THE MALAYSIAN CASE, HOB GOBLINS, HUMPTY DUMPTY AND LORD ATKIN

Robert Lindsay*

At the Prime Minister's press conference in Brisbane on 1 September 2011, one day after the decision of the High Court holding invalid the declaration for removal of asylum seekers to Malaysia (*Plaintiff M70/2011 v MIMC* (*Malaysian case*)), the Prime Minister said 'the High Court's decision basically turns on its head the understanding of the law in this country prior to yesterday's decision'. She also said that the Chief Justice 'considered comparable legal questions when he was a judge of the Federal Court and made different decisions to the one the High Court made yesterday'[1].

In relation to the accusation that the Chief Justice had altered his position, there were only two decisions to which the Prime Minister could have been alluding, both were referred to in the judgment of Justice Heydon, who was the only dissenter in the *Malaysian case*.

The first case referred to by Justice Heydon was *Patto*[2], in which the author was Counsel. Patto was an Iraqi national who fled Iraq in the time of Saddam Hussein and settled in Greece with his family for seven years, but was unsuccessful in securing asylum in that country. He then came to Australia and applied for a protection visa, which was refused by the Refugee Review Tribunal. This decision was set aside by Justice French because the Tribunal had erred in concluding that Patto had 'a right to return to Greece' when the evidence did not support that he had any such right because he was not a Greek National and had no current passport. Affidavit evidence from a lawyer about Greek migration law indicated that Patto would not be allowed re-entry to Greece.

However, during the course of his judgment in *Patto*, Justice French said that where there is a 'safe third country' it need not be a party to the Refugee Convention 'if (the country) would otherwise afford effective protection to the person'[3]. His Honour referred to a Federal Full Court case where it was said that 'so long as, as a matter of practical reality and fact, the applicant is likely to be given effective protection by being permitted to enter and live in the third country' where he will not be at risk of being returned to his original country, this protection will suffice[4].

In making these comments Justice French was referring to Article 33 of the Refugee Convention which prohibits expulsion to any territory where a refugee's life or freedom would be threatened.

In so saying he was not expressing a view which differed from what he said in the *Malaysian case* and it accorded with the view of the Full Federal Court, which he was bound, as a single judge at that time, to follow[5].

* *Robert Lindsay is a barrister at Sir Clifford Grant Chambers, Perth, WA.*

The *Malaysian Case*

The *Malaysian case*[6] involved considering the Minister of Immigration's powers under s 198A(3) of the *Migration Act 1958* (Cth), which allows the Minister to send persons to a declared country where that country provides access to effective procedures for assessing protection; provides protection for persons seeking asylum; provides protection for persons who are given refugee status; and meets relevant human rights standards in providing that protection.

All but Justice Heydon found that Malaysia did not afford these protections. The majority comprised a joint judgment of Gummow, Hayne, Crennan and Bell JJ, with French CJ and Kiefel J writing separate judgments concurring with the joint judgment. Chief Justice French pointed out that Malaysia does not recognise the status of refugees in domestic law and that it was open to the Malaysian authorities to prosecute 'offshore entry persons' such as the plaintiff, under s 6 of the Malaysian *Immigration Act 1959/63*, which provided for such a person, upon conviction, to receive a term of imprisonment of up to five years and be liable to a whipping of up to six strokes[7].

Nowhere in his judgment did the Chief Justice contend that a declaration could not be made in respect of a country which was not a member of the Refugee Convention, provided that the country in question complied with the requirements of s 198A(3) of the Act. Nor was there anything in the Full Federal Court judgment about the adequacy of protection, which Justice French followed when he heard Patto's case, that contradicts what was said by the majority in the *Malaysian case*.

The second case upon which the Prime Minister must be taken to have relied, which was also referred to in Justice Heydon's dissenting judgment, was *P1/2003 v The Minister for Immigration & Multicultural & Indigenous Affairs (P1/2003)*[8] where the validity of s 198A(3) of the Act was at issue following a Ministerial declaration that Nauru was a country to which the plaintiff could be removed.

The applicant was a young Afghani national who, as a minor, had been removed to Nauru and then subsequently returned to the Australian mainland for medical treatment. At the time the plaintiff moved to the mainland for medical treatment, the plaintiff's minority had passed and the duties dependent upon that status no longer existed. The lawfulness of the plaintiff's removal was attacked on the basis that Nauru did not meet the requirements set out in that sub-section, because it did not provide access to effective procedures for assessing applications for protection by minors and did not meet relevant human rights standards in providing that protection. The lawfulness of his removal was also assailed upon the basis that s 198A is not a valid exercise of the legislative power of the Commonwealth. The basis for this attack did not appear from the amended statement of claim but, in submissions, it was said the Commonwealth could not determine the fate of aliens beyond the borders of the Commonwealth. His Honour said in *P1/2003* that the argument advanced for invalidity of s 198A 'was somewhat tentative. No positive argument was put forward.....the Court is left with, at least, a pale shadow of a constitutional argument .....'[9].

His Honour said 'the form of the section suggests a legislative intention that the subject matter of the declaration is for a Ministerial judgment. It (the declaration) does not appear to provide a basis on which a court could determine whether the standards to which it refers are met. Their very character is evaluative and polycentric and not readily amenable to judicial review. *That is not to say that such a declaration might not be invalid if a case of bad faith or jurisdictional error could be made out*'[10] (emphasis added).

In the *Malaysian case* Chief Justice French said the declaration made in regard to Malaysia was again one which required 'an evaluative judgment' by the Minister and if the Minister proceeds 'to make a declaration on the basis of a misconstrued criterion, he would be making a declaration not authorised by Parliament. The misconstruction of the criterion would be a jurisdictional error'[11].

In both *P1/2003* and the *Malaysian case* the Chief Justice said that the Minister's task was 'to form, in good faith, an evaluative judgment based upon matters set out in s 198(A)(3) 'properly construed'. He said in the *Malaysian case* 'a declaration under section 198A(3) affected by jurisdictional error is invalid'[12].

In determining that jurisdictional error had arisen, the Chief Justice said that the declaration set out in s 198A(3)(a) is not limited by those things necessary to characterise the declared country as a safe third country. They are statutory criteria, albeit informed by the core obligation of *non-refoulement* which is the key protection. The Minister must ask himself whether the protection afforded has been provided and this cannot be answered without reference to the domestic laws of the specified country and the international legal obligations to which it has bound itself. The Minister did not look to, and did not find, any basis for his declaration in Malaysia's international obligations or relevant domestic laws[13].

The joint judgment said that s 198A(3) required more than an examination of what has happened, is happening or may be expected to happen in a relevant country. The access and protections to which the sub-paragraphs referred must be provided as a matter of legal obligation[14]. Kiefel J said that s 198A(3)(a) must be taken to require that a country 'provide' the necessary recognition and protection pursuant to its laws[15]. As the Department of Foreign Affairs advised, Malaysia is not a party to the Refugee Convention; it does not recognise or provide for recognition of refugees in its domestic law. Although membership of the Refugee Convention is not a necessary condition, Malaysia does not bind itself, in its immigration legislation, to *non-refoulement*[16].

The Chief Justice said that the mere fact that a Minister makes a declaration is not enough to secure its validity. Where the Minister proceeds to make a declaration on the basis of a misconstrued criterion he would be making a declaration not authorised by the Parliament. Such a misconstruction would be a jurisdictional error[17]. One way of approaching the scope of Ministerial power under s 198A(3) is to treat it as being by necessary implication, conditioned upon the formation of an opinion or belief that each of the matters set out in s 198A(a)(i) – (iv) is true. The requisite opinion or belief is a jurisdictional fact. If based upon a misconstruction, the opinion or belief is not that which this sub-section requires in order that the power be enlivened[18].

The Prime Minister was mistaken to suggest that the Chief Justice had shifted his ground. Several points are salient: firstly, in Patto's case the decision was consistent with the Full Court's view, which Justice French was obliged at the time to follow, and also consistent with both Article 33 relating to *non-refoulement* and article 1E, which states that the Convention does not apply to a person who is recognized as having the rights and obligations attached to the possession of a nationality of a safe third country. These articles do not mandate that a safe third country is confined to those who subscribe to the Refugee Convention. However, such member countries may more readily meet the necessary criteria under s 198A(3) of the Act because of the obligations, owed to asylum seekers, which are placed upon member states by the articles of the Convention. These obligations, as pointed out in the joint judgment in the *Malaysian case*, include giving them the same treatment as nationals in relation to freedom of religion, access to education and courts of law, and freedom of movement[19]. As the joint judgment found, a country does not provide the necessary protection under s 198A(3) unless its domestic law expressly provides the protections to the

classes of persons mentioned or it is internationally obliged to provide the particular protections[20].

Secondly, Patto's case was not concerned with s 198A of the Act, unlike the *Malaysian case*. In *Patto*, Justice French was referring to article 33 of the Refugee Convention which relates to *non-refoulement* to a country where a refugee's life and freedom is at risk. As his Honour said, in the *Malaysian case* the criteria for a declaration set out in s 198A(3)(a) are not limited to those things necessary to characterise the declared country as a safe third country. They are statutory criteria.

Thirdly, although *P1/2003* was concerned with a declaration under the same provision being considered in the *Malaysian case*, the declaration was in respect of a different country (Nauru), proclaimed by a different Minister and, furthermore, was issued at a time when the law relating to the scope of jurisdictional error was thought to be more confined[21]. The joint judgment explained that, at least in the case of Nauru, both the assessment of refugee status and maintenance of protection was to be done by Australia not Nauru, and the arrangement with Nauru created obligations absent from that which Australia had with Malaysia.[22]

It is therefore perplexing that the Prime Minister says that the court turned on its head the understanding of the law. It was of course also a criticism made by Justice Heydon in dissent that the majority of the court had altered the law, as previously propounded by the Federal Court, which Court Justice Heydon considered more experienced than State Courts in considering these matters[23]. Yet Chief Justice French, Gummow, Crennan and Kiefel JJ, who together with Hayne and Bell JJ formed the majority, had all been long serving members of the Federal Court.

Hob goblins

The High Court majority could fairly claim what Maynard Kaynes was reported once to have claimed when charged with inconsistency 'when the facts change, so also my opinion changes, what about you sir?' In this context, it may be said that when the country which is the subject of declaration differs from that country previously under consideration, so too the legal result may be different. However, inconsistency in itself is hardly a badge of dishonour, if the High Court needs to extend or alter legal principles to achieve a just result according to law. As Ralph Emerson once said 'consistency is the hob goblin of little minds', but here the principles of law adopted by the majority do indeed have an echo in historical Anglo Australian law.

Mr Perlzweig, Mr Liversidge and Lord Atkin[24]

The controversy over how far a Minister's discretion should be examined by a court harks back to at least the Second World War and the decision in *Liversidge v Anderson*, notable for Lord Atkin's celebrated dissenting judgment.

In his speech Lord Atkin said: 'I view with apprehension the attitude of Judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive'[25]. In *Liversidge*, Emergency War Regulations provided that 'if the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations.........and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained'.

Was it enough to justify an order of detention that the Secretary of State, acting in good faith, thought he had reasonable cause to believe Liversidge to be a person of hostile associations and to detain him? Or was it necessary that the Secretary of State should actually have reasonable cause?

The Minister declined to give details requested by the detainee of his basis for 'reasonable cause'. The other Law Lords held that those responsible for the national security must be the sole judges of what the national security required. Lord Atkin in his dissent said that the requirement of reasonable cause had always in the past been understood as requiring proof of an objective fact. In rejecting the majority's construction of the section his Lordship said:

> I know of only one authority which might justify the suggested method of construction; "when I use the word", Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean, neither more nor less". "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master – that's all".[26]

As early as 1951 the view of the majority in Liversidge was distinguished by the House of Lords[27]. In *Ridge v Baldwin*[28] Lord Reid described the decision as 'the very peculiar decision of this House' and in 1980 Lord Diplock, with the support of other Law Lords, held that Lord Atkin had been right[29].

In commenting upon this case the late Lord Bingham, Senior Law Lord, in a lecture in 1997 to the London Reform Club said:

> there is a simple but crucial distinction between a condition which requires the existence of an objective fact (on the existence of which the court can, if necessary, rule) and the existence of a subjective belief (which requires little more than good faith or an absence of gross irrationality, which leave little room for review by the Court). Lord Atkin's central legal argument was surely correct[30].

Whilst having due regard for the statutory distinctions, the case shares similarities with the *Malaysian case*. As in *Liversidge* the decision required the Minister to determine the objective facts: as to whether a specified country would provide protection for persons seeking asylum, and give refugee status, and that the country would meet relevant human rights standards in providing that protection. The recognition that in such circumstances intervention may be made by a court, where there has been an executive failure to appraise correctly the existence of these objectives, necessitated the setting aside of such a declaration on the grounds of jurisdictional error. Both cases involved construing Ministerial power, though the Minister in the *Malaysian Case* did divulge the basis upon which he had determined to make the declaration.

It is evident, however, as the High Court itself found, that it was the legal advisers to the Minister who misconstrued the relevant legal principles rather than any altered judicial approach to that which had previously been adopted in Anglo Australian Law dating back at least as far as vindication of Lord Atkin's dissenting judgment by the House of Lords over thirty years ago.

Endnotes

1 Transcript of Press Conference in Brisbane 1 September 2011, http://www.pm.gov.au/press-office/transcript-joint-press-conference-Brisbane-1.
2 *Patto v Minister for Immigration* [2000] FCA 1554 (*Patto*).
3 *Patto* supra at [36].
4 *Patto* supra at [40] citing *MIMA v Al Sallal* [1999] FCA 1332 (Full Court) approving Emmett J in *Al-Zafiry v MIMA* [1999] FCA 1472.
5 Supra Al Sallal.
6 *Plaintiff M70/2011 v MIMC*; *Plaintiff M106/2011 v MIC* [2011] HCA 32. This article is concerned with Plaintiff M70/2011 and not Plaintiff M106/2011 who was a minor and also succeeded.

7 *Plaintiff M70/2011* supra at [30].
8 *P1/2003 v MIMIA* [2003] FCA 1029.
9 *P1/2003* supra at [48].
10 *P1/2003* supra at [49].
11 *Plaintiff M70/2011* supra at [59].
12 *Plaintiff M70/2011* supra at [59].
13 *Plaintiff M70/2011* supra at [66].
14 *Plaintiff M70/2011* supra at [116].
15 *Plaintiff M70/2011* supra at [244].
16 *Plaintiff M70/2011* supra at [249].
17 *Plaintiff M70/2011* supra at [59].
18 *Plaintiff M70/2011* supra at [59].
19 *Plaintiff M70/2011* supra at [117].
20 *Plaintiff M70/2011* supra at [126].
21 See now enlargement of jurisdictional error in cases such as *Plaintiff S157/2002 v the Commonwealth* (2003) 211 CLR 476; *Kirk v Industrial Relations Commission* [2010] HCA 1
22 *Plaintiff M70/2011* supra at [128].
23 *Plaintiff M70/2011* at [164] and [165].
24 Tom Bingham, *The Business of Judging: Selected Essays and Speeches 1985-1990* (Oxford University Press, 2011). Paperback Edition pp 210-221. Perlzweig was the true name of Liversidge. I am much indebted to this wonderful lecture for what appears hereafter.
25 Tom Bingham quoting Lord Atkin at 215.
26 Tom Bingham quoting Lord Atkin at 216.
27 Tom Bingham supra at [220] *Nakkuda Ali v Jayaratne* [1951] AC 66.
28 [1964] AC 40.
29 *Inland Revenue Commissioners v Rossminster* [1980] AC 952.
30 Tom Bingham supra at 220.