IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S169 of 2014

BETWEEN:

CPCF
Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Defendant

and

THE COMMONWEALTH OF AUSTRALIA
Second Defendant

PROPOSED SUBMISSIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION SEEKING LEAVE TO INTERVENE

Part I: Publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Basis of intervention

2. By summons filed on 28 July 2014, the Australian Human Rights Commission (**Commission**) seeks leave to intervene in this proceeding.

3. The Commission seeks leave to make submissions in relation to issues arising under question 1(a) of the special case (Special Case Book (**SCB**) p 64), in particular, whether the power under s 72(4) of the *Maritime Powers Act 2013* (Cth) (**Maritime Powers Act**) to take a person to a particular place is limited by Australia's *non-refoulement* obligations.

4. These submissions are the submissions of the Commission and not of the Commonwealth Government.

Part III: Why leave to intervene should be granted

5. The Commission is an independent body established by the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) which has the statutory function of intervening in legal proceedings that involve human rights issues, where the Commission considers it appropriate to do so and with the leave of the court hearing the proceeding, subject to any conditions imposed by the court.[1] The term 'human rights' is defined in s 3 of the AHRC Act to include the rights and freedoms recognised in the *International Covenant on Civil and Political Rights* (**ICCPR**).[2]

---

1 Section 11(1)(o) of the AHRC Act.

2 ICCPR, opened for signature 16 December 1966, [1980] ATS 23 (entered into force generally on 23 March 1976, except Article 41, which came into force generally on

Australian Human Rights Commission
Level 3, 175 Pitt Street
SYDNEY NSW 2000

Telephone (02) 8231 4205
Fax (02) 9284 9787
Ref: Graeme Edgerton

6. The Commission has expertise in relation to the interpretation and application of Australia's international human rights obligations, including those arising under the ICCPR. The special case includes a claim by the plaintiff that he is a person in respect of whom Australia owes *non-refoulement* obligations. For the purpose of the special case, the *non-refoulement* obligations are defined as those arising under Article 33(1) of the Refugees Convention,[3] Article 7 of the ICCPR and Article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**CAT**).[4]

7. In addressing those matters, the Commission's submissions aim to assist the Court in a way that it may not otherwise be assisted. Should the Commission be granted leave, its intervention will neither delay nor unduly prolong the proceedings, nor lead to the parties incurring additional costs in a manner that would be disproportionate to the assistance that is proffered.[5]

Part IV: Applicable provisions

8. The provisions of ss 72 and 95 of the Maritime Powers Act and s 36 of the Migration Act as they existed at the time of the conduct referred to in the special case are set out in the annexure to these submissions. These provisions are still in force in this form.

Part V: Issues addressed

9. Question 1(a) of the special case asks:

> Did s 72(4) of the Maritime Powers Act authorise a maritime officer to detain the plaintiff for the purpose of taking him, or causing him to be taken, to a place outside Australia, being India:
>
> (a) whether or not the plaintiff would be entitled by the law applicable in India to the benefit of the non-refoulement obligations; ...

10. The Commission submits that the power conferred by s 72(4) is limited by Australia's *non-refoulement* obligations for the following reasons:

    a. such an interpretation of s 72(4) is consistent with international obligations binding on Australia;

    b. consistently with its long title, the Maritime Powers Act seeks to provide for the administration and enforcement of Australian law in

---

28 March 1979; entered into force for Australia on 13 November 1980, except Article 41, which came into force for Australia on 28 January 1993).

3 Convention relating to the Status of Refugees, opened for signature 28 July 1951, [1954] ATS 5 (entered into force generally 22 April 1954; entered into force for Australia on 22 April 1954), as amended by the Protocol relating to the Status of Refugees, opened for signature 31 January 1967, [1973] ATS 37 (entered into force generally on 4 October 1967; entered into force for Australia on 13 December 1973) (together the **Refugees Convention**).

4 CAT, opened for signature 10 December 1984, [1989] ATS 21 (entered into force generally on 26 June 1987; entered into force for Australia on 7 September 1989).

5 See *Levy v State of Victoria* (1997) 189 CLR 579 at 605 (Brennan CJ).

maritime areas, including, relevantly, the *Migration Act 1958* (Cth) (**Migration Act**) in which the direct predecessor of s 72 was to be found, and which proceeds, in important respects, from the assumption that Australia has protection obligations to individuals;

c. the related enforcement powers in the Maritime Powers Act proceed from an assumption that Australia has protection obligations to individuals including obligations of *non-refoulement*; and

d. the Maritime Powers Act also evinces an intention that it be interpreted consistently with international law, and with the terms of the Act, which use language derived from Articles 7 and 10 of the ICCPR when describing how persons detained at sea should be treated.

Non-refoulement

11. According to Goodwin-Gill and McAdam, the first reference in an international agreement to the principle that refugees should not be returned to their country of origin occurred in the 1933 Convention relating to the International Status of Refugees.[6] Article 3 of that Convention contained an undertaking by States not to remove resident refugees or keep them from their territory 'by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*)' unless dictated by national security or public order.

12. The language that ultimately formed the basis for Article 33(1) of the Refugees Convention was the product of an *Ad hoc* Committee on Statelessness and Related Problems appointed by the United Nations Economic and Social Council. A representative of the United States delegation on that Committee provided the following description of the key principle:[7]

> Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same. ... Whatever the case may be ... he must not be turned back to a country where his life or freedom could be threatened.

13. Australia has undertaken certain *non-refoulement* obligations under the Refugees Convention, the ICCPR and the CAT. The special case identifies three particular *non-refoulement* obligations that Australia has undertaken:[8]

---

6 Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed, 2007), p 202.

7 *Ad hoc* Committee on Statelessness and Related Problems: UN doc. E/AC.32/SR.20 at [54]-[55] (1950), cited in Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed, 2007), p 204, fn 14.

8 SCB pp 57-58.

a. Article 33(1) of the Refugees Convention:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

b. Article 7 of the International Covenant on Civil and Political Rights (ICCPR):

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

c. Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT):

> 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

14. Article 33(1) of the Refugees Convention and Article 3 of CAT refer explicitly to *non-refoulement*. In a series of cases, the United Nations Human Rights Committee (**UNHRC**) has found that signatories to the ICCPR are subject to a *non-refoulement* obligation in cases involving potential breaches of Articles 6 and 7 of that Convention.[9]

15. In *Nakrash and Qifen v Sweden* the UNHRC put the relevant test for breach of the *non-refoulement* obligation in respect of Article 7 of the ICCPR as requiring assessment of:[10]

---

9 *GT v Australia* UN Doc CCPR/C/61/D/706/1996 at [8.1]-[8.2]; *ARJ v Australia* UN Doc CCPR/C/60/D/692/1996; *C v Australia* UN Doc CCPR/C/76/D/900/1999; *Kindler v Canada* UN Doc CCPR/C/48/D/470/1991 at [13.1]-[13.2]; *Ng v Canada* UN Doc CCPR/C/49/D/469/1991 at [14.1]-[14.2]; *Cox v Canada* UN Doc CCPR/C/52/D/539/1993 at [16.1]-[16.2]; *Judge v Canada* UN Doc CCPR/C/78/D/829/1998 at [10.2]-[10.7]; *Nakrash and Qifen v Sweden* UN Doc CCPR/C/94/D/1540/2007 at [7.3]; *Bauetdinov v Uzbekistan* UN Doc CCPR/C/92/D/1205/2003 at [6.3]; *Munaf v Romania* UN Doc CCPR/C/96/D/1539/2006 at [14.2].

10 *Nakrash and Qifen v Sweden* UN Doc CCPR/C/94/D/1540/2007 at [7.3]. See also: *Bauetdinov v Uzbekistan* UN Doc CCPR/C/92/D/1205/2003 at [6.3]; *Munaf v Romania* UN Doc CCPR/C/96/D/1539/2006 at [14.2].

> whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his removal to Syria, there is a real risk that the author would be subjected to treatment prohibited by article 7.

16. General Comment No. 31 on the *Nature of the General Legal Obligation Imposed on State Parties to the Covenant* adopted on 29 March 2004 by the UNHRC summarised the position in the following way:[11]

> ... the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.

17. The removing of a person to a country in circumstances where there is a real risk of subsequent removal to face persecution or irreparable harm in another country is commonly referred to as 'chain *refoulement*'.

18. *Non-refoulement* obligations may also attach to other articles of the ICCPR,[12] although that is disputed by the Commonwealth in these proceedings[13] and by Australia in international fora.[14] For the purposes of these submissions, the Commission restricts its submissions to the *non-refoulement* obligations identified in the special case.

19. Critically for the purposes of the present case, the *non-refoulement* obligation under the Refugees Convention brings with it an obligation not to return a person to a country in which he or she *claims* to have a well-founded fear of persecution, unless those claims have been assessed and rejected.[15] By

---

11 UNHRC, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 at [12] (29 March 2004).

12 The UNHRC has held admissible claims against one State that a person removed to a second State would be subject to a violation of the following articles of the ICCPR: Article 9 (arbitrary detention: *GT v Australia* UN Doc CCPR/C/61/D/706/1996 at [7.5]; *Munaf v Romania* UN Doc CCPR/C/96/D/1539/2006 at [7.5] and [8]); Article 10 (conditions of detention: *Munaf v Romania* UN Doc CCPR/C/96/D/1539/2006 at [7.5] and [8]); and Article 14(1) and (3) (equality before the law: *ARJ v Australia* UN Doc CCPR/C/60/D/692/1996 at [6.6]; *Munaf v Romania* UN Doc CCPR/C/96/D/1539/2006 at [7.5] and [8]). See also the judgment of the European Court of Human Rights in *Soering v United Kingdom*, Application no. 14038/88, 7 July 1989, at [113].

13 In relation to Article 9 of the ICCPR, see Second Further Amended Defence [3(f)(iii)], SCB p 32.

14 See eg the submissions of the Commonwealth recorded in the judgment of the UNHRC in *C v Australia* UN Doc CCPR/C/76/D/900/1999 at [4.11].

15 Eg *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 191 [94] per Gummow, Hayne, Crennan and Bell JJ, 224 [215], 230 [233], 231 [237] per Kiefel J; United Nations High Commission for Refugees, *Advisory Opinion on the Extraterritorial Application of* Non-Refoulement *Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, at [6].

parity of reasoning, the same principle must apply in respect of the *non-refoulement* obligations under the ICCPR and the CAT. That is, there must be an assessment of whether there is a 'real risk' of a breach of the ICCPR and CAT in order for a state party to be satisfied that it is complying with its obligations. The UNHRC has emphasised this point in the context of the ICCPR, saying that: '[t]he relevant judicial and administrative authorities should be made aware of the need to ensure complicance with the Covenant obligations' in matters where a real risk of refoulement arises.[16]

Extra-territorial application of Australia's international obligations regarding non-refoulement

20. With respect to the ***ICCPR***, the principle against *non-refoulement*, as implied from Articles 6 and 7, is defined in its scope by Article 2(1) to apply to individuals 'within [a State Party's] territory and subject to its jurisdiction'. The jurisprudence of the UNHRC and the International Court of Justice confirms that this phrase is to be read disjunctively,[17] and that 'jurisdiction' in this sense encompasses the power or effective control of the forces of a State acting outside its territory.[18] The obligation therefore extends to the exercise of power and control over persons following their interception by agents of Australia in international waters.[19]

21. The prohibition on *refoulement* in the ***CAT*** is also quite clear. The UN Committee Against Torture considers the *non-refoulement* rule in Article 3 to apply to all people under a State Party's *de jure* or *de facto* control.[20] The reference to 'any territory' in Article 2 of the CAT, includes prohibited acts committed on board a ship or aircraft registered by a State party, and also other areas over which a State exercises factual or effective control.[21]

22. In *JHA v Spain*, the Committee Against Torture considered that Spain had control over persons on board a vessel from the time the vessel was rescued in

---

16 UNHRC, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 at [12] (29 March 2004). See also *Judge v Canada* UN Doc CCPR/C/78/D/829/1998 at [10.9] in which the UNHRC found that 'the State party failed to demonstrate that the author's contention that his deportation to a country where he faces execution would violate his right to life, was sufficiently considered,' and therefore found a breach of Article 6 of the ICCPR.

17 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136.

18 UNHRC, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 at [10] (29 March 2004).

19 See the judgments of the Grand Chamber of the European Court of Human Rights in *Medvyedev v France* [GC], no.3394/03 at [67], and *Al-Skeini v United Kingdom* [GC], no. 55721/07 at [136], considering the analogous provision of the European Convention on Human Rights.

20 United Nations Committee Against Torture, *General Comment No. 2, Implementation of article 2 by States parties*, UN Doc. CAT/C/GC/2, 24 January 2008, at [7].

21 United Nations Committee Against Torture, *General Comment No. 2, Implementation of article 2 by States parties*, UN Doc. CAT/C/GC/2, 24 January 2008, at [16].

international waters by Spanish authorities and throughout the identification and repatriation process that then took place. The rescued persons were within the jurisdiction of Spain, and therefore Spain was obliged to respect the requirements of the CAT.[22]

23. As to the extra-territorial application of the ***Refugees Convention***, the clear view of the United Nations High Commission for Refugees (**UNHCR**) is that the obligation imposed on a State party by Article 33(1) of the Convention is not limited in its application to conduct within the State party's own territory:[23] ie, the obligation not to 'return' a refugee to a place where his or her life or freedom would be threatened on one of the identified grounds may be breached if authorities or agents of the State party intercept the refugee in international waters and take him or her to such a place. The UNHCR has responsibility for supervising the application of the Convention's provisions, as reflected in Article 35.[24]

24. The view of the UNHCR accords with the proper construction of Article 33(1) in its context.

    a. The term 'return' in Article 33(1) is at least capable, as a matter of ordinary English, of encompassing circumstances in which a person who has fled from a country where he or she fears persecution is intercepted in international waters and taken back to that country. Indeed that must follow if (as is widely accepted)[25] Article 33(1) applies to an attempt to turn back a refugee at the frontier.

    b. To give the word a narrower, more technical meaning on the basis of shades of difference between 'return' and the French word *refouler* would be inconsistent with the injunction in Article 31(1) of the *Vienna Convention on the Law of Treaties* to interpret a treaty 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty'. In any event, contemporary English translations of *refouler* include 'drive back', 'turn back' and 'turn away',[26] all of which are consistent with the ordinary, broad meaning of 'return'.

    c. To give a narrower meaning to 'return' would also be inconsistent with the humanitarian object and purpose of the Convention.

---

22 United Nations Committee Against Torture, *JHA v Spain*, UN Doc CAT/C/41/D/323/2007 (21 November 2008), at [8.2].

23 *Advisory Opinion on the Extraterritorial Application of* Non-Refoulement *Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, esp at [25]-[31].

24 The source of UNHCR's duty of supervising the application of the provisions of the Refugees Convention is clause 8(a) of the Statute of the UNHCR, adopted by the General Assembly of the United Nations pursuant to resolution 319 A (IV) of 3 December 1949.

25 Eg *R (European Roma Rights Centre and others) v Immigration Officer at Prague Airport* [2005] 2 AC 1 at 38 [26] (Lord Bingham of Cornhill).

26 Collins French-English Dictionary, available at: http://www.collinsdictionary.com/dictionary/english-french (viewed 10 September 2014).

d. No contrary inference arises from Article 33(2), which denies the benefit of Article 33(1) to a person properly regarded as 'a danger to the security of the country in which he is'. The fact that a carefully drawn exception to the general rule only arises in certain circumstances is not a proper basis for a corresponding limitation on the general rule.

e. Many provisions of the Refugees Convention are expressed to apply only to a refugee within the territory of a State party.[27] The absence of such a limitation in Article 33(1) strongly indicates that it was not intended to be so limited.

25. It is therefore respectfully submitted that the construction given to Article 33(1) by the majority of the US Supreme Court in *Sale v Haitian Centers Council, Inc*,[28] is incorrect. The majority reasoning in that case relied on inferences from Article 33(2)[29] and the insertion in parentheses of *refouler*[30] which, for reasons outlined above, should not be regarded as persuasive. Reference was also made[31] to certain statements found in the *travaux préparatoires* which, for reasons explained in the dissenting opinion of Blackmun J,[32] do not demonstrate the existence of any consensus on the present issue; and even if they did, they could not displace the clear meaning of the language of Article 33(1) in its context.[33]

26. This aspect of the reasoning in *Sale* was referred to by Gummow J in *Minister for Immigration and Multicultural Affairs v Ibrahim*;[34] a similar understanding may have been assumed by Gummow and McHugh JJ in *Minister for Immigration and Multicultural Affairs v Khawar*.[35] However, in neither case was the territorial reach of Article 33(1) significant for the Court's reasoning. When this aspect of the reasoning in *Sale* was raised in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*, the joint judgment noted that it was unnecessary to determine whether this construction was correct.[36] (*Sale* has been cited in

---

27 Articles 2, 4 and 27 (presence); 18, 26 and 32 (lawful presence); 15, 17(1), 19, 21, 23, 24 and 28 (lawful residence).

28 509 US 155 (1993).

29 509 US 155, 179-180.

30 509 US 155, 180-182.

31 509 US 155, 184-187.

32 509 US 155, 194-198.

33 See Article 32 of the Vienna Convention.

34 (2000) 204 CLR 1, 45 [136].

35 (2002) 210 CLR 1, 15 [42]. However, McHugh and Gummow JJ appear to draw a distinction between the provisions of chapters I to IV of the Refugees Convention on the one hand (containing civil rights conferred on refugees within a State) and Ch V on the other (containing the *non-refoulement* obligation): see [44].

36 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 171 [21]-[22] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

this Court on other occasions, but for a different proposition.)[37] *Sale*, *Ibrahim* and *Khawar* were referred to by Lord Bingham of Cornhill in *R (European Roma Rights Centre and others) v Immigration Officer at Prague Airport* (the 'Roma rights' case),[38] where it was held that British officials had not acted unlawfully in turning back the appellants when they sought to board a flight at Prague. However, that decision is properly explained on the basis that the appellants did not come within the Refugees Convention on any view (and did not contend that they did), because they were not outside their country of nationality.[39]

10 ***The power to detain and take a person to a place***

27. The Maritime Powers Act received Royal Assent on 27 March 2013 and the substantive parts of it commenced on 27 March 2014.[40] The Act sought to consolidate and harmonise a previously existing maritime enforcement regime contained in a number of different enactments.[41] So much is apparent from the long title to the Act, which describes the Act as one 'to provide for the administration and enforcement of Australian laws in maritime areas, and for related purposes'. In this respect, the Maritime Powers Act forms part of a scheme with the Migration Act (and a number of other Acts).

28. It is also significant in this context that the terms of s 72(4) and (5) reflect the
20 former ss 245F(9) and (9A) of the Migration Act, which were repealed with effect from the date on which the substantive provisions of the Maritime Powers Act commenced.[42] Immediately prior to the commencement of the substantive provisions of the Maritime Powers Act, s 245F(9) and (9A) of the Migration Act provided:

> *Powers of officers in respect of people found on detained ships or aircraft*
>
> (9) If an officer detains a ship or aircraft under this section, the officer may:
>
> (a) detain any person found on the ship or aircraft and bring the person, or cause the person to be brought, to the migration
30 zone; or
>
> (b) take the person, or cause the person to be taken, to a place outside Australia.

---

37 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 273; *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243 at [273], [486].

38 [2005] 2 AC 1, 30 [17].

39 [2005] 2 AC 1, 30 [18].

40 Maritime Powers Act s 2.

41 Explanatory Memorandum to the Maritime Powers Bill 2012 (Cth), p 1; Commonwealth, *Parliamentary Debates*, House of Representatives, 30 May 2012, p 6224 (The Hon Nicola Roxon MP, Attorney-General). The other enactments were: *Customs Act 1901* (Cth), *Environment Protection and Biodiversity Conservation Act 1999* (Cth), *Fisheries Management Act 1991* (Cth) and *Torres Strait Fisheries Act 1984* (Cth).

42 *Maritime Powers (Consequential Amendments) Act 2013* (Cth) s 2.

Powers to move people

(9A) For the purpose of moving a person under subsection (9), an officer may, within or outside Australia:

(a) place the person on a ship or aircraft; or

(b) restrain the person on a ship or aircraft; or

(c) remove the person from a ship or aircraft.

29. The statutory history of s 245F is relevant in assessing the kinds of places that s 245F(9)(b) was directed to, and the circumstances in which people would be taken to those places.

30. Division 12A of Part 2 of the Migration Act, containing s 245F, was inserted by the *Border Protection Legislation Amendment Act 1999* (Cth). As first enacted, s 245F(9) of the Migration Act provided:

(9) If an officer detains a ship or aircraft under this section, the officer may also detain any person who is found on the ship or aircraft and bring the person, or cause the person to be brought, to the migration zone.

31. This is how the sub-section stood at the time of the *MV Tampa* incident, described in the judgment of the Full Court of the Federal Court in *Ruddock v Vadarlis*.[43] At that time, the section allowed ships to be detained at sea and brought into the migration zone, but not to a place outside Australia.

32. The sub-section was amended by the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) (the **amending Act**). The primary purpose of the amending Act was to validate acts by Commonwealth officers taken in relation to the *MV Tampa*. Those acts involved the taking of people rescued by the *MV Tampa* from Australia to Nauru and New Zealand for the purposes of determining whether they were entitled to the benefit of the Refugees Convention, pursuant to an agreement between Australia, New Zealand and Nauru which was read by the Solicitor-General to the court at first instance in *Ruddock v Vadarlis*.[44] The people were first taken by sea to Papua New Guinea pursuant to an agreement between Australia and Papua New Guinea and were then taken by air to Nauru and New Zealand.[45]

33. The amending Act provided that any action taken between 27 August 2001 and 27 September 2001 by the Commonwealth in relation to the *MV Tampa*, the *Aceng*, any other vessel carrying people intending 'to enter Australia unlawfully' and any person who was on board such a vessel 'is taken for all

---

43 *Ruddock v Vadarlis* (2001) 110 FCR 491, esp at [127]-[146].

44 *Ruddock v Vadarlis* (2001) 110 FCR 491 at [128] and [143]. See also *Vadarlis v MIMA & Ors* M93/2001 [2001] HCATrans 625 (27 November 2001) at lines 1478-1481 and 1498-1522.

45 *Ruddock v Vadarlis* (2001) 110 FCR 491 at [146].

purposes to have been lawful when it occurred'.[46] Schedule 2 of the amending Act included amendments to the Migration Act to deal with vessels and people who might arrive in the future.

34. The statutory context for the amendment of s 245F(9) suggests that the kinds of places that a person may be taken outside Australia, and the circumstances in which they may be taken there, are of the same nature as the conduct that the amending Act sought to validate. In particular, the context suggests that the amended s 245F(9) was not directed to taking people to a country without the agreement of that country or to taking people to a place which would result in a breach of Australia's *non-refoulement* obligations.

Consistency with international law

35. The *non-refoulement* obligations identified in the special case are contained in international instruments which have not been directly incorporated into Australian law. However, even where an international instrument has not been implemented in domestic law, it is well settled that legislative provisions that are ambiguous are to be interpreted by reference to the presumption that Parliament did not intend to violate Australia's international obligations.[47]

36. The requirement of ambiguity has been interpreted broadly; as Mason CJ and Deane J observed in *Teoh*:[48]

> [T]here are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.

37. The principle that legislation is to be construed so as to give effect to, and not to breach, Australia's international obligations assists in minimising the risk of legislation inadvertently causing Australia to breach international law. Any breach of international law occasioned by an Act of Parliament ought to be the result of a deliberate decision by Parliament. To this end, where a

---

46 *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth), ss 5 and 6.

47 This principle was first stated in the Commonwealth context in *Jumbunna Coal Mine No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363. It has since been reaffirmed by the High Court on many occasions: see, eg, *Zachariassen v Commonwealth* (1917) 24 CLR 166 at 181 (Barton, Isaacs and Rich JJ); *Polites v Commonwealth* (1945) 70 CLR 60 at 68-69 (Latham CJ), 77 (Dixon J), 80-81 (Williams J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ); *Dietrich v R* (1992) 177 CLR 292 at 306 (Mason CJ and McHugh J); *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 (Gummow and Hayne JJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 33 (McHugh and Gummow JJ); *Al-Kateb v Godwin* (2004) 219 CLR 562; *Coleman v Power* (2004) 220 CLR 1 at 91 (Kirby J). Despite his criticism of the rule, in *Al-Kateb* at [63]-[65] McHugh J acknowledged that 'it is too well established to be repealed now by judicial decision'.

48 (1995) 183 CLR 273 at 287-8.

construction that is consistent with international law is open, that construction is to be preferred over a construction that is inconsistent with international law.[49]

38. Section 72(4) provides that a maritime officer may take a person who has been detained to 'a place outside the migration zone, including a place outside Australia'. No detail is provided about the range of places to which a person may be taken pursuant to s 72(4). Given the structure and scope of the Maritime Powers Act, it is reasonable to infer that the range of places outside Australia to which a maritime officer may take a person was not intended to be unlimited, but rather was to be limited by considerations of international law as well as comity.[50] For example, it is unlikely that officers were intended to be authorised to take a person to a place where his or her entry would be contrary to local law.

39. The Maritime Powers Act itself reflects a concern for consistency with principles of international law. Section 41 provides that the Act does not authorise the exercise of powers in relation to a foreign vessel at a place between Australia and another country unless the power is exercised in one of the limited circumstances set out in that section. These circumstances reflect, and are intended to reflect, the limits of international law, particularly the *United Nations Convention on the Law of the Sea* (**UNCLOS**),[51] in relation to the use of enforcement powers against foreign vessels.[52] (For example, in the present case, the Commonwealth appears to rely on s 41(1)(c) for the validity of the exercise of maritime powers in relation to the Indian Vessel. This section permits the exercise of powers in Australia's contiguous zone in order to prevent a contravention of immigration law occurring in Australia and is modelled on Article 33 of UNCLOS.)[53] The same restrictions do not apply in respect of Australian vessels, where the powers afforded to Australia under international law are broader. Similarly, s 40 of the Maritime Powers Act provides that the Act does not authorise the exercise of powers at a place in another country (including that country's territorial sea) unless the requirements of that section are met.

40. The Act also contains in s 95 a provision dealing with how people detained under that Act are to be treated, which picks up the language of Articles 7 and 10 of the ICCPR. Section 95 is a further indication that the Act was drafted with a view to consistency with international obligations. Section 95 also, by its own force, imposes a limitation which would be breached by

---

49 *Teoh* (1995) 183 CLR 273 at 362 (Mason CJ and Deane J); *Chu Kheng Lim* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ).

50 *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 at 423-424 (Dixon J).

51 UNCLOS, opened for signature 10 December 1982, [1994] ATS 31 (entered into force generally on 16 November 1994; entered into force for Australia on 16 November 1994).

52 Explanatory Memorandum to the Maritime Powers Bill 2012 (Cth), p 39.

53 Explanatory Memorandum to the Maritime Powers Bill 2012 (Cth), p 38.

taking a detained person to a place where there is a real risk that he or she would be subjected to the kind of treatment which it mentions.

41. It should also be noted that some attention was given, in the Explanatory Memorandum to the Bill for the Maritime Powers Act, to the possible interaction of s 72 with Australia's *non-refoulement obligations*. The Memorandum asserted that the Bill was 'compatible with Australia's non-refoulement obligations under the ICCPR and CAT', on the footing that operational procedures would be developed for the consideration of 'refoulement risks'.[54] These observations serve to confirm the absence of an intention to authorise actions which would contravene Australia's *non-refoulement* obligations.

42. Given the careful delimitation of the powers in the Maritime Powers Act to comply with international law, the structure of the Act supports an inference that the power conferred by s 72(4) does not extend to taking a person to a place if to do so would result in a breach of Australia's *non-refoulement* obligations pursuant to the Refugees Convention, the ICCPR and the CAT.

Relationship between the Migration Act, the Refugees Convention and the ICCPR

43. The Migration Act proceeds, in important respects, from the assumption that Australia has protection obligations to individuals. Consistently with that assumption, the text and structure of the Act proceed on the footing that the Act provides power to respond to Australia's international obligations under the Refugees Convention by granting a protection visa in an appropriate case and by not returning that person, directly or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason.[55] The ambit of the duty and power to remove non-citizens from Australia pursuant to relevant provisions of the Migration Act must be understood in the context of these protection obligations.[56]

44. On 24 March 2012, the 'protection obligations' to which effect is given by the Migration Act were expanded to include 'complementary protection' under the ICCPR, the CAT and other treaties described below.[57] A new alternative criterion for a protection visa was inserted as s 36(2)(aa) of the Migration Act, namely that the applicant for a visa is:

> a non-citizen in Australia ... in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial

---

54 Explanatory Memorandum to the Maritime Powers Bill 2012 (Cth), p 6.

55 *Plaintiff M61/2010E v Commonwealth; Plaintiff M69/2010 v Commonwealth* (2010) 243 CLR 319 at 339 [27].

56 *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 189 [90] and [94] and 192 [98] (Gummow, Hayne, Crennan and Bell JJ), 230-232 [233]-[239] per Kiefel J.

57 *Migration Amendment (Complementary Protection) Act 2011* (Cth), s 2.

grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.

45. Section 36(2A) provides that a non-citizen will suffer 'significant harm' if:

(a) the non-citizen will be arbitrarily deprived of his or her life; or

(b) the death penalty will be carried out on the non-citizen; or

(c) the non-citizen will be subjected to torture; or

(d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or

(e) the non-citizen will be subjected to degrading treatment or punishment.

46. The terms 'torture,' 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are each defined including by reference to Article 7 of the ICCPR.[58] Taken together, the statutory basis for claiming protection against 'significant harm' was inserted for the purpose of establishing an efficient, transparent and accountable system for considering complementary protection claims under the ICCPR, CAT, the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*,[59] and the *Convention on the Rights of the Child*,[60] in addition to claims under the Refugees Convention.[61]

47. By reason of s 15AB(2)(d) of the *Acts Interpretation Act 1901* (Cth), each of the Refugees Convention, the ICCPR and the CAT may be considered for the purposes described in s 15AB(1) in interpreting the Migration Act. Further, Australian courts will endeavour to adopt a construction of the Migration Act, if that construction is available, which conforms to the Refugees Convention, the ICCPR and the CAT.[62]

48. These points are significant for the construction of s 72(4) of the Maritime Powers Act in two respects. First, s 72(4) is the direct descendant of former s 245F(9) and (9A) of the Migration Act, which were enacted in the context of the body of assumptions concerning protection obligations that inform that Act (and which were in force as part of the Migration Act when the

---

58 Migration Act, s 5(1).

59 *Second Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 15 December 1989, [1991] ATS 19 (entered into force generally on 11 July 1991; entered into force for Australia on 11 July 1991).

60 *Convention on the Rights of the Child*, opened for signature on 20 November 1989, [1991] ATS 4 (entered into force generally on 2 September 1990; entered into force for Australia on 16 January 1991).

61 Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 (Cth), p 1.

62 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) CLR 1 at 15 [34] (Gummow A-CJ, Callinan, Heydon and Crennan JJ).

complementary protection provisions were added). There is nothing to indicate that the transfer of these provisions to the Maritime Powers Act (albeit with some redrafting) was intended to enhance their scope in any significant way.[63] Secondly, the long title of the Maritime Powers Act indicates that its primary purpose is to provide for the 'administration and enforcement of Australian laws in maritime areas'. Section 72(4), read in the light of that purpose, should not be understood to authorise action in contravention of principles that underlay the Migration Act (it being prominent among the Australian laws whose provisions are sought to be 'enforced').

Part VI: Timing of oral submissions

49. The Commission seeks leave to intervene by filing these written submissions, and also briefly to address the Court. If permitted, any oral submissions would not exceed 20 minutes.

Dated: 11 September 2014

Geoffrey Kennett
Telephone: 02 9221 3933
Facsimile: 02 9221 3724
E: kennett@tenthfloor.org

Anna Mitchelmore
Telephone: 02 9223 7654
Facsimile: 02 9232 1069
E:amitchelmore@sixthfloor.com.au

63 See further, Explanatory Memorandum to the Maritime Powers Bill 2012 (Cth), p 51.

Annexure

Relevant legislative provisions

Maritime Powers Act 2013 (Cth)

72 Persons on detained vessels and aircraft

(1) This section applies to a person:

(a) on a detained vessel or detained aircraft; or

(b) whom a maritime officer reasonably suspects was on a vessel or aircraft when it was detained.

Note: For detaining vessels and aircraft, see section 69.

(2) A maritime officer may return the person to the vessel or aircraft.

(3) A maritime officer may require the person to remain on the vessel or aircraft until it is:

(a) taken to a port, airport or other place (see section 69); or

(b) permitted to depart from the port, airport or other place.

Note: It is an offence to fail to comply with a requirement under this subsection: see section 103.

(4) A maritime officer may detain the person and take the person, or cause the person to be taken:

(a) to a place in the migration zone; or

(b) to a place outside the migration zone, including a place outside Australia.

(5) For the purposes of taking the person to another place, a maritime officer may within or outside Australia:

(a) place the person on a vessel or aircraft; or

(b) restrain the person on a vessel or aircraft; or

(c) remove the person from a vessel or aircraft.

95 Treatment of persons held

A person arrested, detained or otherwise held under this Act must be treated with humanity and respect for human dignity, and must not be subject to cruel, inhuman or degrading treatment.

Migration Act 1958 (Cth)

36 Protection visas

(1) There is a class of visas to be known as protection visas.

Note: See also Subdivision AL.

(1A) An applicant for a protection visa must satisfy:

(a) the criterion in subsection (1B); and

(b) at least one of the criteria in subsection (2).

(1B) A criterion for a protection visa is that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*).

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or

(b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (a); and

(ii) holds a protection visa; or

(c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (aa); and

(ii) holds a protection visa.

(2A) A non-citizen will suffer ***significant harm*** if:

(a) the non-citizen will be arbitrarily deprived of his or her life; or

(b) the death penalty will be carried out on the non-citizen; or

(c) the non-citizen will be subjected to torture; or

(d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or

(e) the non-citizen will be subjected to degrading treatment or punishment.

(2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:

(a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or

(b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or

(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

Ineligibility for grant of a protection visa

(2C) A non-citizen is taken not to satisfy the criterion mentioned in paragraph (2)(aa) if:

(a) the Minister has serious reasons for considering that:

(i) the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or

(ii) the non-citizen committed a serious non-political crime before entering Australia; or

(iii) the non-citizen has been guilty of acts contrary to the purposes and principles of the United Nations; or

(b) the Minister considers, on reasonable grounds, that:

(i) the non-citizen is a danger to Australia's security; or

(ii) the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.

Protection obligations

(3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, subsection (3) does not apply in relation to a country in respect of which:

(a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.

(5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:

(a) the country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.

(5A) Also, subsection (3) does not apply in relation to a country if:

(a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

(6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

(7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.