# FEDERAL COURT OF AUSTRALIA

**Victorian Council for Civil Liberties Incorporated**
**v**
**Minister for Immigration & Multicultural Affairs & Ors**

**V 899 of 2001**

**Eric Vadarlis**
**v**
**Minister for Immigration & Multicultural Affairs & Ors**

**V 900 of 2001**

## *INTRODUCTION*

In accordance with the practice of the Federal Court in some other cases of public interest, North J has prepared this brief statement to accompany the reasons for judgment, delivered today. It must, of course, be emphasised that the only authoritative pronouncement of the Court's reasons is that contained in the published reasons for judgment. This summary is intended to assist in understanding the principal conclusions reached by the Court, but is necessarily incomplete.

## *STATEMENT*

1. On 26 August 2001, 433 people were rescued at sea in international waters near Christmas Island and taken on board the MV Tampa.

2. The rescuees were mostly Afghanis. They have sent a letter to the government of Australia saying "you know well about the long time war and its tragic human consequences and You know about the genocide and massacres going on in our country and thousands of us innocent men, women and children were put in public graveyards, and we hope that you understand that keeping view of above mentioned reasons we have no way but to run out of our dear homeland and to seek a peaceful asylum."

3. On Wednesday 29 August Captain Arne Rinnan, the master of the MV Tampa, came to the conclusion that some of the rescuees required urgent medical treatment. He asked for assistance. When none was forthcoming he took the MV Tampa into Australian territorial waters about 4 nautical miles off Christmas Island.

4. Mr Farmer, the Secretary of the Department of Immigration and Multicultural Affairs, was present at a number of government meetings held to deal with the situation. He gave evidence to the Court that the government determined its policy at the highest level. That policy was that responsibility for the rescuees was not with Australia but with Indonesia and Norway.

5. Consequently, the government determined that it would not permit the rescuees to land on Christmas Island.

6. When the MV Tampa came into Australian territorial waters 45 SAS troops were sent out to board the ship.

7. The question of Australia's policy towards refugees is a matter of great current debate in our community. It is important for me to stress that the role of the Court is to determine

questions of law which are brought to it. That is what I have done in this case. The written reasons explain how I have come to my conclusions. It is not part of the function of the Court to interfere in the policy decisions made by government. But it is part of the function of the Court to determine if the government respondents have acted within the law.

8. The *Migration Act* gives the government very wide powers to detain and remove unlawful non-citizens who are about to enter or who are in Australia. These powers, however, also confer certain rights on detainees.

9. The proceedings were commenced by the Victorian Council for Civil Liberties Incorporated and Mr Eric Vadarlis. The Victorian Council for Civil Liberties Incorporated is an organisation concerned to protect fundamental rights and freedoms. Mr Vadarlis is a solicitor practising in Melbourne who wishes to provide free legal advice to the rescuees on migration matters.

10. The applicants argued that the *Migration Act* applied to the situation of the rescuees. As a result, the respondents had duties under the Act to detain the rescuees and at the same time to allow them the applicable rights, including the right to apply for protection visas as refugees. The applicants asked the Court to order that the rescuees be brought ashore to the Australian mainland and allow them to make applications for protection visas.

11. For a number of reasons set out in my judgment I do not accept these arguments of the applicants. In one instance, they have not established that the duty under the *Migration Act* applied to the situation of the rescuees. In other instances the present law means that they do not have a sufficient interest to bring the proceeding. This aspect of the applications must fail.

12. The applicants then argued an alternative basis for their claims. They contended that if the *Migration Act* did not apply to the situation of the rescuees, then the rescuees were detained without any lawful authority.

13. They contended that no person in Australia, whether a citizen or a non-citizen, can be held

in detention without lawful authority.

14. That principle is so well established in Australian law that the respondents did not challenge it. It has a foundation in the law reaching back many hundreds of years.

15. Therefore, the area of debate on this issue was confined. The applicants argued that the rescuees were held in detention by the respondents on board the MV Tampa, and as the respondents had no authority to detain them the court should order that they be released from detention.

16. The respondents argued that the rescuees were not held in detention on the MV Tampa but that they were free to go wherever they wished other than to Australia.

17. I have considered the evidence placed before the Court concerning the situation of the rescuees on the MV Tampa. I have concluded that they were held in detention within the meaning of the law. An extract from my written judgment explains part of the reasoning as follows:

> "In my view the evidence of the respondents' actions in the week following 26 August demonstrate that they were committed to retaining control of the fate of the rescuees in all respects. The respondents directed where the MV Tampa was allowed to go and not to go. They procured the closing of the harbour so that the rescuees would be isolated. They did not allow communication with the rescuees. They did not consult with them about the arrangements being made for their physical relocation or future plans. After the arrangements were made the fact was announced to them, apparently not in their native language, but no effort was made to determine whether the rescuees desired to accept the arrangements. The respondents took to themselves the complete control over the bodies and destinies of the rescuees. The extent of the control is underscored by the fact that when the arrangements were made with Nauru, there had been no decision as to who was to process the asylum applications there or under what legal regime they were to be processed. Where complete control over people and their destiny is exercised by others it cannot be said that the opportunity offered by those others is a reasonable escape from the custody in which they were held. The custody

simply continues in the form chosen by those detaining the people restrained."

18. The applicants have established that the rescuees were held in detention by the respondents without lawful authority.

19. An ancient power of the Court is to protect people against detention without lawful authority.

20. The orders of the Court will require that the respondents release the rescuees onto the mainland of Australia. Given the practical issues that arise in releasing the rescuees and bringing them to Australia and the agreement reached by the parties, I have allowed a short delay so that the release must be completed by 5.00pm Australian Eastern Standard Time on Friday 14 September 2001, or at the determination of any appeal from my decision to the Full Court of the Federal Court of Australia, whichever is the later.

Melbourne, 11 September 2001

# FEDERAL COURT OF AUSTRALIA

## Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs
## [2001] FCA 1297

**PRACTICE & PROCEDURE** – joinder of parties – status of interveners

**ADMINISTRATIVE LAW** – prerogative writs and orders – habeas corpus – power of Court to grant order for release – nature of relief available – whether court has a discretion not to order release when detention is found to exist

**HABEAS CORPUS** – applicability of remedy – nature of restraint required – distinction between partial and total restraint – whether reasonable means of egress available – whether purpose for which release is sought affects the grant of release

**EXECUTIVE GOVERNMENT** – prerogative power of the Executive – whether power to detain aliens without statutory authority

**ADMINISTRATIVE LAW –** standing – where orders for mandamus, injunctions and declarations are sought – whether applicants have a special interest – where acting in the public interest – where mere intellectual or emotional concern

**CITIZENSHIP & IMMIGRATION** – where unlawful non-citizens – whether s245F of the *Migration Act* 1958 (Cth) applies – whether s189 of the Act imposes a duty to detain unlawful non-citizens attempting to enter the migration zone

**CONSTITUTIONAL LAW** – implied freedom of political communication – whether right extends to aliens – whether right extends to citizens to provide legal advice to aliens – whether government required to facilitate communication

*Associations Incorporations Act* 1981 (Vic)
*Judiciary Act* 1903 (Cth), s 39B
*Migration Act* 1958 (Cth), ss 5, 13, 14, 189, 196, 198, 199, 229, 245A, 245B, 245F, 256
*Human Rights and Equal Opportunity Act* 1986 (Cth), ss 3, 11
*Lunacy Act* 1890
*Extradition (Foreign States) Act* 1966 (Cth)
*Border Protection Bill* 2001 (Cth)

*United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520, applied
*Tait v R* (1962) 108 CLR 620, applied
*Kelleher v Corrective Services Commission of New South Wales* (1987) 8 NSWLR 423, referred to

*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, considered
*Re Bolton & Another; Ex parte Beane* (1987) 162 CLR 514, considered
*Waters v Commonwealth of Australia* (1951) 82 CLR 188, referred to
*Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591, referred to
*Clarkson v R* [1986] VR 464, referred to
*Bird v Jones* (1845) 115 ER 668, distinguished
*Burton v Davies and General Accident Fire and Life Assurance Corporation Ltd* [1953] StRQd 26, considered
*Jones v Cunningham* 371 US 236 (1963), considered
*R v Clarkson* (1722) 93 ER 625, referred to
*R v Delaval* (1763) 97 ER 913, referred to
*Chin Yow v United States* 208 US 8 (1907), considered
*R v The Coroner at Mackay* (1990) 1 QdR 451, considered
*R v Commissioner of Taxation; Ex parte Swiss Aluminium Australia Ltd* (1986) 13 FCR 66, considered
*Somerset v Stewart* (1772) 98 ER 499, considered
*Re Gregory* (1899) 25 VLR 539, applied
*Re Esperalta* [1987] VR 236, considered
*R v Langdon; Ex parte Langdon* (1953) 88 CLR 158, referred to
*Robtelmes v Brenan* (1906) 4 CLR 395, considered
*Mayer v Minister for Immigration and Ethnic Affairs* (1984) 4 FCR 312, considered
*Minister for Immigration and Ethnic Affairs v Mayer* (1985) 7 FCR 254, referred to
*Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, referred to
*Australian Conservation Foundation Incorporated v Commonwealth of Australia* (1980) 146 CLR 493, applied
*Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Limited* (1998) 194 CLR 247, considered
*Cunliffe v Commonwealth of Australia* (1994) 182 CLR 272, considered
*McClure v Australian Electoral Commission* (1999) 163 ALR 734, applied

*Universal Declaration of Human Rights* (1948)
*Convention relating to the Status of Refugees* (1951)

David Clark & Gerard McCoy, *Habeas Corpus: Australia, New Zealand, The South Pacific* (The Federation Press, 2000)
RJ Sharpe, *The Law of Habeas Corpus* (2nd Ed) (Clarendon Press, 1989)
Harry Street & Rodney Brazier, *de Smith Constitutional and Administrative Law* (5th Ed) (Penguin Books, 1985)

**THE VICTORIAN COUNCIL FOR CIVIL LIBERTIES INCORPORATED v THE HONOURABLE PHILIP RUDDOCK, MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS, THE HONOURABLE DARYL WILLIAMS, ATTORNEY-GENERAL, THE HONOURABLE PETER REITH, MINISTER FOR DEFENCE and THE COMMONWEALTH OF AUSTRALIA**

**V 899 of 2001**

**ERIC VADARLIS v THE HONOURABLE PHILIP RUDDOCK, MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS, THE COMMONWEALTH OF AUSTRALIA and WILLIAM JOHN FARMER, SECRETARY AND CHIEF EXECUTIVE OFFICER OF THE DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AFFAIRS**

**V 900 of 2001**

**NORTH J**
**11 SEPTEMBER 2001**
**MELBOURNE**

GENERAL DISTRIBUTION

**IN THE FEDERAL COURT OF AUSTRALIA**

**VICTORIA DISTRICT REGISTRY** **V889 of 2001**

**BETWEEN:** **THE VICTORIAN COUNCIL FOR CIVIL LIBERTIES INCORPORATED**
**APPLICANT**

**AND:** **THE HONOURABLE PHILIP RUDDOCK, MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS**
**FIRST RESPONDENT**

**THE HONOURABLE DARYL WILLIAMS, ATTORNEY-GENERAL**
**SECOND RESPONDENT**

**THE HONOURABLE PETER REITH, MINISTER FOR DEFENCE**
**THIRD RESPONDENT**

**THE COMMONWEALTH OF AUSTRALIA**
**FOURTH RESPONDENT**

**IN THE FEDERAL COURT OF AUSTRALIA**

**VICTORIA DISTRICT REGISTRY** **V900 of 2001**

**BETWEEN:** **ERIC VADARLIS**
**APPLICANT**

**AND:** **THE HONOURABLE PHILIP RUDDOCK, MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS**
**FIRST RESPONDENT**

**THE COMMONWEALTH OF AUSTRALIA**
**SECOND RESPONDENT**

**WILLIAM JOHN FARMER, SECRETARY AND CHIEF EXECUTIVE OFFICER OF THE DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AFFAIRS**
**THIRD RESPONDENT**

**JUDGE:** **NORTH J**

**DATE OF ORDER:** **11 SEPTEMBER 2001**

**WHERE MADE:** **MELBOURNE**

**THE COURT ORDERS THAT:**

1 Subject to paragraph 2, the respondents release those persons rescued at sea who were brought on board MV Tampa on or about 26 August 2001 and who were then transferred to HMAS Manoora on or about 3 September 2001, and bring those persons ashore to a place on the mainland of Australia.

2 Paragraph 1 operates from 5.00pm Australian Eastern Standard Time on 14 September 2001, or on the determination of any appeal from this decision to the Full Court of the Federal Court of Australia, whichever is later.

3 Paragraph 1 does not apply in respect of any of the said persons who indicate to the respondents that they do not wish to be released and brought ashore to a place on the mainland of Australia.

4 Liberty is granted to the parties to apply generally as to the implementation of the orders made in paragraph 1.

5 (a) Subject to (c) hereof the respondents are to pay to each of the applicants the costs of and incidental to the proceeding commenced by that applicant; and

(b) Subject to (c) hereof the respondents are to pay to Amnesty International Limited and the Human Rights and Equal Opportunity Commission their costs of and incidental to these proceedings; and

(c) Liberty is granted to the respondents to apply by 4.15pm on 13 September 2001 to vary the orders made in subparagraph (a) and (b) hereof.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

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**IN THE FEDERAL COURT OF AUSTRALIA**

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**SECOND RESPONDENT**

**WILLIAM JOHN FARMER, SECRETARY AND CHIEF EXECUTIVE OFFICER OF THE DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AFFAIRS**
**THIRD RESPONDENT**

**JUDGE:** **NORTH J**

**DATE:** **11 SEPTEMBER 2001**

**PLACE:** **MELBOURNE**

## REASONS FOR JUDGMENT

### THE APPLICATIONS, PARTIES AND INTERVENERS

1 Before the Court are two applications which were filed on 31 August 2001.

2 The applicant in the first application is the Victorian Council for Civil Liberties Incorporated (VCCL). VCCL is incorporated in Victoria under the *Associations Incorporations Act* 1981 (Vic). It is a non-government organisation committed to advocating and protecting fundamental rights and freedoms. It has been active in public discussion of the problems facing refugees, and in promoting Australia's adherence to its international obligations owed to refugees.

3 The respondents to the first application are the Minister for Immigration and Multicultural Affairs, the Attorney-General, the Minister for Defence, and the Commonwealth of Australia.

4 As the case was finally argued VCCL claimed that the respondents were unlawfully holding 433 asylum seekers, whose situation will be outlined shortly, aboard the MV Tampa near Christmas Island. VCCL claimed, under s 39B of the *Judiciary Act* 1903 (Cth) mandamus and injunctions to enforce compliance with obligations which it said the respondents had under the *Migration Act* 1958 (Cth) (the Act) to bring these people to Australia, or alternatively, relief in the nature of habeas corpus compelling the respondents to release the 433 people from unlawful detention.

5 The applicant in the second application is Mr Eric Vadarlis. He is a solicitor practising in Melbourne who seeks to offer legal assistance to the asylum seekers on a pro bono basis. The first respondent to this application is the Minister for Immigration and Multicultural Affairs, and the second respondent is the Commonwealth of Australia. The third respondent was added in the course of the proceedings and is the Secretary and Chief Executive Officer of the Department of Immigration and Multicultural Affairs (DIMA).

6 Mr Vadarlis made the same claims as VCCL but pursued several additional arguments and claims which will be referred to in detail later. In particular he claimed that he had been prevented from communicating with the asylum seekers and that this amounted to an

infringement of his implied constitutional freedom of communication. In respect of this claim he also relied on s 39B of the *Judiciary Act* to seek orders giving him access to the asylum seekers.

7 The two applications were heard together. It is convenient to refer to the respondents in both applications as "the respondents".

8 Leave was granted by consent of all the parties to Amnesty International Limited (Amnesty) and the Human Rights and Equal Opportunities Commission (HREOC) to intervene in the proceedings limited to the right to file submissions in writing and to be present in Court represented by counsel for the purpose of supplementing the written submissions if necessary. The consequence of the grant of leave to intervene was explained in *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520 at 534 as follows:

> *"An intervener, whether pursuant to s 12 of the* ADJR Act*, O 6, r 8(1) of the* Federal Court Rules*, s 78A of the* Judiciary Act *1903 (Cth) or otherwise, becomes a party to the proceedings with the benefits and burdens of that status."*

9 Amnesty is a worldwide movement of more than 1 million members in over 140 countries. Its object is to secure throughout the world observance of the provisions of the *Universal Declaration of Human Rights* (1948). It has a particular interest in the fair treatment of refugees.

10 HREOC is established under the *Human Rights and Equal Opportunity Act* 1986 (Cth) and has a statutory function to seek leave to intervene in proceedings which involve human rights issues (s 11(1)(o)) as defined in s 3 of the *Human Rights and Equal Opportunity Act.*

11 Both Amnesty and HREOC filed written submissions, which generally supported the case of the applicants. Mr Vadarlis expressly adopted the submissions filed by HREOC as his own.

**THE ROLE OF THE COURT**

12 Questions relating to refugees are matters of spirited debate at present in Australia.

The situation of the 433 people rescued by the MV Tampa has attracted considerable public attention and discussion. In these circumstances it is necessary to stress that the role of the Court is strictly confined. It has a duty to apply the law of Australia. It does not have a general power to do what judges personally think is right. Judges of the Court take an oath on appointment to do justice "according to law". That is the task that I have undertaken in this case. In the following reasons I explain how I have gone about that function. In particular I have defined the legal questions which the Court must answer. The definition of the issues demonstrates that the only matters before the Court concern the legal position of the people rescued by the MV Tampa. Questions of policy concerning the way Australia should treat refugees are solely questions for the government.

13 In order to determine the legal issues in the case it is first necessary to set out the facts relating to the applications.

**THE FACTS**

14 On Sunday 26 August 2001 a 20 metre wooden fishing boat was sinking in the Indian Ocean about 140 kilometres north of Christmas Island.

15 At the time the MV Tampa was in the vicinity on its way from Fremantle to Singapore. The MV Tampa carried a crew of 27 and was under the command of Captain Arne Rinnan. The MV Tampa is a 49,000 tonne roll on/roll off container ship registered in Norway and was carrying a cargo worth about 20 million dollars. It was licensed to carry no more than 50 people.

16 Captain Rinnan received a call from Australian authorities asking him to rescue a ship in distress. He agreed, and was guided to the ship by the Australian Coast Guard.

17 At about 5.00pm Captain Rinnan found 433 people on the sinking ship (these people will be referred to in this judgment for convenience by the neutral, if clumsy, term "the rescuees"). Previously, he had been told that the sinking ship carried 80 people. Nevertheless, he took the rescuees on board and inquired from the Australian Coast Guard where the rescuees should be taken. The Coast Guard responded that they did not know.

18 The MV Tampa started to head for Indonesia. Several of the rescuees objected and

threatened to commit suicide if the Captain did not change course for Christmas Island. Under that pressure the Captain determined to sail towards Christmas Island. When the MV Tampa was close to Christmas Island but outside Australian territorial waters, Captain Rinnan was asked by the Australian authorities to change course for Indonesia. Following this incident the owners engaged a solicitor on behalf of themselves and the master. In a fax sent off the following day to the DIMA, the solicitor, James Neill, related the events of the previous day as follows:

> *"5. … the Australian Authorities requested he sail to Indonesia and made certain threats. At the time, he was very close to Christmas Island. Had he sailed to Indonesia he would have exposed the vessel and persons on board to a number of potentially dangerous factors across an open ocean which may have resulted in massive loss of life. His view was that by far the safest course was to continue to Christmas Island.*
>
> *6. At this time the vessel is at Christmas Island. It does not have food and water on board to sustain the passengers and crew for long. Additionally, at present the vessel is lying off shore awaiting instructions / assistance in good weather for discharge of passengers into lighters which are available. Were the weather to turn ugly and this become not possible, there could be dire consequences.*
>
> *Lastly, please note that 'James Neill Solicitor' now acts for Owners and Master. Given that threats have been made about massive fines, they now require that their lawyer be present at any interview or discussion in relation to matters pertinent or relevant to fines, criminal or civil proceedings – either by phone or in person. … In relation to practical matters relevant to the discharge of the passengers please feel free to have all the discussions you like with the Captain, Owners and crew."*

19 Monday 27 August 2001 saw significant activity on and around the MV Tampa.

20 The Cabinet Office asked Mr Bill Taylor, the Administrator of Christmas Island, to ensure that no Australian vessel went out to the MV Tampa from Christmas Island. Mr Taylor was told that Cabinet was considering the issue. He was asked to ensure that boats from Christmas Island did not attempt to reach the MV Tampa. Flying Fish Cove, the port at Christmas Island, was then closed. The Harbour Master signed an order that "all boat movements in and out of the cove is prohibited" and this was placed on either side of the jetty. Barriers were erected at the end of the jetty and the public and local authorities on Christmas Island were notified in various ways of the closure of the port. The Administrator

advised DIMA that these steps had been taken.

21 Mr Neville Nixon, an officer of DIMA, spoke by phone to Captain Rinnan. The conversation was confirmed by Ms Phillipa Godwin, First Assistant Secretary, Detention Task Force, DIMA, in a memo dated the same day, 27 August 2001, to Captain Rinnan, as follows:

> *"This is to confirm your recent telephone conversation with Neville Nixon, DIMA. As Mr Nixon advised, the Australian Government at the highest level formally requests that you not approach Christmas Island and that you stand off at a distance at least equal to your current position – 13.5 nautical miles from the island.*
>
> *Mr Nixon has advised that you have agreed not to proceed further until advised by the Australian Government."*

22 At 11.30am Mr Neill, the solicitor acting on behalf of the owners and Captain Rinnan, spoke to Ms Godwin. He confirmed the conversation in a fax dated the same day, 27 August 2001, as follows:

> *"As discussed at approx 11.30 today the medical situation on board is critical.* ***If it is not addressed immediately people will die shortly.***
>
> *At this time, four people on board are unconscious, 1 Broken leg and 3 women are pregnant. Additionally diarrhoea is severe and a number of people are in a dangerously dehydrated condition. The ship has now run out of the relevant medical supplies and has no way of feeding these people.*
>
> *It is a simple matter to send a boat from shore to collect the sickest people, supply food and medical assistance. It could be along side in 30 minutes.*
>
> *At the request of the Australian Government the vessel is currently just off shore of Christmas Island. If the situation is not resolved soon more drastic action, may have to be taken to prevent loss of life."* [bold in original]

23 Captain Rinnan contacted the Royal Flying Doctor Service and reported that several rescuees were unconscious, one had a broken leg and two pregnant women were suffering pains. The Royal Flying Doctor Service did not regard the situation as requiring evacuation. Captain Rinnan was, however, concerned at the deterioration in the condition of the rescuees and was concerned about the welfare of his crew.

24 Nothing of relevance to these proceedings appears to have happened on the next day, Tuesday 28 August 2001.

25 However, as a result of these mounting concerns, at about 9.00am on Wednesday 29 August, Captain Rinnan took the MV Tampa into Australian territorial waters and stopped about 4 nautical miles from Christmas Island.

26 In response, within approximately two hours, 45 Special Armed Services (SAS) troops from the Australian Defence Force left Christmas Island and boarded the MV Tampa.

27 That evening in the House of Representatives the Prime Minister introduced the *Border Protection Bill* 2001 and moved that it be read a second time. In less than an hour the Bill was passed in the House of Representatives. In the early hours of the following morning the Bill was defeated in the Senate. Its provisions, however, indicate the intentions of the respondents. Some of the relevant provisions were as follows:

> *"2. Commencement*
>
> *This Act is taken to have commenced on 29 August 2001 at 9.00am by legal time in the Australian Capital Territory.*
>
> …
>
> *4. Direction that ship be removed from Australian territorial sea*
>
> *(1) An officer may, in his or her absolute discretion, direct the master or other person in charge of a ship that is within the outer limits of the territorial sea of Australia to take the ship, and any person on board the ship, outside the territorial sea.*
>
> …
>
> *5. Enforcement of direction*
>
> *Where a direction has been given under section 4, an officer may detain the ship, and take it, or cause it to be taken, outside the territorial sea of Australia. For this purpose, reasonable means, including reasonable force, may be used by the officer or another person.*
>
> …
>
> *8. No proceedings available to prevent removal of ship*
>
> *Proceedings may not be instituted or continued by any person in any court to prevent a ship, or any persons on board a ship, being removed to a place outside the territorial sea of Australia pursuant to a direction given under section 4.*

*9. No applications for protection visas*

*(1) Any application for a protection visa under the* Migration Act 1958*, made by a person who is on board a ship at the time when a direction is given under section 4 in respect of the ship, is not a valid application.*

*(2) Section 91F of the* Migration Act 1958 *applies in relation to an application covered by subsection (1) of this section as if it were an application covered by section 91E of that Act.*

*10. Act has effect in spite of any other law*

*This Act has effect in spite of any other law."*

28 On Thursday 30 August 2001 the Norwegian Ambassador went on board the MV Tampa and was handed a letter signed "Afghan Refugees Now off the coast of Christmas Island". It stated in part as follows:

> *"You know well about the long time war and its tragic human consequences and you know about the genocide and massacres going on in our country and thousands of us innocent men, women and children were put in public graveyards, and we hope you understand that keeping view of above mentioned reasons we have no way but to run out of our dear homeland and to seek a peaceful asylum. And until now so many miserable refugees have been seeking asylum in so many countries. In this regard before this Australia has taken some real appreciable initiatives and has given asylum to a high number of refugees from our miserable people. This is why we are whole heartedly and sincerely thankful to you.*
>
> *We hope you do not forget that we are also from the same miserable and oppressed refugees and now sailing around Christmas Island inside Australian boundaries waiting permit to enter your country.*
>
> *But your delay while we are in the worst conditions has hurt our feelings. We do not know why we have not been regarded as refugees and deprived from rights of refugees according to International Convention (1951).*
>
> *We request from Australian authorities and people, at first not to deprive us from the rights that all refugees enjoy in your country. In the case of rejection due to not having anywhere to live on the earth and every moment death is threatening us. We request you to take mercy on the life of 438 men, women and children."*

29 On Friday 31 August 2001 the two applications presently before the Court were filed. The applicants sought an immediate hearing. The circumstances and outcome of that application were explained in an *ex tempore* judgment delivered at 9.00pm that evening.

Relevantly the judgment stated:

> *"At approximately 5 pm tonight an application was filed by the Victorian Council of Civil Liberties Incorporated against the Minister for Immigration and Multicultural Affairs, Mr Ruddock, the Attorney-General, Mr Williams, the Minister for Defence, Mr Reith, and the Commonwealth of Australia. At approximately 5.20pm a further application was filed by Mr Eric Vadarlis against Mr Ruddock and the Commonwealth.*
>
> *These matters were referred to me because I am presently the rostered duty judge. In response to the urgency of the applications the court was convened at approximately 5.40pm. I was told when the court was convened that the respondents, at this time only one of whom, Mr Ruddock, in the first application, was represented by Mr Tracey QC and Mr Star of counsel, had barely been served with the papers. It is of course fundamental to the exercise by the Court of its jurisdiction that all parties have a fair opportunity to be heard and their arguments considered carefully and deliberately.*
>
> *Consequently, I stood the matter down until 7.15pm to allow the respondents time to instruct Mr Tracey and Mr Star or other counsel. Upon return to the Court Mr Tracey told me that the respondents sought an adjournment of the application until next Monday when the matter would be considered and after the respondents had obtained full instructions and had been able to fully consider their position.*
>
> *At that point I determined that the* ex parte *applications sought to be agitated by the respondents would proceed at 2.15pm tomorrow. The question then arose as to whether any orders should be made between that time and 2.15pm tomorrow.*
>
> *The applicants in each application contended that an order should be made to prevent the respondents from taking any steps to remove the motor vessel Tampa out of the territorial waters of Australia. The basis for seeking these orders was to preserve the authority of the Court to consider the merits of the application tomorrow. The applicants relied upon the oft-cited case of* Tait v R *(1962) 108 CLR 620 at 624.*
>
> *In the circumstances that application is compelling. The merits of each of the applications will be determined tomorrow. If the Tampa was removed from Australian waters before then, the Court's consideration of the issues would have been frustrated. Whether the applicants are correct or the respondents are correct in their cases, the Court cannot allow itself to be thwarted in the performance of its duty."*

30 In the result the respondents were restrained until the following day from taking any steps to remove the MV Tampa from Australian territorial waters. The application for *ex parte* relief was adjourned until 11.00am on the following day, Saturday 1 September 2001.

31 It is necessary to explain briefly the way the proceedings developed because several events which occurred in the course of the proceedings bear upon the determination of the issues now before the Court.

32 The case commenced at about 11.00am on Saturday 1 September 2001 and shortly afterwards Mr Bennett QC, the Solicitor-General for the Commonwealth, appearing for the respondents, read to the Court an announcement which had just been made by the Prime Minister. The announcement stated:

> *"I am announcing today that we have reached agreement with the Governments of New Zealand and Nauru for the processing of the people rescued by the MV Tampa.*
>
> *Under the terms of the agreement, the rescuees will be conveyed to Nauru and New Zealand for initial processing.*
>
> *New Zealand has agreed to process 150 of those aboard the Tampa. It is envisaged that this will include family groups involving women and children. Those found to be genuine refugees in New Zealand would remain there.*
>
> *The remainder of the rescuees will be assessed in Nauru and those assessed as having valid claims from Nauru would have access to Australia and other countries willing to share in the settlement of those with valid claims.*
>
> *Australia will bear the full cost of Nauru's involvement in this exercise.*
>
> *Arrangements will be made to safely transship the rescuees through a third country. We are currently in discussions with appropriate countries to effect this.*
>
> *We are also working closely with the International Organisation for Migration and the UNHCR to ensure that these arrangements are managed carefully and that the rescuees receive appropriate counselling and assistance.*
>
> *Australia will continue to ensure that the rescuees receive all necessary humanitarian assistance while these arrangements are put in place.*
>
> *I would like to take this opportunity to express my Government's gratitude to the Governments of Nauru and New Zealand for their ready and constructive humanitarian assistance*
>
> *1 September 2001"*

The arrangements will be referred to as "the Nauru/NZ arrangements".

33 At about 1.00pm Mr Bennett said:

> *"Your Honour, my instructions are that the government wishes to commence implementing the arrangements announced by the Prime Minister as soon as possible and if it is possible to do so, tomorrow. In those circumstances, we would ask your Honour to convert these proceedings to a final hearing today and deal with the matter today."*

34 In order to assess whether this course was practicable I directed, with the consent of the parties, that they deliver contentions of fact and law by 4.15pm that day. That was done. What followed is reflected in the judgment delivered at about 5.45pm as follows:

> *"In the course of the proceedings today, Mr Bennett, appearing on behalf of the respondents, sought orders that the trial of the action be expedited, that it commence tomorrow and that therefore it replace the anticipated three-stage process of first, today's intended* ex parte *application, followed by an application for interlocutory orders and then the trial of the action. That would be the conventional course for a matter such as this. The reason for making the application for an expedited trial arose from the statement made this morning by the Prime Minister that an agreement had been reached with New Zealand and Nauru, to process the rescuees on the MV Tampa. It seems from the material before me that that course has been agreed to by the Opposition.*
>
> *Notwithstanding that agreement or arrangement, the applicants seek to proceed with their application. It appears that they assert rights in the rescuees that they seem to contend will not be recognised or protected by the arrangement announced by the Prime Minister this morning. The request for orders that the trial be expedited so as to start tomorrow is an extraordinary application. The question for me is whether the circumstances are so unusual and the protections for all the parties sufficient to make it proper to take such a step. Ordinarily, the process of litigation is spaced in such a way that sufficient time is given for the interlocutory steps to be taken with some degree of leisure. Obviously, the proposal does not allow any such leisure.*
>
> *Ultimately, the consideration which must guide me is the interests of justice in all the circumstances. It is very obvious that the interests of the rescuees will be best served by the court coming to a final conclusion as quickly as is possible. With that in mind, there has been considerable discussion through the afternoon about procedural methods by which this unusual step could be taken. Firstly, I asked the parties to file contentions of fact and law by 4.15pm so that the essence of the cases made by each of them could be understood a little better. With very commendable cooperation and speed, that was done.*
>
> *As a result of the resumption of the proceedings shortly after 4.15pm, certain other procedural requirements have been isolated. I propose to make directions in relation to each of them. They, however, represent only the first examples of the sort of cooperation and flexibility which I envisage will be*

*necessary in order to achieve the expedited hearing, which I propose to order. I am confident from the approach that counsel have taken and the absolute necessity that such a flexibility requires, that counsel will cooperate with each other and with the Court in order to make the trial workable.*

*I have indicated, particularly to the applicants, that in the event that they see the need at the end of the respondents' case to reopen their case, for the reason that they are taken by surprise by anything raised by the respondents, such an application would be viewed in the context of the expedition that has been accorded to the case. The ordinary rules would be relaxed to a considerable degree. In the end, of course, it will be a matter for judgment if such an application arises.*

*Therefore, I order that:*

*1. The trial of the applications will commence at 11 am tomorrow, Sunday 2 September 2001.*

*And I direct:*

*2. (a) That Captain Rinnan and Lieutenant Colonel Gus Gilmore attend the proceeding on 2 September by telephone for the purpose of being examined.*

*(b) That the deponent Farmer attend for cross-examination on his affidavit filed on 1 September 2001.*

*(c) That the Department of Immigration and Multicultural Affairs disclose and make available for inspection by 10.15am on 2 September 2001, all documents concerning the immigration status and/or custody and detention of the rescuees on MV Tampa.*

*(d) That by 10.15am on 2 September 2001, the Department of Defence disclose and produce for inspection all relevant documents relating to the presence of the SAS on MV Tampa, including orders to Lieutenant Colonel Gilmore and the witness, C1, and directions relating to and reports concerning the control of the port at Christmas Island, including any relevant documentary information concerning boats other than SAS boats approaching the MV Tampa.*

*(e) The respondents disclose and produce for inspection any letter from the rescuees to the respondents or any of them.*

*(f) That the witness described as C1, who is to be called by the respondents, attend the proceedings on 2 September 2001 by telephone from the MV Tampa.*

*(g) The respondent is not obliged to produce for inspection documents referred to in subparagraphs (c), (d) and (e) for which privilege is claimed and which are listed in a document delivered to*

*the applicants at 10.15am on 2 September 2001.*

*3. Costs are reserved."*

35 The trial commenced at about 11.00am on Sunday 2 September 2001. With commendable cooperation and speed the parties overnight formulated a statement of agreed facts. The statement became part of the evidence in the case. It read:

*"1. The MV Tampa ("the ship") rescued certain persons ("the rescuees") on the High Seas.*

*2. The rescuees boarded the Ship voluntarily.*

*3. The Ship commenced proceeding towards an Indonesian port. Certain of the rescuees objected to this course and threatened to commit suicide whereupon the master altered course at their request for Christmas Island.*

*4. The Ship was refused permission to enter Australian Territorial Waters.*

*5. Nevertheless it did so. It is in Australian Territorial Waters but not in a port and therefore not in the Migration Zone.*

*6. There are 433 rescuees on board the ship, anchored about 4 nautical miles off Christmas Island and outside the port. They are not part of the crew of the MV Tampa.*

*7. The rescuees were picked up by the MV Tampa at the request of the Australian authorities.*

*8. They are not allowed to leave the ship except to leave Australian territorial waters. The Ship is free to leave Australian territorial waters.*

*9. No other vessels are permitted to approach the ship without the authorisation of the Commonwealth, whether through the SAS officers on board or otherwise who would refuse permission unless it was for the purpose of moving the rescuees out of Australian territorial waters and then subject to safety considerations and satisfaction of a bona fide intention not to move them to Australia.*

*10. Their movements on the ship are controlled by SAS officers and not by the Captain of the ship.*

*11. SAS officers boarded the ship because it contained unlawful non-citizens who did not hold visas to enter Australia. The officers included SAS medical personnel whose purpose was to render medical and humanitarian assistance in response to a distress signal. Part of*

*the purpose was to provide security for the crew. Another part of the purpose was to deal with any medical emergencies and thus remove the basis for the distress signal and facilitate the departure of the ship from Australian Waters.*

*12. The ship has been forbidden by Australian authorities from proceeding any closer to Christmas Island and from entering the port. Thus far that instruction has been obeyed. The effect of the continuing presence of the SAS officers is that the captain and crew are unlikely to attempt to move the ship into the port. This is a consequence desired by the Australian Government.*

*14. None of the asylum seekers hold a visa entitling them to enter Australia. Therefore they would be unlawful non-citizens for the purposes of s.14 of the Migration Act if they entered the "migration zone" as that phrase is defined in s.5 of the Migration Act.*

*15. The evidence justifies an inference that many of the rescuees would, if entitled, wish to apply for protection visas, and would wish to leave the ship and enter Australia.*

*16. The rescuees have no access to communications with persons off the ship and persons off the ship are unable to communicate with them."* [numbering incorrect in original.]

36 A further fact was later agreed as follows:

*"It is, and at all relevant times has been, the view of the Captain of the Tampa that he will not sail the Tampa out of Australian territorial waters while the rescuees are on board."*

37 Despite the huge effort required – Mr Bennett said 100 people had been involved overnight – discovery was completed by the start of the hearing and the parties agreed on the documents to be tendered. As a result of the tender of the statement of agreed facts, the number of witnesses required to be called was significantly reduced.

38 Mr Bennett then indicated that the respondents would be seeking an undertaking as to damages from the applicants if they sought the continuance of the interim injunction after the conclusion of the hearing that day.

39 At that point I required each of the parties to briefly outline their arguments so that the evidence could be more easily understood. Following these outlines a number of affidavits were formally read as part of the evidence of each of the parties. Only one deponent was

cross-examined, namely, Mr William John Farmer, the third respondent in the second application. I will return to his evidence in due course.

40 Mr Bennett then tendered comments made by the Prime Minister at a press conference held earlier on that day. As it bears on the issues in this case it should be included. It stated:

> *"Ladies and gentlemen I can announce that an agreement has been reached with the Government of Papua New Guinea for the trans-shipment of the people from the Tampa through Port Moresby and then via aircraft to both Nauru and New Zealand. The proposal is that the people should be transferred from the Tampa to the amphibious troop ship Manoora which is a very large vessel capable of travelling six thousand kilometres. It's a large troop ship that has extensive medical facilities on board including I understand two operating theatres. Troops remain on this ship for weeks on end. It is within the inevitable constraints of any vessel quite comfortable and it can adequately accommodate all of the people who will be taken from the Tampa.*
>
> *I am told by the Chief of the Defence Force through the Defence Minister that as I speak the Manoora is ready to take people on board. The Manoora is now ready to take people on board. The idea is that they should be transferred to the Manoora then the Manoora will sail to Port Moresby and then they will be transferred to aircraft that will take them to Nauru and to New Zealand. I can also inform you that a party comprising representatives from the Department of Immigration and other relevant Federal Government departments are on the way to Nauru with a view to putting in hand preparations for the construction of temporary accommodation by way of a tent facility for the people to be received on that island.*
>
> *So in quite a real sense the arrangements are now in place. We have achieved an humanitarian outcome. All of the people can be properly cared for. They will on my advice be far more comfortable on the Manoora than they are on the Tampa. I repeat that the Manoora is now ready to take people on board. It could begin to take people on board today and complete that process tomorrow. So I want it to be understood that all the arrangements that were necessary to put in place the execution of the arrangement that I negotiated with the governments of New Zealand and Nauru yesterday, all of the things that are necessary to give effect to that are now in place. And from our point of view the government is ready, the Defence Forces are ready, the Immigration authorities are ready to give effect to that plan. I want to record my deep appreciation to the Prime Minister of Papua New Guinea, Sir Mekere Morauta, for the cooperation and the willingness of the government of that country to cooperate with Australia in relation to this issue. This is a truly Pacific solution to a problem which involved the governments of Australia, New Zealand, Nauru and Papua New Guinea and they have all worked together and I again express on behalf of the Government and the Australian people our thanks to the governments and the people of those three*

*countries for their willingness to cooperate. I believe that the humanitarian consideration and the best welfare of the people now on the vessel will be better met if they can be transferred as soon as possible to the Manoora where the conditions are obviously more comfortable than what they are on the Tampa."*

41 Then, just before 6.00pm, I said to the parties:

*"I think it time to discuss timetabling and the issues that are left. The position is that I assess that the submissions that the Court will require will take some time. The matters that are raised are novel and they are not easy and I am not prepared to have them argued at the tail-end of the day in circumstances where necessarily everyone is weary, including myself. The Court has sat from Friday at various times right through the weekend. The matter must be dealt with in accordance with proper and careful procedures and proper deliberation. That won't be the case if the matter proceeds to submissions tonight.*

*Consequently it seems to me there needs to be considered (a) the fate of the injunction and (b) an application, if there is to be any, in relation to undertakings as to damages. But given that that is where the case stands, I turned my mind to the usual process adopted by this Court in the conduct of any litigation. One of the central procedures used by this Court, as no doubt all those at the bar table know, is the process of mediation - mediation by either outside mediators or mediators who are employed by the Court.*

*The process of mediation has proved to be extremely successful in directing parties' attention to issues in cases and allowing them to see the results in much more flexible terms than the Court might be able to deliver by a judgment according to the strict letter of the law.*

*On the assumption that the case will not conclude tonight, it seems to me that a moment has been reached when that process is particularly appropriate in this case. I will shortly hear whether the parties are prepared to engage in a process of mediation with a Registrar of the Court who is immediately available, that process to be strictly limited in time, and if unsuccessful, then I will proceed to hear any applications relating to the future of the injunctions and/or any application for an undertaking as to damages. I will hear those matters to conclusion this evening and propose to list the remainder of the case to commence tomorrow morning.*

*It is probably best I think for the parties to have a short time to consider whether they are prepared to engage in the process of mediation. That should be seen against the background that there has been evidence given this afternoon, particularly evidence relating to the intentions of the government consequent upon the arrangement that has been reached. That must be seen against the background of the various arguments that have been outlined and the parties will have to assess the strength of those arguments. It seems to be undoubted that the applicants have moved the Court out of strong feelings based on conscience and justice and there may be room for those concerns to*

*be addressed in some sort of procedures in consultation with the respondents.*

*Having had extensive experience of the success of mediation, I am fairly committed to that course in this case. The Court has power to order the parties into mediation compulsorily. I would prefer not to exercise that power, but may be inclined to do so unless I can be dissuaded. Consequently, I propose to adjourn until 6.10pm so that I can return to hear argument on the question whether the matter should be referred to mediation. If the parties accept that it should be, then there is no reason why the mediation could not start immediately on the basis that I would resume any other applications at 7.30pm tonight."*

42 Neither the respondents nor the VCCL, agreed to mediation. Nonetheless the matter was referred to Registrar Wood for mediation. Despite the initial reluctance to enter mediation, at 9.45pm the parties announced an agreement in principle. The agreement was reduced to writing and read into transcript at the commencement of the hearing on the next day. It was slightly varied in the evening of 3 September 2001 by adding paragraph 4.1A. The variation permitted the respondents to remove a number of persons from the MV Tampa suspected of committing people smuggling offences. As the agreement is relevant to the matters in question, it is set out as follows:

*1. The interlocutory injunction is to be discharged.*

*2. No application is to be made for an undertaking as to damages in relation to the undertakings and other terms of this agreement.*

*3. The rescuees presently on board the MV Tampa will be transferred to the HMAS Manoora.*

*4. The Respondents undertake that:*

*5.1 None of the rescuees will be required to leave HMAS Manoora or removed from it until the determination of the proceedings before North J and any appeal by the Respondents to the Full Federal Court.*

*4.1A Clause 4.1 shall not prevent any of the rescuees who it is intended to charge with an offence being arrested and brought to any part of Australia or Christmas Island.*

*4.2 Notwithstanding 4.1 the Respondents or any of them may, if any of the rescuees so request, remove any such rescuee or permit him or her to leave for the purpose of transportation to any country requested by such rescuee and agreed to by the Respondents or any of them.*

*4.3 If the Respondents are unsuccessful in these proceedings and if*

*the Court makes an order for the return of any or all of the rescuees to Australia (other than rescuees referred to in paragraph 4.2), the Respondents will comply with any such order.*

*4.4 In the event that the Respondents are unsuccessful in any appeal to the Full Court of the Federal Court and seek leave to appeal to the High Court of Australia, they are at liberty to apply for a stay of the order on such terms as may be agreed or determined by the court to which the application is made.*

*5. The Third Respondent agrees that the general effect of this Agreement will be made known to the rescuees.*

*6. The parties agree that this litigation, and any appeal flowing from it, will be conducted, on the basis of the evidence given at the trial including the agreed facts and that no party will seek relief or assert rights or legal consequences on the basis that the status of any alleged detention of the rescuees on HMAS Manoora is different to the status of any alleged detention on the MV Tampa.*

*7. The terms of this agreement are accepted by HREOC.*

*8. All parties will oppose intervention by any party not willing to be bound by the terms of this agreement (or in case of HREOC, any party not willing to be bound by the terms of clause 6 of this agreement).”*

43 Following the agreement the rescuees were transferred from the MV Tampa to the HMAS Manoora. The HMAS Manoora then commenced the voyage towards Port Moresby.

**OVERVIEW OF THE ARGUMENTS**

44 For ease of understanding the remainder of these reasons, it is useful to briefly outline the arguments which will now be considered.

45 **The order for release argument**. On the basis that the Act does not apply to the situation of the rescuees, the applicants claim that the rescuees were detained by the respondents on board the MV Tampa without any legal authority. The applicants asked the Court to order the respondents to release the rescuees. The respondents agree that the Act does not apply to the situation of the rescuees, and also that an order for release would be made if the rescuees were detained without lawful authority. However, the respondents contended that the rescuees were not detained by the respondents, but were free to go anywhere other than Australia.

46 **The power to expel argument.** Again on the basis that the Act does not apply to the rescuees the applicants claim that the respondents have no lawful authority to expel the rescuees from Australia. They contend that the Court should grant an injunction restraining the respondents from expelling the rescuees from Australia. This argument raises the question of the applicants' standing to seek such relief.

47 **The section 245F argument**. The applicants claim that s 245F(9) of the Act applies to the situation of the rescuees and requires the respondents to bring them to the mainland of Australia. They seek mandamus to compel the respondents to perform that statutory duty. The respondents contended that the Act does not apply to the situation of the rescuees, and, in any event, the applicants do not have standing to bring the claim.

48 **The section 189 argument.** Mr Vadarlis claims that s 189 of the Act applies to the situation of the rescuees and requires the respondents to take the rescuees into detention. He seeks mandamus to compel the performance by the respondents of this duty. Again the respondents argued, amongst other matters, that the Act does not apply to the situation of the rescuees, and, in any event, the applicants do not have standing to bring the claim.

49 **The freedom of communication argument.** Mr Vadarlis argued that the respondents had prevented him from communicating with the rescuees and had thereby denied him his implied constitutional freedom of communication. He seeks an injunction and mandamus to allow him to give legal advice to the rescuees.

**THE ORDER FOR RELEASE ARGUMENT**

50 The process of an application for the grant of a writ of habeas corpus is an ancient procedure whereby the Court may order the release of a person who is detained without lawful authority. The Latin expression habeas corpus, although quite widely understood, is rather outdated: see *Kelleher v Corrective Services Commission of New South Wales* (1987) 8 NSWLR 423 at 424 per Priestley JA. I will mainly use the more modern description "application for an order for release" in this judgment.

51 In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, Brennan, Deane and Dawson JJ said at 19:

> *"Under the common law of Australia and subject to qualification in the case of an enemy alien in time of war, an alien who is within this country, whether lawfully or unlawfully, is not an outlaw. Neither public official nor private person can lawfully detain him or her or deal with his or her property except under and in accordance with some positive authority conferred by the law. Since the common law knows neither lettre de cachet nor other executive warrant authorizing arbitrary arrest or detention, any officer of the Commonwealth Executive who purports to authorize or enforce the detention in custody of such an alien without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision."* [citations omitted]

52 Their Honours made reference to a passage in the judgment of Deane J in *Re Bolton & Another; Ex parte Beane* (1987) 162 CLR 514 where he said at 528-9:

> *"The common law of Australia knows no lettre de cachet or executive warrant pursuant to which either citizen or alien can be deprived of his freedom by mere administrative decision or action. Any officer of the Commonwealth Executive who, without judicial warrant, purports to authorise or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate. That being so, it is the plain duty of any such officer to satisfy himself that he is acting with the authority of the law in any case where, in the name of the Commonwealth, he directs that a person be taken and held in custody. The lawfulness of any such administrative direction, or of actions taken pursuant to it, may be challenged in the courts by the person affected: by application for a writ of habeas corpus where it is available or by reliance upon the constitutionally entrenched right to seek in this Court an injunction against an officer of the Commonwealth. It cannot be too strongly stressed that these basic matters are not the stuff of empty rhetoric. They are the very fabric of the freedom under the law which is the prima facie right of every citizen and alien in this land. They represent a bulwark against tyranny."*

53 In *Lim,* McHugh J concurred with Brennan, Deane and Dawson JJ, stating at 63:

> *"Absent a statutory power of detention, no public official has any power to detain an alien who has entered the country whether or not that person's entry constituted an illegal entry."*

54 The ancient process involves two steps. The first step is the making of an order nisi for the issue of a writ of habeas corpus which requires the person holding the detainee to bring the detainee to the court and show cause why the detention is lawful. If, on the hearing, the detention cannot be justified the order nisi is made absolute and the court orders that the detainee be released.

55 The respondents did not contest that this Court has jurisdiction in this case to make an order of such a nature. They were correct in this.

56 The respondents also did not deny that the applicants have standing to bring this aspect of the application. In this the respondents were also correct: *Waters v Commonwealth of Australia* (1951) 82 CLR 188 at 190; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591 per Gleeson CJ and McHugh J at 600, Gummow J at 627 and Kirby J at 652-3; and *Clarkson v R* [1986] VR 464 at 465-6.

57 The respondents' answer to the claim for an order for release of the rescuees was that the rescuees were not detained by the respondents in the sense required for the making of such an order.

58 Mr Bennett relied on *Bird v Jones* (1845) 115 ER 668, a case in which it was claimed that the plaintiff was falsely imprisoned. In that case, Williams J outlined the facts at 670 as follows:

> *"A part of Hammersmith Bridge, which is generally used as a public footway, was appropriated for seats to view a regatta on the river, and separated for that purpose from the carriage way by a temporary fence. The plaintiff insisted upon passing along the part so appropriated, and attempted to climb over the fence. The defendant (clerk of the Bridge Company) pulled him back; but the plaintiff succeeded in climbing over the fence. The defendant then stationed two policemen to prevent, and they did prevent, the plaintiff from proceeding forwards along the footway in the direction he wished to go. The plaintiff, however, was at the same time told that he might go back into the carriage way and proceed to the other side of the bridge, if he pleased. The plaintiff refused to do so, and remained where he was so obstructed, about half an hour."*

59 Coleridge, Williams and Patteson JJ held that the plaintiff had not been falsely imprisoned. Coleridge J said at 669:

> *"But, although thus obstructed, the plaintiff was at liberty to move his person and go in any other direction, at his free will and pleasure: and no actual force or restraint on his person was used, unless the obstruction before mentioned amounts to so much.*
>
> …
>
> *And I am of opinion that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be moveable or fixed: but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that*

> *place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom: it is one part of the definition of freedom to be able to go withersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own."*

60 Williams J said at 670:

> *"About the meaning of the word imprisonment, and the definitions of it usually given, there is so little doubt that any difference of opinion is scarcely possible. Certainly, so far as I am aware, none such exists upon the present occasion. The difficulty, whatever it may be, arises when the general rule is applied to the facts of a particular case."*

61 On the facts of *Bird v Jones*, Lord Denman CJ came to the conclusion that the plaintiff had been imprisoned.

62 Mr Bennett relied on this case as defining in principle what amounts to detention for the purposes of an application for an order for release. But in truth it was a case determined on its own facts. Those facts are very far from the facts of the present case. For that reason it is of limited assistance in resolving the issues which arise in the present case.

63 In the present case the distinction between partial and total restraint of freedom distracts the focus from the essential issue. It may be accepted that as far as the respondents were concerned the rescuees were free to go anywhere other than Australia and hence were only partially restrained. But the question here is whether that freedom is real or illusory. As Townley J said in *Burton v Davies and General Accident Fire and Life Assurance Corporation Ltd* [1953] StRQd 26 at 30:

> *"If I lock a person in a room with a window from which he may jump to the ground at the risk of life or limb, I cannot be heard to say that he was not imprisoned because he was free to leap from the window."*

64 Mr Bennett contended that the Court must view the opportunities for escape from custody against the background of the circumstances in which the custody arose. He said that the custody of the rescuees was "self-inflicted". They were only brought towards Australia because several had threatened to commit suicide if Captain Rinnan continued to sail to Indonesia after rescuing them. They demanded to be taken to Christmas Island.

65 To describe the plight of the rescuees as self-inflicted is not a balanced view of the full circumstances of their situation. The evidence is that Captain Rinnan decided to change course from Indonesia to Australia because of threats by five men to jump overboard. There is no evidence that any of the other 428 rescuees played any direct part in inducing Captain Rinnan to head for Australia. Further, the rescuees were saved from a sinking ship. They did not contemplate the events that took them aboard the MV Tampa. Moreover, the immediate event that gave rise to the boarding of the MV Tampa by the SAS was the decision of Captain Rinnan to enter Australian territorial waters. He did so in response to what he regarded as a medical emergency. These developments could not have been foreseen by the rescuees.

66 In addition, it is probable that a significant number of the rescuees are people genuinely fearing persecution in Afghanistan. Prime Minister Helen Clark of New Zealand said in a media statement concerning the Nauru/NZ arrangements on 1 September 2001:

> *"… asylum seekers from Afghanistan flee from one of the world's most repressive regimes.*
>
> *Human rights abuses are common, one quarter of children die by the age of five and 3.6 million Afghans have become refugees.*
>
> *The next planned refugee arrivals in New Zealand under its quota arrangements with the UNHCR are also Afghans."*

67 It is notorious that a significant proportion of asylum seekers from Afghanistan processed through asylum status systems qualify as refugees under the *Convention relating to the Status of Refugees* (1951) (the Refugees Convention). Once assessed as refugees, this means that they are recognised as persons fleeing from persecution in Afghanistan. While such people no doubt make decisions about their lives, those decisions should be seen against the background of the pressures generated by flight from persecution.

68 The totality of the circumstances of the rescuees is to be considered and it is not adequately described as "self-inflicted" in relation to a significant number of the rescuees.

69 Then Mr Bennett argued that the rescuees were not detained because there were three avenues of escape open to them.

70 One of the means of escape was to leave with anybody who was prepared to take them from the MV Tampa. There is no evidence that there is any such person or body. None

has so far come forward. The chances of any such offer being made is limited because the number of rescuees is so large. The nearest port was closed by the respondents to stop any local ships approaching. There was a limit on how long the rescuees could remain on board the MV Tampa as it could not accommodate them for long. They stayed on the deck under a tarpaulin and in five empty shipping containers. The suggested means of egress was not a real option. In the circumstances it is mere speculation.

71 Another means of escape suggested by Mr Bennett is for the rescuees to leave on the MV Tampa. It is an agreed fact that the captain will not sail out of Australian waters while the rescuees are on board. This means that leaving with the MV Tampa is not an option for the rescuees. The respondents contended that it was no fault of theirs that the rescuees could not leave in this way, and hence no orders against them are justified if this means of escape is blocked to the rescuees.

72 However, the respondents cannot, in my view, rely on this as a means of escape. The resolution of the Captain is to be expected. He rescued the people from the sea and brought them towards Australia. He came into territorial waters only in response to what he regarded as a medical emergency. The ship is not equipped to accommodate such a large number of people. And further it is engaged in a high value commercial operation which has already been interrupted by these events. In the circumstances it is not reasonable to expect, nor is it a practical possibility, that the rescuees could leave on the MV Tampa. It could not be the reasonable expectation of the respondents with the knowledge of these facts that this course was open to the rescuees.

73 Finally, Mr Bennett contended that the rescuees could leave pursuant to the Nauru/NZ arrangements, and that would be an escape from the detention. Consequently, any restraint on the rescuees is partial. In order to examine this argument it is necessary to consider the objectives of the respondents throughout the incident involving the rescuees.

74 Mr Farmer, the Secretary and Chief Executive Officer of DIMA, has been involved in discussions at meetings concerning the MV Tampa issue from 27 August 2001 when the rescuees were picked up by the MV Tampa. Those meetings included meetings with various Ministers and the Prime Minister. From these meetings Mr Farmer gained a clear view of government policy. That policy was that the rescuees were the responsibility of Norway and

Indonesia. It followed, and Mr Farmer accepted, that the government was determined that the rescuees would not be permitted to enter Australian territorial waters.

75 The circumstances of this case were unusual. Mr Farmer gave evidence that the illegal entry of persons into Australia is not normally dealt with at the highest level of government. Ordinarily asylum seekers rescued at sea near Christmas Island are brought onto Christmas Island, sometimes by locals and sometimes by the Australian Federal Police. They are then processed under provisions of the Act which allow for detention of unlawful non citizens (s189). In this case, the evidence establishes that the respondents resolved that the situation would be handled so that the Act would not apply. That meant that the rescuees would not be given the chance to make applications for protection visas within the migration zone, that is to say Christmas Island or the port at Flying Fish Cove. In order to achieve these objectives the following steps were taken.

76 Captain Rinnan was directed by the authorities to keep out of territorial waters. The evidence establishes that he was threatened by the authorities with fines if he did not comply. The threat was serious enough for the shipowners to engage a solicitor to handle discussion about the movements of the ship.

77 The Cabinet Office procured the Christmas Island Administrator to have Flying Fish Cove closed to prevent any boats from Christmas Island approaching the MV Tampa and returning to Christmas Island with the rescuees. Then on Wednesday 29 August when Captain Rinnan brought the MV Tampa into Australian territorial waters SAS troops were ordered aboard very quickly. That evening the government sought to introduce legislation which would have allowed the authorities to remove the MV Tampa from territorial waters. On Saturday 1 September the Prime Minister announced the arrangements with Nauru and New Zealand, and on Sunday 2 September the HMAS Manoora was standing by near the MV Tampa to take the rescuees on board. On 1 September 2001 the solicitor for VCCL sent a fax to the Minister for Immigration and Multicultural Affairs as follows:

> *"We are instructed by our client to request you to permit the detainees on board the MV Tampa to have access to persons who are able to provide legal advice on the rights that the detainees have under Australian law.*
>
> *It is our understanding that you have, through the presence on the MV Tampa of members of the Special Air Service, the capacity to allow others contact with the detainees. We also seek your assistance in indicating how contact*

*may be effected."*

78 Mr Farmer explained that the rescuees had not been consulted about the Nauru/NZ arrangements before they were announced. Following the announcement by the Prime Minister, his statement was apparently read to the rescuees. Mr Farmer "*believe[d] it was read by one of the people on the ship*". Mr Farmer was not able to tell the Court whether the rescuees were able to ask any questions, nor was he able to confirm whether any of the rescuees had changed their mind about wishing to seek asylum in Australia as a result of the Prime Minister's statement. There was no evidence before the Court clarifying whether the Prime Minister's statement was read to the rescuees in English or Afghani or, if in English, how many understood English.

79 Mr Farmer also gave evidence that no selection had been made of those rescuees who were to go to New Zealand and those who would go to Nauru. He said "*it is too early for me to say anything about Nauru*". No decision had been made about the legal regime to apply to the processing of refugee claims in Nauru. Nauru is not a signatory to the Refugees Convention. Hence, if persons are found not to be refugees they will not have the protection of the non-refoulement obligation contained in the Convention.

80 In assessing whether there is a reasonable means of egress, a relevant matter is the knowledge of the rescuees of any such means. The presence of 45 SAS troops, armed and in combat fatigues, is likely to have led the rescuees to the conclusion that they were bound to do as they were told. Indeed one of the agreed facts is that the SAS troops control the movements of the rescuees on board the MV Tampa.

81 In my view the evidence of the respondents' actions in the week following 26 August demonstrate that they were committed to retaining control of the fate of the rescuees in all respects. The respondents directed where the MV Tampa was allowed to go and not to go. They procured the closing of the harbour so that the rescuees would be isolated. They did not allow communication with the rescuees. They did not consult with them about the arrangements being made for their physical relocation or future plans. After the arrangements were made the fact was announced to them, apparently not in their native language, but no effort was made to determine whether the rescuees desired to accept the arrangements. The respondents took to themselves the complete control over the bodies and destinies of the rescuees. The extent of the control is underscored by the fact that when the

arrangements were made with Nauru, there had been no decision as to who was to process the asylum applications there or under what legal regime they were to be processed. Where complete control over people and their destiny is exercised by others it cannot be said that the opportunity offered by those others is a reasonable escape from the custody in which they were held. The custody simply continues in the form chosen by those detaining the people restrained.

82 The preceding analysis is based upon the distinction relied upon by Mr Bennett between partial and total restraint. Applying that dichotomy to the facts, I have found that there was in reality a total restraint on the freedom of the rescuees.

83 As mentioned earlier, undue emphasis on the distinction between partial and total restraint distracts attention away from the appropriate test in cases where an order for release is sought. It is appropriate to recall the words of the US Supreme Court in *Jones v Cunningham* 371 US 236 (1963) at 243 as to the approach which should be taken in relation to habeas corpus. The court said:

> *"Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."*

A more appropriate enquiry is as to the effect of the restraint on the liberty of the person. The level of restraint required to order the release of someone detained has long been recognised as less than close physical confinement: *Jones v Cunningham* at 238.

84 In *Jones v Cunningham* the US Supreme Court considered whether an order for release should be granted to a prisoner on parole but not in immediate physical detention. In reaching the conclusion that parole constituted custody for the purpose of habeas corpus, the Court reviewed the common law development of the concept of restraint. The court found that in England as early as 1722 an order for release was the proper remedy even where the restraint was something less than close physical confinement: see *R v Clarkson* (1722) 93 ER 625; *R v Delaval* (1763) 97 ER 913. In relation to the United States the court held at 239 that:

> *"… the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody. This Court itself has repeatedly held*

> *that habeas corpus is available to an alien seeking entry into the United States, although in those cases each alien was free to go anywhere else in the world."*

85 The court concluded on this point at 240:

> *"History, usage, and precedent can leave no doubt that, besides physical imprisonment , there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus."*

86 Relying on *Jones v Cunningham* the learned authors of both David Clark & Gerard McCoy, *Habeas Corpus: Australia, New Zealand, The South Pacific* (The Federation Press, 2000) at 66 and RJ Sharpe, *The Law of Habeas Corpus* (2nd Ed) (Clarendon Press, 1989) at 175, suggest that the test whether a person is detained for the purpose of habeas corpus is whether the restraint imposed is one that is not shared by the public generally. If this test were used in the present case the applicants would be similarly entitled to an order for release of the rescuees.

87 Such an approach was applied in an American case in which the facts were similar to the present case. In *Chin Yow v United States* 208 US 8 (1907) the question arose whether a Chinese person detained unlawfully on a ship in the port of San Francisco to be sent to China was imprisoned for the purpose of a petition of habeas corpus. The Supreme Court said at 12:

> *"If we regard the petitioner, … as if he had been stopped and kept at the limit of our jurisdiction, … still it would be difficult to say that he was not imprisoned, theoretically as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried to China. The case would not be that of a person simply prevented from going in one direction that he desired and had a right to take, all others being left open to him, a case in which the judges were not unanimous in* Bird v Jones*, 7 QB 742."*

**Purpose**

88 Mr Bennett then argued that an order for release was not available in this case because the traditional purpose of habeas corpus is to secure the release of persons, whilst the applicants seek relief "*for the purposes of triggering other rights*".

89 He contended that the Act and its associated Regulations do not permit the rescuees to apply for protection visas from the MV Tampa. However, the Act and Regulations do allow

them to apply from Christmas Island. The purpose of these applications, he argued, was to position the rescuees to make such visa applications.

90 Further, Mr Bennett contended that if an order for release were made and the rescuees were landed on Christmas Island they would be susceptible to detention under s189(2) of the Act. He submitted that it was not the purpose of an order for release to deliver the detainees into another form of detention. The purpose was to secure liberty not to continue detention.

91 For this approach Mr Bennett relied upon *R v The Coroner at Mackay* (1990) 1 QdR 451 and *R v Commissioner of Taxation; Ex parte Swiss Aluminium Australia Ltd* (1986) 13 FCR 66. Neither case concerned applications for habeas corpus. They are of limited assistance in resolving the present issue. *Swiss Aluminium* involved an application to set aside a subpoena directed to a stranger to the litigation. Beaumont J observed that a subpoena could be set aside on the ground that it was an abuse of process. He said at 68:

> *"If the proper inference to be drawn from the facts of the case is that a subpoena has been issued to a stranger, not with a view to obtaining documents for use at a trial, but in order to discover, for some other purpose, what documents the stranger holds, an abuse of process may have occurred."*

92 For present purposes I am prepared to accept as a general proposition that an application for an order for release could be rejected on the ground that it was made for a collateral purpose. It is, however, difficult to imagine practical circumstances which would meet such a description. If the applicant for an order for release genuinely seeks the relief no collateral purpose is shown. This is so even if the effect, including the desired effect, of the grant of the order is to change the legal rights of the detainee, or to expose the detainee to a different, but lawful, form of detention.

93 The former circumstance, namely that release occasions a change in legal rights, is not unprecedented in cases seeking an order for release. Indeed, this result occurred in the well known case of *Somerset v Stewart* (1772) 98 ER 499, in which the court ordered that a slave be released from detention by his master. There can be no greater change in legal circumstances occasioned by release from detention than a change from being treated as mere property to becoming a free person.

94 The Court is not prevented from making such an order for the reason that the effect would be to change the legal rights of a detainee. If this were so, for example, an order for

release of a detainee excluded by reason of his detention from the right to vote in an election would be foreclosed where that detainee sought an order for release so that he could vote in an election.

95 In this case there was some debate as to whether an order for release would trigger a change of substance in the legal rights of the rescuees. The applicants contended that the rescuees had the right to make protection visa applications while aboard the MV Tampa and they did not depend on reaching the port at Christmas Island to make such applications. It is not necessary for me to determine this issue because I have found that the applicants' purpose is to obtain the release of the rescuees from the alleged unlawful detention.

96 The latter circumstance, namely that release will expose the detainee to a different form of detention, has similarities to the situation which arose in *Re Gregory* (1899) 25 VLR 539. Mr Gregory, an alleged lunatic, had been detained on the basis of a medical certificate which the court found did not comply with statutory requirements. The detention was held to be unlawful and habeas corpus was granted in respect of that detention. However, the court was concerned that Mr Gregory was a dangerous lunatic and ordered that he be remanded in custody pending the holding of an inquiry under the *Lunacy Act* 1890. The court did not refuse to discharge Mr Gregory from the unlawful custody on the ground that it was about to order him into a different, but lawful, form of custody. In *Re Esperalta* [1987] VR 236 Gobbo J held that the detention of the applicant under the *Extradition (Foreign States) Act* 1966 (Cth) was unlawful. In consequence of an application for habeas corpus his Honour ordered that the applicant be discharged from that detention even though the applicant thereafter was held in detention under the *Migration Act.* See also Clark & McCoy, supra, at 232.

97 The purpose of an order for release is to discharge a person from unlawful detention. That is the purpose of the present application. It is no barrier to the making of the order for release that the rescuees will be susceptible to detention under s189(2) of the Act hereafter.

**Discretion**

98 Mr Bennett accepted that if it was found that the rescuees were detained there is only a "very limited" discretion to refuse an order for release. Whether the matters raised by Mr Bennett are properly open for consideration by the Court is a matter to which I will return

shortly. For the moment I will deal with each of the contentions as if they raised legitimate matters for consideration in the exercise of discretion.

99 First Mr Bennett argued that the detention was only a technical detention because the respondents had power to expel the rescuees without statutory authority. Thus the detention was in aid of the exercise of a valid power. Even if there is such a power its existence is not sufficient to negative the right of the rescuees to be released. This flows from the high value placed in our society on personal liberty. In any event, later in these reasons, I hold that there is no right to expel the rescuees without statutory authority. The respondents did not rely on any statutory authority. It follows that the detention was not in aid of the exercise of a valid power to expel.

100 Then it was said that the rescuees should not be released because the purpose of the application was to procure access to the Australian refugee processing system. I have already held that the immediate purpose of the application is to procure the release of the rescuees from unlawful detention. That is a legitimate purpose. If, as a result of the release, the rescuees apply for protection visas they would be exercising rights which Australia has provided in conformity with the norms of international law set out in the Refugees Convention. Subject to the next matter considered, the likely exercise of such rights is not a reason to refuse an order of relief.

101 Next, Mr Bennett referred to the effect of an order for release as changing the legal rights of the rescuees. Again I do not accept that this is a reason for refusing an order for release. The order simply effects the release of the rescuees. What steps the rescuees then take is up to them. They may utilise rights which then become available or they might not. Such matters go beyond the proper concern of the Court.

102 Then the respondents contended that the Court should not stand in the way of the exercise by the Executive of its attempt to protect the borders of Australia. There is a legitimate place for the deference of the Court to the action of the Executive. However, the power of the Executive must be exercised within the law. The Act has provisions enabling the protection of Australian borders against illegal entry. The Executive chose not to use those powers. The choice by the Executive to use an unlawful process to detain and expel the rescuees cannot exclude the rescuees from the benefit of an order for release.

103 Finally, it was submitted that the existence of the Nauru/NZ arrangements should persuade the Court not to order the release of the rescuees. In exercising any residual discretion it is not the role of the Court to pass judgment on the policies of the government. Rather, the Court must balance the right of the rescuees to be free of the unlawful detention if the order is made and the consequences of making no order and thereby leaving the rescuees subject to the Nauru/NZ arrangements, against the inconvenience caused by preventing the implementation of the Nauru/NZ arrangements. Prima facie, the rescuees have the right to their liberty and to their own choice as to their future course of action. They should not be forced by the exercise of discretion by the Court to accept a plan which they did not formulate or approve.

104 Thus, even if it were the case that the Court has a discretion to refuse the order for release, I would not exercise the discretion in favour of the respondents.

105 Although I have considered the arguments raised by Mr Bennett in favour of the exercise of discretion generally, it is quite clear that there is no discretion to refuse habeas corpus once the grounds for the issue of the writ have been made out: *R v Langdon; Ex parte Langdon* (1953) 88 CLR 158 per Taylor J; Clark & McCoy, supra, at 241 and Sharpe, supra, at 58.

106 So in this case, as the applicants have established that the rescuees have been unlawfully detained, it is not open to the Court to refuse relief as a matter of discretion on any of the grounds advanced by Mr Bennett.

**Relief**

107 In the result, the applicants are entitled to a remedy requiring the release of the rescuees. Usually it is unnecessary to specify the place of release. But as the present detainees are aboard a ship at sea the remedy can only be made effective in a practical sense if the respondents are obliged to release the rescuees on mainland Australia. In other words, designating the place of release is necessary to ensure the effectiveness of the remedy.

108 There is a further basis for requiring release on the mainland of Australia. In pars 110-122 below I consider whether the respondents have a right to expel the rescuees where the respondents do not rely on any statutory power to remove aliens. My conclusion is that

there is no such power. In those circumstances, the designation of the place of release is integral to the remedy of an order for release, because the purpose of the detention was to expel the rescuees from Australia.

109 In the unusual circumstances of this case, where the application for an order for release is made by persons other than the rescuees themselves and where the rescuees may wish to participate in the Nauru/NZ arrangements, it is appropriate to qualify the remedy so that the respondents' obligation to release the rescuees does not apply to any rescuee who indicates to the respondents a desire to continue to participate in the Nauru/NZ arrangements.

**THE POWER TO EXPEL ARGUMENT**

110 The Nauru/NZ arrangements involve the removal of the rescuees from Australian territorial waters. The respondents do not rely on any statutory power to expel the rescuees from Australian waters. They contend that the expulsion is a valid exercise of prerogative power.

111 This argument is significant in two respects. Mr Bennett relied upon the existence of this prerogative power as relevant to the question whether relief in the nature of habeas corpus should be granted. This matter has been referred to in par 107 of these reasons. Further, if contrary to my view, the rescuees are found not to have been detained, the question arises whether the respondents are, in any event, entitled to expel them from Australian territorial waters absent any statutory authority to do so.

112 In Harry Street & Rodney Brazier, *de Smith Constitutional and Administrative Law* (5th Ed) (Penguin Books, 1985) the learned authors said at 149-50:

> *"Whether the exclusion and expulsion of friendly aliens was permissible under the prerogative is doubtful".*

113 In *Robtelmes v Brenan* (1906) 4 CLR 395, Barton J said at 414-5 as to the existence of a royal prerogative to allow the expulsion of alien friends:

> *"Whether expulsion in Great Britain or in one of her self-governing Colonies or States, requires statutory authority has, no doubt, been the subject of some hesitation on the part of eminent lawyers, but it is not necessary for us to decide that question. It does not arise. The question here is, first, whether the statutory authority exists, and next, whether it has been properly exercised?*

*Now, in the* Encyclopœdia of the Laws of England*, vol. 5, p. 268, there are a few lines that state that question very clearly:-*

> 'There are dicta of *Blackstone* (1 Com. 366) and *Chitty (Pleas of Crown* ed. 1820 p. 49) to the effect that the Crown by its prerogative, can expel even alien friends; but there does not seem to have been any attempt since the Revolution to exercise such prerogative, and the extrusion of alien friends has since then always been effected by statutory authority.'

*The question to-day is one of statutory authority."*

114 *Re Bolton* concerned the power to arrest a US Army deserter and to deliver him to US authorities. At 520-2 Brennan J explained that in Australia the power to arrest and surrender persons was governed by statute. His Honour said at 520-2:

> *"Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force. This is such a case and the common law of habeas corpus and the* Habeas Corpus Act *1679 (31 Car. II c. 2) as extended by the* Habeas Corpus Act *1816 (56 Geo. III c. 100) are such laws. Section 11 (originally s.12) of the* Habeas Corpus Act *1679 prohibited under the severest penalties the sending of inhabitants or residents of England as prisoners into foreign places (per Scrutton L.J. in* R v Secretary of State for Home Affairs; Ex parte O'Brien) *[1923] 2 KB 361, at p.383 except in cases falling within certain provisos in the Act:* Colonel Lundy's Case *(1690) 2 Vent 314 [86 ER 460]. This provision remedied a defect in the writ of habeas corpus which Clarendon had been accused of exploiting by sending persons to 'remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law': Holdwsorth,* A History of English Law*, 3rd ed. (1996 rep.), vol. IX, pp. 116-117. Although a view persisted until 1815 that there was a prerogative power to arrest and surrender aliens to foreign states (Shearer,* Extradition in International Law *(1971), p.24), that view has long since been rejected: see* Clarke upon Extradition*, 4th ed. (1903), pp. 126-128;* Reg. v. King (*1860) 1 QSCR 1;* Brown v Lizars *(1905) 2 CLR 837. It is established that statutory authority is necessary for the surrender of any person to another country and to provide for his custody and conveyance: per Barwick C.J. in* Barton. v The Commonwealth *(1974) 131 CLR 477 at p.483. And thus the laws of this country secure the freedom of every lawful resident, whether citizen or alien, from arrest and surrender into the custody of foreign authorities on a mere executive warrant. Lord Denning M.R.* in Reg. v. Governor of Brixton Prison; Ex parte Soblen *[1963] 2 QB 243 at p. 299 stated the common law in terms which I would respectfully adopt:*

> > '… every person coming from abroad, as soon as he sets foot lawfully in this country, is free; and, so long as he commits no offence here, he is not to be arrested or detained for any offence that he may have

> committed in some other country. If any attempt were made to arrest him in order to surrender him to that other country, he would at once be entitled to be set free. The writ of habeas corpus is available to him for the purpose. In the absence of an extradition treaty, it is no answer for the Crown, or any officer of the Crown, to say that he wishes to send him off to another country to meet a charge there.'
>
> *The laws relating to the return and deportation of prohibited immigrants and the deportation of aliens and laws relating to extradition for trial on criminal charges qualify the general freedom from arrest and surrender to foreign authorities but, unless a provision of such an exceptional law applies, the common law and the* Habeas Corpus Act *1679 deny to the Executive Governments of this country, whatever inducement a foreign government may offer or press, any power to arrest and surrender an Australian resident into the custody of foreign authorities. Unless there be overriding statutory authority for the arrest and surrender of an Australian resident, he is entitled to a writ of habeas corpus to obtain his freedom here:* Ex parte Besset *(1844) 6 QB 481 [115 ER 180]. To justify such an arrest and surrender, there must be a statute or subordinate legislation …"*

115 The passage from the judgment of Deane J at 528-9 which is reproduced in par 52 of these reasons is to the same effect, although Mr Bennett observed that it is limited to the question of detention.

116 Mr Bennett accepted that these statements recognise that a resident alien cannot be removed from Australia without statutory authority. But he submitted that the same principle does not extend to non-resident aliens.

117 In my view, the fact that the applicant in *Re Bolton* had been granted permanent residence in Australia was not relevant to the statement of principle. He was an alien, and the remarks were directed to the situation of aliens, whether resident or not.

118 In *Lim* the issue was whether Commonwealth legislation authorising the detention and removal of aliens, namely, some Cambodian citizens who had arrived in Australia by boat, by the Executive was within the constitutional power to legislate with respect to aliens, and whether the legislation contravened the investment of judicial power of the Commonwealth in the judiciary, not the Executive.

119 Mr Bennett contended that several passages in the judgment of Brennan, Deane and Dawson JJ established that there was a power to deport aliens without statutory authority. Dr

Griffith QC, who appeared for Mr Vadarlis, contended that the passages confirmed that the power of the Executive in Australia to deport aliens is governed by statute, and that the Executive may not lawfully exclude an alien without such authority. The relevant passages are at 25-6 as follows:

> *The legislative power conferred by s.51(xix) with respect to "aliens" is expressed in unqualified terms. It prima facie encompasses the enactment of a law with respect to non-citizens generally. It also prima facie encompasses the enactment of a law with respect to a particular category or class of non-citizens, such as non-citizens who are illegal entrants or non-citizens who are in Australia without having presented a visa or obtained an entry permit. Such a law may, without trespassing beyond the reach of the legislative power conferred by s.51(xix), either exclude the entry of non-citizens or a particular class of non-citizens into Australia or prescribe conditions upon which they may be permitted to enter and remain; and it may also provide for their expulsion or deportation."*

And at 29-31 their Honours said:

> *"While an alien who is actually within this country enjoys the protection of our law, his or her status , rights and immunities under that law differ from the status, rights and immunities of an Australian citizen in a variety of important respects. For present purposes, the most important difference has already been identified. It lies in the vulnerability of the alien to exclusion or deportation. That vulnerability flows from both the common law and the provisions of the Constitution. For reasons which are explained hereunder, its effect is significantly to diminish the protection which Ch. III of the Constitution provides, in the case of a citizen, against imprisonment otherwise than pursuant to judicial process.*
>
> *The power to exclude or expel even a friendly alien is recognized by international law as an incident of sovereignty over territory. As Lord Atkinson, speaking for a strong Judicial Committee of the Privy Council, said in* Attorney –General (Canada) v. Cain and Gilhula*:*
>
> > 'One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: Vattel, *Law of Nations,* book 1, s.231; book 2, s.125."
>
> *His Lordship added:*
>
> > "The Imperial Government might delegate those powers to *the governor or the Government* of one of the Colonies, either by royal proclamation which has the force of a statute – *Campbell v Hall* – or by a statute of the Imperial Parliament, or by the statute of a local

> Parliament to which the Crown has assented. If this delegation has taken place, *the depositary or depositaries of the executive and legislative powers and authority of the Crown* can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them." (emphasis added)

> *The question for decision in* Attorney-General (Canada) v Cain *was whether the Canadian statute 60 and 61 Vict. c. 11 had validly clothed the Dominion Government with the power to expel an alien and to confine him in custody for the purpose of delivering him to the country whence he had entered the Dominion. The Judicial Committee concluded that it had. As the emphasized words in the above passage indicate, the power to expel or deport a particular alien, and the associated power to confine under restraint to the extent necessary to make expulsion or deportation effective, were seen as prima facie executive in character. The outcome of the appeal was that their Lordships upheld the lawfulness of the arrest and confinement of the respondents pursuant to executive "warrants", issued by the Attorney-General, 'to take the respondents, then residing in the province of Ontario, and return them to the United States of America".*
>
> *In this Court, it has been consistently recognized that the power of the Parliament to make laws with respect to aliens includes not only the power to make laws providing for the expulsion or deportation of aliens by the Executive but extends to authorizing the Executive to restrain an alien in custody to extent necessary to make the deportation effective."*

Further at 32 their Honours said:

> *"It can therefore be said that the legislative power conferred by s.51(xix) of the Constitution encompasses the conferral upon the Executive of authority to detain (or to direct the detention of ) an alien in custody for the purposes of expulsion or deportation. Such authority to detain an alien in custody, when conferred upon the Executive in the context and for the purposes of an executive power of deportation or expulsion, constitutes an incident of the executive power."* [citations omitted]

120 These passages recognise the fact that deportation of aliens is now comprehensively governed by statute. They do not directly address the question whether the power to deport an alien exists absent statutory authority. But the underlying assumption appears to be that that is the case.

121 In *Mayer v Minister for Immigration and Ethnic Affairs* (1984) 4 FCR 312 Davies J said at 316:

> *"But, whatever was, at one time, the common law prerogative power of the Crown in this matter, and that clearly was an arguable matter, at the present time the law with respect to the entry of persons to Australia and with respect to their expulsion is regulated by statute."*

This statement was not disturbed by the majority on appeal: *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 7 FCR 254.

122 The Act contains comprehensive provisions concerning the removal of aliens (ss198-9). In my view the Act was intended to regulate the whole area of removal of aliens. The long title of the Act is "[*a*]*n Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons"*. It leaves no room for the exercise of any prerogative power on the subject: *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508.

**Standing**

123 The applicants' claims that they have standing to seek an injunction to restrain the respondents from removing the rescuees from Australia are simple and compelling. They say that the acts of removal are unlawful. The unlawful actions of the respondents transgress the fundamental liberties of the rescuees. The rescuees are unable to bring proceedings themselves. The Attorney-General, who might otherwise act in the enforcement of law in the public interest, is himself a respondent.

124 Were the matter free from authority I would hold that in the unusual circumstances of this case, any citizen has standing to vindicate the fundamental right of the rescuees not to be expelled from Australia in the absence of a power to do so.

125 However, the question is not free from authority. The principles applicable were set out in *Australian Conservation Foundation Incorporated v Commonwealth of Australia* (1980) 146 CLR 493 (*ACF*) in which the High Court held that the Australian Conservation Foundation Incorporated did not have standing to challenge the decision of the government and some Ministers to approve a proposal to establish a tourist resort in Central Queensland and certain exchange control transactions relating to the project. Gibbs J said at 526-7:

> *"… the action was not brought by the Foundation to assert a private right. It is brought to prevent what is alleged to be a public wrong. The wrong is not one that causes, or threatens to cause, damage to the Foundation, or that affects, or threatens to affect, the interests of the Foundation in a material way. The Foundation seeks to enforce the public law as a matter of principle, as part of an endeavour to achieve its objects and to uphold the values which it was formed to promote. The question is whether, in these circumstances, it*

*has standing to sue.*

*It is quite clear that an ordinary member of the public, who has no interest other than that which any member of the public has in upholding the law, has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty. There is no difference, in this respect, between the making of a declaration and the grant of an injunction. The assertion of public rights and the prevention of public wrongs by means of those remedies is the responsibility of the Attorney-General, who may proceed either ex officio or on the relation of a private individual. A private citizen who has no special interest is incapable of bringing proceedings for that purpose, unless, of course, he is permitted by statute to do so.*

*The rules as to standing are the same whether the plaintiff seeks a declaration or an injunction. In* Boyce v Paddington Borough Council *[1903] 1 Ch 109, at p. 114, Buckley J. stated the effect of the earlier authorities as follows:*

> "A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with …; and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right."

…

*Although the general rule is clear, the formulation of the exceptions to it which Buckley J. made in* Boyce v. Paddington Borough Council *is not altogether satisfactory. Indeed the words which he used are apt to be misleading. His reference to "special damage" cannot be limited to actual pecuniary loss, and the words "peculiar to himself" do not mean that the plaintiff, and no one else, must have suffered damage. However, the expression "special damage peculiar to himself" in my opinion should be regarded as equivalent in meaning to "having a special interest in the subject matter of the action"."*

126 At 530-31 his Honour said:

*"I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it."*

127 Mason J said at 547:

> *"I also agree with Gibbs J. that, apart from cases of constitutional validity which I shall mention later, a person, whether a private citizen or a corporation, who has no special interest in the subject matter of the action over and above that enjoyed by the public generally, has no locus standi to seek a declaration or injunction to prevent the violation of a public right or to enforce the performance of a public duty."*

128 In a separate judgment Stephen J took the same approach.

129 On the basis of these principles the applicants do not have standing to seek an injunction in respect of the unlawful removal of the rescuees. They have no special interest in the subject matter of the action as explained in *ACF*.

130 The applicants, however, relied on the more recent authority of *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Limited* (1998) 194 CLR 247 (*Bateman*). In that case two organisations were involved in providing funeral benefits funds for the Aboriginal community of New South Wales. Another organisation, financed by public funds, intended to commence a funeral benefit fund catering for all Aborigines. The organisations involved in operating the existing funds sought an injunction to restrain the new fund from commencing, on the ground that the operation of the new fund was outside the statutory power of the organisation. The High Court held that the applicants had standing to bring the application.

131 The case was argued and decided on the principles in *ACF*. Gaudron, Gummow and Kirby JJ said at 267-8:

> *"Here, the respondents had an interest in the observance by the appellants of the statutory limitations upon their activities with respect to contributory funeral funds which, as a matter of practical reality, was immediate, significant and peculiar to them. The primary judge found that because the parties would be operating in substantially the same limited market it was highly probable that, if not restrained from commencing and concluding their activities, the appellants would cause severe detriment to the business of the respondents. That, in the circumstances of this litigation, gave the respondents a sufficient special interest to seek equitable relief."* [citations omitted]

132 McHugh J at 283-4 reached the same conclusion, as did Hayne J at 284.

133 There is no doubt that the present law as to standing is subject to criticism and is in a

state of flux. In *Bateman* McHugh J explained the position at 279-80 thus:

> *"The recent report on standing by the Australian Law Reform Commission concludes that there is no necessity for the Attorney-General to be the primary party to instigate actions for injunctive or declaratory relief in relation to public wrongs. The Commission has proposed the following test to replace all the common law standing test and almost all of the statutory tests in public law:*
>
> > 'Any person should be able to commence and maintain public law proceedings unless
> > - the relevant legislation clearly indicates an intention that the decision or conduct sought to be litigated should not be the subject of challenge by a person such as the applicant; or
> > - in all the circumstances it would not be in the public interest to proceed because to do so would unreasonably interfere with the ability of a person having a private interest in the matter to deal with it differently or not at all.'
>
> *Such a test of standing was regarded by the Australian Law Reform Commission as necessary to facilitate the role of private plaintiffs in public law proceedings.*
>
> *Furthermore many people, particularly those who are lawyers, think it wrong that breaches of the law should go unpunished. In their view, the law must be enforced whatever the circumstances.*
>
> *There can be little doubt that the present law of standing is far from coherent. Even if its current rationale is maintained, it is apparent that it is in need of rationalisation and unification."* [citations omitted]

134 His Honour expressed the view that the deficiencies in the law should be resolved by the legislature.

135 In the judgment of Gaudron, Gummow and Kirby JJ there is a lengthy analysis of the shortcomings of the present law. The passage at 257-64 is too long to include in this judgment but repays careful reading. Their Honours observe that the proper vindication of public rights is constrained by the requirement that applicants must show a special interest in the subject matter of the action. Equity intervenes in other cases where public rights rather than personal proprietary interests are involved. The need for a wider gateway to standing is desirable in Australia where the role of the Attorney-General is more administrative and political than the role of Attorney-General in Britain, where the rules of standing were first developed. Their Honours said at 262-3:

> *"At the present day, it may be "somewhat visionary" for citizens in this*

> *country to suppose that they may rely upon the grant of the Attorney-General's fiat for protection against ultra vires action of statutory bodies for the administration of which a ministerial colleague is responsible* [see the remarks of Gibbs J in *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 383]."

136 Their Honours concluded at 263 as follows:

> *"In a case where the plaintiff has not sought or has been refused the Attorney-General's fiat, it may well be appropriate to dispose of any question of standing to seek injunctive or other equitable relief by asking whether the proceedings should be dismissed because the right or interest of the plaintiff was insufficient to support a justiciable controversy, or should be stayed as otherwise oppressive, vexatious or an abuse of process. The plaintiff would be at peril of an adverse costs order if the action failed. A suit might properly be mounted in this way, but equitable relief denied on discretionary grounds. Further, declaratory rather than injunctive relief may be sufficient."*

137 On the approach which Gaudron, Gummow and Kirby JJ suggest the law should take, the applicants would probably qualify for standing to restrain the unlawful removal of the rescuees from Australia. However, the analysis proposed by their Honours does not represent the present state of the law, however desirable such a development would be. It is not open to me as a single judge of the Court to depart from the established principle. If this case is considered by the High Court, the question of standing may be an appropriate matter for the High Court to consider.

**THE SECTION 245F(9) ARGUMENT**

138 The following statutory provisions are relevant to this argument.

139 Section 245B(1) provides a general power to make a request to board a ship as follows:

> *"In the circumstances described in subsection (2) … the commander of a Commonwealth ship … may request the master of a ship to permit the commander, a member of the commander's crew or an officer to board the master's ship."*

140 Section 245B(2) provides:

> *"The commander may make the request if the master's ship is a foreign ship that is on the landward side of the outer edge of Australia's territorial sea. However, the request must be made for the purposes of this Act."*

141 "Commonwealth ship" is defined in s245A as:

> *"a ship that is in the service of the Commonwealth and flying the ensign prescribed for the purposes of the definition of* ***Commonwealth ship*** *in subsection 4(1) of the Customs Act 1901."*

"Ship" means any vessel used in navigation, including a barge or lighter (s245A). It is accepted that the MV Tampa is a foreign ship within the meaning of s245B(2).

142 Section 245F confers on officers the power to board ships. Section 245F(1)(a) provides:

> *(1) This section applies to a ship that is outside the territorial sea of a foreign country if:*
> *(a) a request to board the ship has been made under section 245B."*

143 Section 245F(3) gives very wide powers to an officer to not only board a ship, but also to search and take copies of any document, to interrogate persons aboard and to make arrests. "Officer" means an officer within the meaning of s5 and includes a member of the Australian Defence Force (s245F(18)).

144 Section 245F(8)(a) gives power to an officer to detain a ship as follows:

> *"(8) An officer may detain the ship … and bring it, or cause it to be brought, to a port or other place that he or she considers appropriate if:*
> *(a) in the case of a ship … that is in Australia—the officer reasonably suspects that the ship … is or has been involved in a contravention, either in or outside Australia, of this Act".*

145 In the circumstances of this case, the transportation of the rescuees into Australian territorial waters may have contravened s229.

146 Of central importance to the applicants' arguments is s245F(9) which provides:

> *"If an officer detains a ship … under this section, the officer may also detain any person who is found on the ship … and bring the person, or cause the person to be brought, to the migration zone."*

147 The applicants argued that the rescuees were detained by the SAS troops who, as members of the Australian Defence Force, are officers for the purpose of the subsection. They further said that on the proper construction of the section the duty of the detaining officer is to bring the rescuees or cause them to be brought into the migration zone. This duty

should be enforced by the Court by the grant of mandamus or injunction requiring the respondents to bring the rescuees into the migration zone.

148 The respondents submitted that:

- The applicants do not have standing to bring the claim;
- There was no request to board the MV Tampa, as required by s245B(2), for the purposes of the Act;
- There was no request by a commander of a Commonwealth ship as required, because the SAS boarded the MV Tampa from two craft, neither of which were flying the ensign required by the definition of Commonwealth ship in s5;
- There was no detention of the ship itself, as distinct from the detention of the rescuees, and subsection 9 is conditioned on the detention of the ship;
- The power to detain and bring people into the migration zone is a police power conferred for the purpose of law enforcement and not for the purpose of conferring benefits on individuals; and
- There are strong discretionary reasons to refuse the relief sought.

149 For the reasons referred to earlier in this judgment under the heading “Standing” in pars 123-37, the applicants do not have standing to bring the claim for mandamus or injunction, in relation to s245F.

150 Further, the second, third and fourth dot points concern alleged insufficiencies in the evidence led by the applicants. On these issues the applicants carried the onus of proof. It was part of their case to establish that the preconditions for the operation of the section existed. In my view the evidence led by the applicants did not establish the preconditions necessary for the operation of this subsection. In these circumstances, it is not necessary to deal with the arguments set out in the last two dot points.

**THE SECTION 189 ARGUMENT**

151 Section 189 gives a power to detain unlawful non-citizens as follows:

*"(1) If an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person.*

*(2) If an officer reasonably suspects that a person in Australia but outside the migration zone:*

*(a) is seeking to enter the migration zone; and*
*(b) would, if in the migration zone, be an unlawful non-citizen;*

*the officer must detain the person."*

152 Section 5 contains the following relevant definitions:

*"**detain** means:*
*(a) take into immigration detention; or*
*(b) keep, or cause to be kept, in immigration detention; and includes taking such action and using such force as are reasonably necessary to do so.*

***officer** means:*

*(a) an officer of the Department, other than an officer specified by the Minister in writing for the purposes of this paragraph; or*
*(b) a person who is an officer for the purposes of the Customs Act 1901, other than such an officer specified by the Minister in writing for the purposes of this paragraph; or*
*(c) a person who is a protective service officer for the purposes of the Australian Protective Service Act 1987, other than such a person specified by the Minister in writing for the purposes of this paragraph; or*
*(d) a member of the Australian Federal Police or of the police force of a State or an internal Territory; or*
*(e) a member of the police force of an external Territory; or*
*(f) a person who is authorised in writing by the Minister to be an officer for the purposes of this Act; or*
*(g) any person who is included in a class of persons authorised in writing by the Minister to be officers for the purposes of this Act, including a person who becomes a member of the class after the authorisation is given.*

***migration zone** means the area consisting of the States, the Territories, Australian resource installations and Australian sea installations and, to avoid doubt, includes:*
*(a) land that is part of a State or Territory at mean low water; and*
*(b) sea within the limits of both a State or a Territory and a port; and*

*(c) piers, or similar structures, any part of which is connected to such land or to ground under such sea;*

*but does not include sea within the limits of a State or Territory but not in a port."*

153 Section 14(1) defines of the meaning of "unlawful non-citizen" as follows:

*"A non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen."*

154 A "lawful non-citizen" is defined in s13(1) as follows:

*"A non-citizen in the migration zone who holds a visa that is in effect is a lawful non-citizen."*

155 A person detained under s189 will be in "immigration detention", a term defined in s5 as follows:

"***immigration detention*** *means:*

*(a) being in the company of, and restrained by:*
- *(i) an officer; or*
- *(ii) in relation to a particular detainee—another person directed by the Secretary to accompany and restrain the detainee; or*

*(b) being held by, or on behalf of, an officer:*
- *(i) in a detention centre established under this Act; or*
- *(ii) in a prison or remand centre of the Commonwealth, a State or a Territory; or*
- *(iii) in a police station or watch house; or*
- *(iv) in relation to a non-citizen who is prevented, under section 249, from leaving a vessel—on that vessel; or*
- *(v) another place approved by the Minister in writing."*

156 The period of immigration detention is prescribed by s196 as follows:

*"(1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:*
- *(a) removed from Australia under section 198 or 199; or*
- *(b) deported under section 200; or*
- *(c) granted a visa.*

*(2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.*

*(3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa."*

157 Sections 198 and 199 constitute a comprehensive code for the removal from Australia of unlawful non-citizens and their dependants.

158 The Act gives persons in immigration detention certain rights which are set out in s256 as follows:

> *"Where a person is in immigration detention under this Act, the person responsible for his or her immigration detention shall, at the request of the person in immigration detention, give to him or her application forms for a visa or afford to him or her all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention."*

159 Mr Vadarlis contended that the rescuees were unlawful non-citizens attempting to enter the migration zone. He argued that Mr Farmer reasonably suspected that this was so. Consequently, Mr Farmer should be compelled by the Court to cause the rescuees to be detained under s189. Alternatively, the respondent Minister for Immigration and Multicultural Affairs should be compelled by the Court to direct an officer as defined in s5 to detain the rescuees under the section. The consequence of detention under s189 would be that the rescuees would be in immigration detention and the rights available under s256 would apply to them.

160 The respondents contended:

- That Mr Vadarlis lacks standing;
- That there was no evidence that an officer within the meaning of s5 of the Act had formed the necessary suspicion;
- The duty to detain was for the purpose of law enforcement and not for the benefit of individuals; and
- There were strong discretionary reasons for refusing the relief sought.

161 Again, this claim fails because Mr Vadarlis lacks standing to pursue it for the reasons given in pars 123-37 of this judgment. Consequently, it is not necessary to consider the remaining arguments on this issue.

**THE FREEDOM OF COMMUNICATION ARGUMENT**

162 Mr Vadarlis contended that the respondents have prevented him from communicating with the rescuees. He asserted that both he and the rescuees are entitled to freedom from

such restrictions and, further, that the respondents are bound to ensure that he is able to exercise that freedom. Mr Vadarlis claimed that this entitlement flows from the implied constitutional freedom of communication. In *Cunliffe v Commonwealth of Australia* (1994) 182 CLR 272 the High Court considered the validity of legislation concerning the registration of migration agents and a majority (Brennan, Dawson, Toohey and McHugh JJ) held that the legislation was valid. The majority held that the provisions of the Act did not interfere with the implied freedom of communication.

163 All of the judges, except for Mason CJ, held that the constitutional freedom could only be claimed for the benefit of Australian citizens and not aliens. For example, Brennan J said at 335-6:

> *"While an alien who is within this country enjoys the protection of the ordinary law, including the protection of some of the Constitution's guarantees, directives and prohibitions, he or she stands outside the people of the Commonwealth whose freedom of political communication and discussion is a necessary incident of the Constitution's doctrine of representative government. That being so, the implication does not operate to directly confer rights or immunities upon an alien. Any benefit to an alien from the implication must be indirect in the sense that it flows from the freedom or immunity of those who are citizens."* [citations omitted]

164 Thus, insofar as Mr Vadarlis asserted this freedom on behalf of the rescuees, the claim cannot be maintained.

165 However, Mr Vadarlis also rested this claim on his own freedom of political communication. Mr Bennett appeared to accept that Mr Vadarlis, as a lawyer seeking to provide immigration advice and assistance, is entitled to the benefit of the implied freedom of political communication. This is consistent with the views of Mason CJ at 298-9, Deane J at 335-7 and 341, Toohey J at 378-9 and 384 and Gaudron J at 387-9 in *Cunliffe* that the implied freedom of political communication applies to a lawyer giving advice on migration matters to aliens.

166 Mr Bennett, however, submitted that the freedom is not a right to require the respondents to facilitate communication. In this he is correct: *McClure v Australian Electoral Commission* (1999) 163 ALR 734 at 740-1. The relief sought by Mr Vadarlis included orders requiring the respondents to facilitate his communication with the rescuees. For instance, at one stage he sought to be permitted to land a helicopter on the HMAS

Manoora for the purpose of disembarking and providing legal advice to the rescuees. Such an order would not be within the scope of the vindication of the implied constitutional freedom.

167 However, Mr Vadarlis also seeks orders for the removal by the respondents of some of the obstacles placed in the way of his communication with the rescuees. For instance, the closure of the port at Flying Fish Cove prevents him from seeking access to the MV Tampa. My tentative view is that Mr Vadarlis has standing to agitate this aspect of the claim. However, no detailed argument was addressed on this question.

168 In the end it is not necessary to come to a final view on this part Mr Vadarlis' case. As I have determined the respondents are obliged to release the rescuees, there is no practical need for the specific relief sought under this head in favour of Mr Vadarlis.

**CONCLUSION**

169 I have determined that the rescuees are entitled to be released by the respondents and brought to the Australian mainland.

170 The orders to be made will allow the respondents until 5.00pm Australian Eastern Standard Time on 14 September 2001, or the determination of any appeal to the Full Court of the Federal Court of Australia, whichever is later, to release the rescuees and bring them to the Australian mainland. This delay recognises cl 4.1 of the agreement reached between the parties and referred to in par 42 of these reasons and the practical difficulties that may attend the implementation of the orders. I will reserve liberty to all parties to apply generally in relation to the implementation of the orders.

**COSTS**

171 The order for costs will require the respondents to pay the applicants' costs and the intervener's costs on the principle that costs follow the event. For the purposes of the award of costs the interveners are parties to the proceedings: see par 8 of these reasons. As I have heard no argument on the question of costs, liberty will be reserved to all parties and interveners to apply by 4.15pm on 13 September 2001 to vary the orders as to costs.

I certify that the preceding one hundred and seventy-one (171) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice North.

Associate:

Dated: 11 September 2001

| | |
|---|---|
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| Date of Hearing: | 2-5 September 2001 |
| Date of Judgment: | 11 September 2001 |