person is an adverse security risk. Immunity is a 'blunt' instrument.²³⁴

As a result, as observed in *Sagar v O'Sullivan*, 'no jurisdictional error is made if sensitive security information is withheld from an applicant and the applicant is not, as a result, alerted to prejudicial material on which the decision has been based'.²³⁵ The AHRC has criticised this practice for making it 'virtually impossible' to challenge security information.²³⁶ It is no comfort for an affected person to learn from the High Court in *Church of Scientology v Woodward* that the *Australian Constitution* preserves esoteric jurisdictional interests, but not those of the affected person:

The fact that a successful claim for [Crown] privilege handicaps one of the parties to litigation is not a reason for saying that the Court cannot or will not exercise its ordinary jurisdiction; it merely means that the Court will arrive at a decision on something less than the entirety of the relevant materials.²³⁷

ASIO has so far refused any disclosure to the refugees in indefinite security detention; the courts may thus make decisions on *no information at all*. It is unlikely that ASIO would change its mind in judicial review proceedings by consenting to disclosure, either by not claiming public interest immunity or by deciding that procedural fairness would now allow disclosure without prejudicing national security. The excessive scope of the immunity combines in a perfect storm with the reduction of procedural fairness to preclude effective judicial review of detention as required by art 9(4) of the *ICCPR*.

IV CONCLUSION: MOVING AWAY FROM SECURITY ABSOLUTISM

This article has argued that Australia has subjected the refugees to arbitrary or unlawful detention contrary to art 9(1) because it has not demonstrated the substantive necessity of their initial or persisting detention, and failed to show that less invasive alternatives would be unavailable or ineffective in meeting any security concerns. Further, the refugees' continuing and potentially indefinite detention is arbitrary or unreasonable since there are no current or realistic prospects of removal to another safe country and their detention is neither time-limited nor subject to binding periodic review.

The scope of art 9(1) is also qualified by international refugee law as *lex specialis* and the refugees' detention is further contrary to art 9 because it

²³² *ASIO Act* s 38. See also Australian Law Reform Commission, above n 17, [8.212]–[8.248]; Hardy, above n 28, 44–8.

²³³ *Alister v The Queen* (1983) 154 CLR 404, 412 (Gibbs CJ); *Evidence Act 1995* (Cth) s 130(1).

²³⁴ Australian Law Reform Commission, above n 17, [8.209].

²³⁵ (2011) 193 FCR 311, 325 [73]. See also Australian Law Reform Commission, above n 17, 319–20 [8.185]–[8.187].

²³⁶ Australian Human Rights Commission, Submission to *Independent Review of the Intelligence Community*, above n 19, 6–7.

²³⁷ (1982) 154 CLR 25, 61 (Mason J).

constitutes a prohibited penalty under art 31(1) of the *Refugee Convention*. Their detention pending removal is also likely incompatible with art 9 because neither the removal grounds of art 1F nor art 33(2) of the *Refugee Convention* are met. The real purpose of the refugees' continuing detention is preventive security detention, not removal, but that is not specifically authorised by law and Australia has not declared a public emergency so as to derogate from art 9. Australia has also distinctly failed to inform the refugees of the substantive reasons for their detention under art 9(2) of the *ICCPR*.

Australia has also not provided the refugees with a genuine and effective judicial review of the substantive necessity of detention as required by art 9(4) of the *ICCPR*, as that provision applies in the special circumstances of national security. Judicial review is limited to a purely formal determination of whether the refugees meet narrow statutory criteria as offshore entry persons or persons to whom visas have not been issued. They are unable to effectively challenge the condition precedent to their detention, the adverse security assessments issued by ASIO, because they have not received adequate notice of the allegations, disclosure or reasons and, therefore, cannot identify an error of law to legitimately commence proceedings.

Further, there is no merits review available and the courts cannot review the merits; procedural fairness can be reduced to nothingness; and public interest immunity can preclude disclosure of relevant or even all evidence in court. There is no other special judicial procedure enabling the refugees' security assessments, and thus their detention, to be tested to the standard demanded by art 9(4).

Few doubt the right intentions of ASIO in performing its statutory mandate to safeguard Australia's security. As one Federal Court judge observed, 'recognition and respect must be given to the degree of expertise and responsibility held by relevant senior ASIO personnel in relation to the potential repercussions of disclosure' and 'a degree of faith must, as a practical matter, be reposed in the integrity and sense of fair play of the Director-General'.²³⁸ As ASIO Director-General David Irvine also commented:

We therefore do not take a decision to issue an adverse security assessment lightly and nor are we contemptuous of or blasé about the human rights of the individuals involved. We take very seriously our responsibility to behave ethically and professionally and, obviously, with the utmost probity.²³⁹

ASIO has stated that it is mindful of obligations on the Commonwealth under international human rights and refugee law and works in accordance with them.²⁴⁰ At the same time, ASIO is also concerned to ensure that foreign

²³⁸ *Leghaei* [2005] FCA 1576 (10 November 2005) 27 [86]–[87] (Madgwick J).

²³⁹ Evidence to Senate Joint Select Committee on Australia's Immigration Detention Network, Senate, Parliament of Australia, 22 November 2011, 24 (David Irvine, Director-General, ASIO) quoted in Senate Joint Select Committee on Australia's Immigration Detention Network, above n 4, 161.

²⁴⁰ Australian Security Intelligence Organisation, Submission No 153 to Joint Select Committee on Australia's Immigration Detention Network, *Inquiry into Australia's Immigration Detention Network* (2011) 6.

intelligence partners continue to share information with Australia²⁴¹ and is wary of greater disclosure prejudicing those relationships.²⁴²

There is a growing consensus within the legal profession, DIAC and the Government that the current denial of procedural fairness and the consequence of indefinite detention are untenable for a range of reasons: the human impacts, the innate unfairness which offends Australian legal and social values, the dearth of accountability and transparency in exercising public powers, and the inconsistency with international human rights law. ASIO has indicated its willingness to work within whatever statutory mandate is given to it and has provided some constructive feedback when reforms have been suggested to it.²⁴³

For all the inertia and resistance to change within successive Australian Governments, reform of the security assessment procedure can be achieved simply, quickly and in ways which reasonably balance national security with individual fair hearing rights. As argued elsewhere,²⁴⁴ modest improvements could provide adequate notice, minimum disclosure and reasons, restore merits review by the AAT (which by itself is not sufficient) and require the appointment of a ‘special advocate’ to sensitively deal with security concerns.²⁴⁵ There are many models in comparable democracies which could be transplanted.²⁴⁶

Various existing measures under Australian law can also be used as alternatives to detention without diminishing security. A more ambitious reform agenda could redefine the limits of public interest immunity and even transfer the power to issue adverse security assessments from ASIO to a federal court,²⁴⁷ bringing a greater degree of independence and integrity to decision-making.

Ultimately, a reformed process would improve the quality of security assessments by ensuring that only those who truly pose risks to Australia’s security are adversely assessed or detained on the basis of an independent decision that the evidence substantiates an assessment. Improving the accuracy and reliability of decisions helps to preserve the scarce resources of Australian security agencies; makes Australia safer; and enhances public confidence in

²⁴¹ United Nations High Commissioner for Refugees, above n 21, 4.

²⁴² As occurred, for instance, between the US and UK after the England and Wales Court of Appeal ordered disclosure in 2010 of information shared by the Central Intelligence Agency with British intelligence in *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2011] QB 218 to which the UK Government’s ‘Justice and Security Green Paper’ responded by proposing to tighten the rules on disclosure: UK Government, *Justice and Security Green Paper* (2011). See also Richard Norton-Taylor, ‘MPs Seek to Resist CIA Demands over Disclosure’, *The Guardian* (London), 4 April 2012, 6 <<http://www.guardian.co.uk/law/2012/apr/04/mps-resist-cia-demands-disclosure>>.

²⁴³ Senate Joint Select Committee on Australia’s Immigration Detention Network, above n 4, 168.

²⁴⁴ Saul, “‘Fair Shake of the Sauce Bottle’”, above n 86.

²⁴⁵ Ben Saul, Submission No 130 to Joint Select Committee on Australia’s Immigration Detention Network, *Inquiry into Australia’s Immigration Detention Network*, 31 August 2011, 2; Senate Joint Select Committee on Australia’s Immigration Detention Network, above n 4, 167–8.

²⁴⁶ See, eg, Saul, ‘Submission No 130 to Joint Select Committee on Australia’s Immigration Detention Network’, above n 245; Australian Law Reform Commission, above n 17, 408–19; Monica Silverwood, ‘Open Courts and Closed Files: The Use of Classified Information in Terrorism-Related Litigation’ (Paper presented at Australian and New Zealand Society of International Law, Canberra, 24–26 June 2010).

²⁴⁷ Saul, “‘Fair Shake of the Sauce Bottle’”, above n 86.

ASIO — and the courts, which currently walk close to the wire of rubber stamping executive decisions.

It would also spare innocent refugees from being wrongfully tarnished and detained as security risks, and prevent the deterioration of their mental health that accompanies protracted detention. Every person — citizen or non-citizen — deserves equal respect from a rule of law which precludes protracted, arbitrary detention, secret allegations and ASIO's dark justice.