

PEOPLE AND PLACE

JUDICIAL ACTIVISM, IMMIGRATION AND THE ONE-CHILD CASE

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Changes to administrative law in Australia have increased the access of non-residents to Australia's legal system. Governments have recently sought to limit the impact of this access by restricting the courts' decision-making freedom. The recent High Court's judgment on a refugee claim based on China's one-child family policy illustrates the dilemmas involved.

RIGHTS AND THE EXPANSION OF JUDICIAL POWER

The role of the courts in Australian politics has expanded since the late 1970s and judicial decisions now affect a growing number of areas once seen as the province of parliament and the executive. This growth in judicial power is not something peculiar to Australia; in a number of democracies policy-making has, to a degree, shifted away from the elected institutions designed to express the will of the majority and moved towards the courts, institutions traditionally concerned with questions of individual or minority rights.¹

Under a democracy, parliament and the executive are elected (directly or indirectly) by a majority of citizens, but the rights of the minority who did not win at the ballot box are protected by the rule of law. Drawing on Constitutions, Bills of Rights, case law, or international treaties, courts are increasingly using their power to enforce the rule of law in such a way as to restrict parliament's and the executive's autonomy in governing the lives of their nation's citizens.

There are a number of possible causes of the general expansion of judicial power. The increased influence of the United States, where the judiciary has long played a considerable role, is significant.² In Australia, the growth of the 'new administrative law' has played an important part. This was a series of initiatives sponsored by parliament and the executive in the 1970s and early 1980s. It comprised the establishment of the Administrative Appeals Tribunal (1975) and the office of the Ombudsman (1976), together with the passage of the Administrative Decisions (Judicial Review) (AD[JR]) Act (1977) and the Freedom of Information Act (1982). One other factor stands out: an increase in the 'politics of rights'. If interest groups feel that their chances of achieving their goals through institutions elected by the majority are weak, they have another option. They can turn to the judiciary and learn to formulate their case in the language of rights.³

The expansion of judicial power is a political phenomenon, with political and social causes. But because of the courts' role in protecting rights, it can also be argued for and defended in moral terms. The branches of Government representing the majority are overtly political. Interest groups bargain, compromise and strike deals. In contrast, the legal system is concerned with right and wrong, truth and error. Advocates for the judiciary can claim that, while politics is tarnished, the courts represent enduring principles. In the words of the Chief Justice, Sir Gerard Brennan:

Political issues must be debated, political fortunes must wax and wane, political figures must come and go according to the popular will....

But the apolitical organ of government, the courts, are there continually to extend the

protection of the law equally to all who are subject to their jurisdiction: the minority as well as the majority....

The principle of judicial independence is not proclaimed in order to benefit the judges, it is proclaimed in order to guarantee a fair and impartial hearing and an unswerving obedience to the rule of law.⁴

In 1995 Michael Kirby presented the case for and against an Australian Bill of Rights. (Kirby was then President of the Supreme Court of New South Wales; he was appointed to the High Court in 1996.) One of the arguments for such a Bill was, he said, that: 'It is necessary to ... put some of the values of our society above the party political debate'. He concluded that:

The modern notion of democracy is more subtle than the primitive idea of according full power to the transient majorities of Parliament by a transient vote in a periodic election, accompanied by media jingles and superficial electoral slogans. Democracy now requires respect for minorities and protection of basic constitutional principles: such as the rule of law, the independence of the judiciary, and regard for fundamental human rights.⁵

THE EXAMPLE OF IMMIGRATION

Just as citizens enjoy legal protection from arbitrary and capricious actions which might be taken by the people's elected representatives, so too do non-citizens. For example, if a non-citizen is accused of a crime he or she must be granted a fair trial and the State may not confiscate their property without due cause or compensation. But one particular set of rights of non-citizens has received increased attention from the courts over the last couple of decades and these are the rights of non-citizens who, for a variety of reasons, wish to take up residence in a country and whose requests are rejected by the executive.⁶

At times, judicial responses to these requests draw on the discourse of rights to champion the cause of such applicants. In Australia, Ronald Sackville, a justice in the Federal Court, appears to have written judgements which lend themselves to such an interpretation, as has Michael Kirby.⁷

The growth in legal appeals

In the wake of the Australian High Court's decisions on native title in *Mabo* (1992) and *Wik* (December 1996), the expansion of judicial power has become front-page news. Controversy over which branch of government should determine relations between indigenous Australians and the rest of the population is now widespread. But conflict between the judiciary and the executive over immigration and refugee decisions has a longer, if less public, history.⁸

This conflict has grown because of two major social changes: a growth in on-shore applicants for permanent residence and the consolidation of the new administrative law. Over the last 15 years an increasing number of non-citizens, temporarily in Australia, have applied to stay. In 1980-81 just under 8,000 applied, on the grounds of employment, business interests, marriage to a resident, or other relationships and interests. In 1989-90 the figure was 39,491. This latter total was inflated by the large number of students from the People's Republic of China (PRC) who had been admitted on temporary visas before and after the Beijing massacre in June 1989 but, in 1995-96, 24,615 applied. This was three times the level of the early 1980s. The number of on-shore applicants for refugee

status has risen even more dramatically, from 170 in 1982 to 16,937 in 1990-91, a figure also inflated by PRC applicants. But in 1995-96, 5,830 refugee applications were made,⁹ a total 34 times larger than that of 1982.

Some of these applications have met with success; most have not. But growing numbers of those who were unsuccessful have appealed. Their presence on Australian soil gave them access to the legal system and the new administrative law, particularly the AD(JR) Act, meant that this access was likely to be useful to them. Immigration appeals in the Federal Court under this Act rose from 16 in 1981-82 to 135 in 1990-91. By 1992-93 the figures had reached 207, or 63 per cent of all appeals under the Act.¹⁰ The new administrative law had been designed to enhance the rights of Australia citizens in their dealings with the executive. In the event, non-citizens have proved to be active users of its provisions.

Human rights and immigration

During the 1980s complaints over immigration matters also formed a large part of the work of the Human Rights Commission. The Commission had been formed in 1981, principally to monitor Australia's response to its obligations under the International Covenant on Civil and Political Rights. The volume and content of these immigration-related complaints prompted the Commission to produce a report in 1985, entitled *Human Rights and the Migration Act 1958*. Though this report did not have a direct influence on immigration policy, it helped consolidate the link between human rights and concern about the welfare of non-citizens seeking to secure residence.¹¹ (In 1986 the Human Rights Commission was succeeded by the Human Rights and Equal Opportunity Commission [HREOC].)

The response from the executive and parliament

Prior to 1989 the *Migration Act 1958* vested considerable discretion in the Minister for Immigration. As long as the vast majority of applications were made and assessed off-shore, this discretion gave the executive considerable power. For example, policy changes, such as modification of the 'white Australia' policy, could be made without any need to consult parliament. With the growth of on-shore applicants the advantages of Ministerial discretion evaporated. Not only was the Minister, and other politicians, besieged with requests to intervene personally in individual cases, the unspecific nature of the law meant that it was relatively easy for applicants disappointed with administrative and political approaches to make a case before the court. (Attempts to gain residence in this manner were often made on humanitarian grounds and this also increased the salience of human rights in questions concerning immigration.)

The executive moved to reassert control. Immigration policy was codified into legal regulations in 1989 and an Immigration Review Tribunal was established as a statutory body to hear appeals. Later on, a Refugee Review Tribunal was added.¹² Kathryn Cronin describes these changes as an attempt to make the law 'judge proof'.¹³ If the law spelled out the exact procedures which a selection officer should take, and the precise criteria which he or she should use in assessing applications, the scope for judicial review should be minimal and the new Tribunals should take care of any remaining problems. The Migration Reform Act (MRA) of 1992 attempted to set even tighter limits on the role of the courts by specifying that the AD(JR) Act was not to apply in immigration cases — a provision which came into effect in September 1994.¹⁴

While codification and the specialist tribunals did introduce more certainty into immigration practices, they did not eliminate court appeals. Neither did the MRA. There were still many cases in the pipeline when it came into effect and other avenues of appeal were still open. For example, short

of a referendum, it is constitutionally impossible to prevent applicants for immigrant status going to the High Court.¹⁵

JUDICIAL ACTIVISM AND JUDICIAL VALUES

Judicial activism is more likely to stem from the work of appeal judges¹⁶ than from those below them in the administrative or judicial hierarchy. This is because such judges are more likely to hear controversial cases where the appropriate application of the law is uncertain. Traditionalists who argue that judges should always simply implement the law as it is written and never venture interpretations of their own are asking too much of the written word. In France, the Napoleonic code was an attempt to provide an answer for every eventuality and to restrict the judge's role to that of an operator of the law. Despite nearly two hundred years of rigorous attempts to suppress judicial interpretation, the French have failed.¹⁷ We should not expect Australian immigration law to succeed.

Uncertainty can be minimised, but it is not possible to provide an unambiguous and specific set of laws and regulations to cover every possible eventuality. A degree of interpretation of legal codes and formal constitutions is inevitable. But how should interpretation be made? If the law is prefaced with a clear statement of intentions, courts can be provided with a framework. But this is rare. For example, *The Migration Act 1958* simply states that: 'The object of the Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'.¹⁸

In the absence of clear guidance from the legislation, some judges (including Michael Kirby) assume an activist role enthusiastically, claiming that 'creativity' is 'the very genius of our legal system'.¹⁹ Others can become defensive, justifying their part in reshaping the law as merely one of bringing out-dated legal procedures into line with contemporary standards. Justice Sackville of the Australian Federal Court, quotes Justices Brennan and Mason (the present and former Chief Justices of the High Court) when he writes that judges who are interpreting the law do not draw on their own values but on the 'relatively permanent values of the Australian community'.²⁰

Sackville, however, does not explain how these values are discovered and he also acknowledges that many recent judgments have been unpopular. In explaining this unpopularity he points out that the courts have followed a 'liberal philosophy'.²¹ He also acknowledges that judges do not always make their activism clear: 'the use of apparently authoritative legal materials simply obscures the fact that judges ... are often required to make choices based on policy considerations'. Abandoning the claim that interpretations rest on the 'values of the Australian community', he writes that judges 'necessarily make decisions that reflect their own values'. He also adds that they 'thereby make new law'.²²

Human rights advocates believe that policy-making in refugee cases provides an especially poignant test of the link between immigration applications and human rights. (Virtually all persons granted refugee status on Australian soil also gain permanent residence.)

Most Australians are now disenchanted with immigration. This is particularly true of those who do not have university degrees and who do not work in professional occupations. While the values of human- rights activists in immigration cases may well strike a sympathetic note with some intellectuals, these values are unlikely to be popular with the majority of the electorate.²³ Given this, the 'values of the Australian community' on immigration are likely to be unacceptable to most lawyers. In interpreting immigration and refugee case, members of the elite community of appeal judges are unlikely to consult the general view. They are much more likely to draw on other

resources, including the vast and diverse range of foreign case-law, international treaties, and their own values.

Many of these legal decision-makers work within a sub-culture dominated by immigration advocates, refugee lawyers, humanitarian activists and church groups. Bob Birrell describes this sub-culture as that of the 'humanitarian community'.²⁴ Bernard Lane, the High Court correspondent for *The Australian*, is more forthright. He writes of the 'true believers in the new world order of human rights', true believers who range from 'academics to human-rights bureaucrats and judges, especially of the federal and high courts'.

Lane argues that collisions between these true believers and the executive and the legislature over immigration and refugee policy are inevitable. This is because nation states will want to use 'their considerable power' to defend their integrity and their borders while, for 'the true believers ... there is a borderless world of international solidarity beyond mere national interest'.²⁵ Of course enthusiasm for this world view is not exclusive to people working in and around the Australian legal system. It has strong support within wider intellectual circles in Australia, and overseas. The Catholic Church, for example, has long sought to promote an international order that not only protected a human right to emigrate, but also a right to immigrate,²⁶ an argument which has been endorsed by the Australian Catholic Social Justice Council.²⁷

Australian judicial activists do not announce a commitment to a new order of international human rights in a borderless world. But they may believe that, if human rights are seen to be at stake, conceptions of the national interest must take second place. And this may lead them to a de facto support for porous borders. For example, Michael Kirby was deeply affronted by the Migration Reform Act's provision which prevented non-citizens using the AD(JR) Act in immigration cases.

If a person in this country, entitled to the protection of its laws, can show relevant defects in the lawfulness fairness and reasonableness of an official procedure ... it is inherent in a rule of law society that such defects should be answerable in the courts in token of the submission of all, high and low, to the rule of law

Who will be next? Which powerful and opinionated bureaucracy will be able to persuade ministers to submit to Parliament the withdrawal of effective judicial review in the case of other vulnerable and even unpopular minorities who have no loud voice in our society. ...²⁸

In 1995 the executive moved to limit refugee claims related to China's one-child policy²⁹ after the Minister for Immigration lost in such a case in the Federal Court. Commenting on this, Kirby said that, apart from the Aborigines, we were all 'boat people of one kind or another. ... But the spectre of hordes of people arriving from Asia remains deep in the Australian psyche, long after the White Australia policy had been abandoned'.³⁰

When he came to write his judgment on this case from the bench of the High Court in 1997, Kirby acknowledged the problem of overpopulation in China and the desirability of slowing population growth if the needs of future generations are to be protected. (See extracts, pp. 28-33, this issue.) But the priority he places on human rights — apparently above wider social considerations — leads him to conclude that the individual 'right' to decide on family size without state coercion overrides the wider social interest. But there must be a viable social order before rights of any kind can be protected: a rights-first morality undermines the basis of any morality.

Recently Kirby has described himself as a radical on the question of injustices suffered by minorities and the importance of internal law on human rights. (But he adds that he is a conservative on the question of retaining the monarchy because there is 'a certain genius' in having a head of state who is absent.)³¹

ASSESSING REFUGEE CASES

The purpose of immigration law may be unclear but, at least as far as non-refugee applicants are concerned, there are now numerous regulations defining who is entitled to be selected and who is not. The situation with applicants for refugee status is different. The 1951 Geneva Convention definition of a refugee has been incorporated into Australian law since 1991 but, as Birrell has pointed out, many of the terms in this definition are unclear.³²

The definition states that a refugee is a person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.³³

The expressions 'a well-founded fear' and 'persecution' have a wide semantic range. Their application in any one case will necessarily depend on the values of individuals working within the determination process, particularly if the matter should go to an appeal.

Early in 1997 the High Court handed down its judgment on the refugee case involving China's one-child policy. The case depended on the meaning to be assigned to the phrase 'membership of a particular social group'. Did the appellants belong to a 'social group' of individuals fearing harsh administration of the one-child policy, or was this alleged 'social group' merely a demographic category?

The Court was, and is, presided over by Sir Gerard Brennan, a member since 1981 and Chief Justice since 1995. While insiders regard the Brennan Court as less activist than its predecessor (the Mason Court),³⁴ it has played a major role in judgments on native title and on the States' power to levy taxes.

In the event, the appellants lost their case, three/two, but Brennan and Kirby found in their favour. An analysis of the judgements shows that it was not the facts of the case which were in dispute. Rather it was the judges' predispositions to interpret the phrase 'membership of a particular social group' in a looser or more rigorous fashion which varied. The words of the Convention and their context provided little direction and, while the volume of international case-law was large, its conclusions were too various to offer clear guidance. The judges' belief systems, in particular their respect for national borders and their confidence in a new international order of cosmopolitan internationalism, provide the themes which best separate the judgements for the appellants from the judgements for the respondents.

BACKGROUND TO THE ONE-CHILD CASE

On 5 December 1993 a husband and wife, both nationals of the People's Republic of China (PRC), arrived by boat in Australia. They had no visas and so were detained as illegal entrants. The wife gave birth to her first child the following day and, shortly afterwards, the couple asked to be

recognised as refugees because they feared sterilisation under China's one-child policy. The Minister for Immigration and Ethnic Affairs, through his delegate, refused this recognition. The couple appealed to the Refugee Review Tribunal (RRT) which reversed the Minister's decision. The Minister then appealed to the Federal Court where Sackville upheld the RRT's decision. The Minister then appealed to the full bench of the Federal Court which found that the couple were not refugees, thus reversing Sackville's decision. The appellants then sought, and were granted, special leave to appeal to the High Court.³⁵

On the 24 February 1997, in 'Applicant A' & Anor v Minister for Immigration and Ethnic Affairs & Anor, the High Court upheld the judgement of the full bench of the Federal Court, with the five members who heard the case split two to three. While Brennan and Kirby found for the appellants, Justices Dawson, McHugh and Gummow found for the respondents (the Minister for Immigration and Ethnic Affairs & Anor). The appellants were not named; they are simply referred to as 'Applicant A' (the husband) and 'Applicant B' (the wife).

In a number of respects the Geneva-Convention definition of a refugee is rather tight. A person cannot be granted refugee status because they are fleeing civil war, plague, famine or environmental devastation. They must fear active persecution. That fear of persecution must be well-founded and it must be based on one of the five reasons set out in the Convention. For example, if a despot develops an irrational hatred for an individual, a hatred which develops into active persecution, that person will not qualify for refugee status unless he or she can show that the persecution is based on their race, religion, nationality, membership of a particular social group, or on their political opinions.³⁶

The PRC couple asked for refugee status on the grounds that they faced forcible sterilisation if they returned to China and that such treatment amounted to persecution. They argued that they risked this persecution because they belonged to a particular social group, the group of PRC nationals who already had one child but wanted more. The claim that the couple risked forcible sterilisation and that such a practice amounted to persecution was not disputed by the respondents. The argument in the case turned on the question of whether the appellants were, or were not, members of particular social group and whether it was this membership which was the key to their fear.³⁷

The 1951 Convention is restrictive in that it does not promise refugee status to all individuals who are persecuted, but the wording which sets out the restrictions is vague. How, for example, is the phrase 'membership of a particular social group' to be interpreted? If it were simply intended as a catch-all phrase to provide a safety-net for people who did not fit any of the other four categories, then there could be no need for these categories to be mentioned. This is because everyone who was subject to persecution of any kind would meet the criteria of the definition. But the authors of the Convention did enumerate categories. Consequently they cannot have meant 'membership of a particular social group' to serve as a catch-all safety-net.

If it does not describe a residual category, what does the phrase mean? Does it necessarily imply active membership in an explicit association? Does it have a looser sense of belonging to an ethnic or linguistic group? Or could it refer, quite broadly, to a demographic category, such as young men of military age (who, perhaps, wish to avoid military service) or, as in the present case, persons of reproductive age in the PRC who have one child and want at least one more? Must the 'members' of the category be conscious of their membership and recognise their fellow members? Must outsiders be able to perceive this membership?

What if the fact of membership of a group only develops, or becomes apparent, after the individuals who constitute a demographic category are persecuted for the trait which they hold in common? Such a possibility poses difficulties for the definition of a refugee as a person suffering persecution on one of the five pre-defined grounds. If the fact of membership only develops after the persecution

has taken place, it cannot also be the grounds on which the person was persecuted. It would not be membership of the group which provided the basis for the persecution, but the persecution which gave rise to the group. In such a case the victims of the persecution might not meet the criteria set out by the Convention. However pitiable their situation, the definition of the grounds for their persecution would have become circular. Moreover, if the persecution itself called the group into being then any category of people (such as tax evaders or traffic violators) who were harshly punished could come to see themselves as members of a particular social group. The definition would then lose its restrictive character. It would become a catch-all category, rendering itself and the other four categories redundant.

In their attempts to interpret the phrase 'membership of a particular social group', all of the judgments returned to the circumstances of 1951 Convention and the literature describing this event. None of the authors found this search particularly helpful. They also consulted the wide range of case-law on refugee claims from other common law countries, looking for precedents on the question of how the phrase should be defined. But the case-law findings differed widely and offered no clear guidelines.

The three judgements which found for the respondents (those of Dawson, McHugh and Gummow) argued that, for persecution on the grounds of membership of a social group to be the basis of a valid claim for refugee status, the group in question must exist in some tangible sense before the persecution began. All of these judgements also drew attention to the overall restrictive intent of the Convention. The people who drafted the Convention were, these justices argued, well aware that protecting refugees might impose weighty obligations on a State and the drafters did not wish to impose such heavy burdens on potential signatories as to deter them from signing at all. The judgments which found for the appellants (Brennan and Kirby) took a different approach. They were less concerned about the possibility of circular definitions. They also wished to draw attention to the large humanitarian purpose behind the Convention and to the broad principle of protecting human rights to which it was dedicated.

In no case was a judgment based on the policy implications of the decision but some of the judgments did mention these policy implications, either showing some understanding of China's attempts at population control or offering some thoughts on the possible implications for Australia of a finding in favour of the appellants. Kirby, for example, was undismayed at the prospect of his country accommodating 40 million refugees. His judgment, and that of Brennan, supports the interpretation that these authors were convinced that their obligation to protect their conception of human rights outweighed any countervailing obligation to protect Australia's national interest.

Judges who believe that they merely declare the law, the law which their compatriots have democratically agreed upon, may be excused if they argue that they have simply followed the written word and taken it to its logical conclusion. Creative judges who acknowledge and applaud their own creative role cannot adopt this posture. In their own view they are not simply enunciating the law; the law is ambiguous in some circumstances so this is not always possible, and some interpretations of the law might be unjust. Instead of following words on a page, they are doing what they believe to be right. But they are also making policy. If one other judge had been persuaded by the arguments which moved Brennan and Kirby, we would now be not only reorganising pastoral leases and taxation; we would be involved in a serious debate about the legitimacy of our borders.

References

1 See T. Vallinder, 'When the courts go marching in', in C. N. Tate and T. Vallinder (Eds), *The Global Expansion of Judicial Power*, New York University Press, New York, 1995, p. 15.

2 See M. Shapiro, 'The United States', in *ibid.*, pp. 43-44.

3 C. N. Tate, 'Why the expansion of judicial power?', in *ibid.*, pp. 29-30, 31, 32; Shapiro, *op. cit.* in *ibid.*, pp. 45-48, 58; P. H. Russell, 'Canadian Constraints on Judicialization from without', in *ibid.*, p. 146

4 Quoted in J. Fife-Yeomans and B. Lane, 'Brennan backs judges against MPs', *The Australian*, 15 April 1997, p. 3.

5 M. Kirby, 'A Bill of Rights for Australia — But do we need it?', *Briefing: Australian Institute of Jewish Affairs*, no. 32 (December), 1995, pp. 4, 5

6 See, for example, P. H. Schuck, 'Immigration, refugee, and citizenship law in the United States', in D. Horowitz and G. Noiriél (Eds), *Immigrants in Two Democracies: French and American Experience*, New York University Press, New York, 1992, and 'Immigration law and the problem of community', in N. Glazer (Ed.), *Clamor at the Gates: The New American Immigration*, Institute for Contemporary Studies Press, San Francisco, 1985.

7 Marcus Einfeld, a Federal Court judge, also figures as a champion of the rights of would-be immigrants, as does Alistair Nicholson, Chief Justice of the Family Court. Sir Ronald Wilson, former High Court judge and now retiring President of the Human Rights and Equal Opportunity Commission believes that the Commission's advocacy on such matters has led the executive to cut its funds. See M. Einfeld, 'Detention, justice and compassion', in M. Crock (Ed.), *Protection of Punishment? The Detention of Asylum-Seekers in Australia*, The Federation Press, Sydney, 1993; R. Yallop, 'Judge in dissent', *The Australian*, 14-15 June 1997, p. 2; G. Windsor, 'Rights guardian claims cuts a punishment', *The Australian*, 15 May 1997, p. 6, and J. Walker, 'PC and proud, Sir Ronald bids farewell', *The Australian*, 2-3 August 1997, p. 6.

8 See J. Power, 'The executive, the judiciary, and immigration appeals in Australia', in Tate and Vallinder (Eds), *op. cit.*; R. Birrell, 'Immigration control in Australia', *The Annals of the American Academy of Political and Social Science*, vol. 534, July, 1994, pp. 106-117; K. Cronin, 'A culture of control: an overview of immigration policy-making', in J. Jupp and M. Kabala (Eds), *The Politics of Australian Immigration*, Australian Government Publishing Service (AGPS), Canberra, 1993; S. Cooney, 'Public administration, the judiciary and immigration policy', *The Politics of Immigration Conference*, Brisbane, Bureau of Immigration Research, 1993.

9 On-shore applications for permanent-immigration visas figures for 1980-81 to 1989-90 provided by the former Department of Immigration and Ethnic Affairs (DIEA). Figure for 1995-96 from the Department's annual report at <http://www.immi.gov.au/> (accessed 14/8/97). The 1982 data on on-shore requests for refugee status are from *Australia's Refugee and Humanitarian System: Achieving a Balance Between Refuge and Control*, AGPS, Canberra, 1992. The 1990-91 figure is from Fact sheet 19, DIEA 7/11/94 and the 1995-96 figure was provided by Department of Immigration and Multicultural affairs, On-shore Protection Branch. Since 1995 this latter data series has distinguished between cases and number of people. In order to maintain comparability with the earlier figures, the 1995-96 figure quoted here is for number of cases. If dependents are included, 7,978 people were involved.

10 Department of Immigration, Local Government and Ethnic Affairs, *Review '91: Annual Report 1990-91*, AGPS, Canberra, 1991, p. 279, and Joint Standing Committee on Migration, *Asylum, Border Control and Detention*, AGPS, Canberra, 1994, p. 81

11 See, for example, P. Bailey, *Human Rights: Australia in an International Context*, Butterworths, Sydney, 1990, p. 312.

12 See S. Cooney, *The Transformation of Migration Law*, AGPS, Canberra, 1995. The 1992 Migration Reform Act established the Refugee Review Tribunal and limited the grounds on which appeals could be made to the Federal Court under the AD(JR) Act. See *Migration Reform Bill 1992: Migration (Delayed Visa Applications) Tax Bill 1992: Explanatory Memorandum*, The Parliament of the Commonwealth of Australia, Canberra, 1992. See also note 14.

13 K. Cronin, 'A culture of control: an overview of immigration policy-making', in J. Jupp and M. Kabala (Eds), *The Politics of Australian Immigration*, Canberra, AGPS, 1993, pp. 102-3

14 The MRA gives the Federal Court the exclusive power to review 'judicially reviewable decisions' most of which correspond with the powers of the AD(JR) Act. But there are two exceptions. There is no longer a right to seek review on the basis that the principles of natural justice have not been complied with, or on the basis that the decision made was unreasonable to such a degree that no reasonable person would have made it. Provisions for natural justice and reasonableness are now deemed to be included in the reforms introduced by the MRA. See *Explanatory Memorandum*, *op. cit.* and 'What the Migration Reform Act really means',

Immigration News, no. 33, October/ November, 1993, pp. 8, 9.

15 Personal communication, Sean Cooney, 20 April 1995

16 R. Sackville, 'Speech to launch Vol 20(1) of the University of New South Wales Law Journal' *The University of New South Wales Law Journal Forum*, vol. 3, no. 2, 1997, p. 19

17 J. H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, Stanford University Press, Stanford, 1985, pp. 23, 39, 47, 52-55, 87, 151-5; J. L. Lafon, 'France', in Tate and Vallinder (Eds) *op. cit.*, pp. 289-293

18 Section 4 (1)

19 Kirby quoted in B. Lane, 'Judge attacks failure of drug punishments', *The Australian*, 18 August 1997, p. 4

20 R. Sackville, 'Continuity and judicial creativity — some observations', *University of New South Wales Law Journal*, vol. 20, no. 1, 1997, p. 150-151

21 *ibid.*, p. 154

22 Sackville, 'Speech...' *op. cit.*, p. 19

23 For data on general attitudes to immigration and the split between the opinions of university-educated people and others, see K. Betts, 'Immigration and public opinion in Australia', *People and Place*, vol. 4, no. 3, 1996, pp. 9-20.

24 B. Birrell, 'Defining refugees', *Australian Rationalist*, vol. 38, June-September 1995, p. 17

25 B. Lane, 'The rights fight', *The Australian*, 23 October 1995, p. 11

26 See D. Simcox, 'The Catholic Church's war on borders', *The Social Contract*, vol. 5, no. 3, 1995, pp. 167-171, and J. Robb, 'Scalabrinian fathers: Catholic apostles to the world's immigrants', *The Social Contract*, vol. 5, no. 3, 1995, pp. 184-189.

27 See *I am a Stranger. Will you Welcome Me?* Collins Dove, Melbourne, 1991, p. 42.

28 Address to the Migration Institute of Australia, June 15, reported in 'Migration Reform Act: concern as September 1 looms', *Immigration News*, no. 38, June, 1994, pp. 1-2

29 This initiative was prompted by the case adjudicated by the High Court in February 1997. See excerpts from the judgements which follow. After Sackville handed down a judgement in the Federal Court that the couple were indeed refugees, the *Migration Legislation Amendment Bill No. 4 1995* was introduced into Parliament. The Bill was introduced to ensure that China's fertility control policies should be disregarded in determining refugee status in Australia. After the Full Bench of the Federal Court found for the Minister for Immigration, the Bill was allowed to lapse, pending the outcome of the appeal to the High Court. (Information provided by the Department of Immigration and Multicultural Affairs.)

30 F. Farouque, 'Kirby lashes refugee policy', *The Age*, Melbourne, 15 June 1995, p. 7

31 Quoted in B. Lane, 'Judge attacks failure of drug punishments', *The Australian*, 18 August 1997, p. 4

32 Birrell, *op. cit.*, 1995, pp. 15-16

33 In Australian law a refugee is defined according to the terms of the Convention relating to the Status of Refugees (Geneva, 1951) and the Protocol relating to the Status of Refugees (New York, 1967). Australia acceded to the Convention in 1954 and to the Protocol in 1973. In 1991 the Convention definition of a refugee was incorporated into the *Migration Act 1958*.

34 B. Lane, 'Reserving judgment', *The Australian*, 16-17 August 1997, p. 12

35 This overview of the events is taken from the typescript of the judgments of McHugh and Gummow in 'Applicant A' & Anor v Minister for Immigration and Ethnic Affairs & Anor, The High Court, 24 February 1997.

36 See McHugh in *ibid.*, pp. 34-35.

37 See Dawson in *ibid.*, p. 11.

Back to [Contents Vol. 5 No. 3](#)

Back to [People and Place Home Page](#)