

# Human Rights and Asylum Seekers

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# A contemporary issue illustrating human rights issues

- Treatment of refugees and asylum seekers
  - Rule of law
  - Access to justice
  - Procedural fairness (principles of natural justice)
- Australia's international obligations
- The process of law reform
- Resolving disputes with the State

# NSW Council for Civil Liberties



New South Wales  
Council for  
Civil Liberties

The NSW Council for Civil Liberties (NSWCCL) was founded in 1963 and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone (as long as they don't infringe the rights and freedoms of others) and oppose any abuse or excessive power by the State against its people.

<http://www.nswccl.org.au>

- Current issues
  - Comprehensive DNA database from birth
  - Abuse of CCTV cameras
  - Police use of guns and tasers
- Refugee issues
  - Refugees with adverse security assessments
  - Offshore processing
  - Mandatory detention

# Basic Legal concepts

- procedural fairness (principles of natural justice)
- rule of law
- tyranny

# The individual and the law

- resolving disputes with the state
- non-legal methods:
  - media
  - members of parliament
  - interest groups, including NGO's
- legal methods:
  - internal review
  - external review: administrative, judicial, ombudsman, statutory bodies including Australian Human Rights Commission

# Law in practice

- *A v Australia*

Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997)

- *Plaintiff M61/2010E v Commonwealth of Australia* [2010] HCA 41
- *SZQHI v Minister for Immigration & Anor* [2012] FMCA 72
- *Mr Al Jenabi v Commonwealth of Australia* (Department of Immigration and Citizenship) [2011] AusHRC 45

# *A v Australia*

- **ICCPR Article 9**

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

- **Decision**

“... detention should not continue beyond the period for which the State can provide appropriate justification ... The Committee therefore concludes that the author's detention for a period of over four years was arbitrary within the meaning of article 9, paragraph 1.”

# *Plaintiff M61/2010E v Commonwealth of Australia* [2010] HCA 41

## The Facts

- Plaintiffs were "offshore entry persons" detained under [s 189\(3\)](#) of [Migration Act](#)
- Each plaintiff precluded from making valid visa application unless Minister decided in public interest to allow: [s 46A](#) of [Migration Act](#) – Minister had power to grant visa in absence of valid application: [s 195A](#) of [Migration Act](#)
- Each plaintiff subject to "Refugee Status Assessment" by departmental officer and subsequent "Independent Merits Review" by independent contractor – Each departmental officer and independent reviewer concluded plaintiff not a person to whom Australia had protection obligations
- Powers under [ss 46A](#) and [195A](#) "may only be exercised by the Minister personally" – Minister not under duty to consider whether to exercise power under [s 46A](#) or [s 195A](#)

## The issues

- Administrative law – Procedural fairness
- Whether those who conducted assessment and review bound to afford procedural fairness to plaintiffs and act according to law
- Whether each review procedurally fair and undertaken in accordance with law.



# *SZQHI v Minister for Immigration & Anor [2012] FMCA 72*

## **Issues**

- Review of decision of Independent Merits Reviewer – procedural fairness
- Whether Reviewer used a repeated formula or template
- Where similarities and use of template paragraphs – whether reasonable apprehension of bias.

## **Decision**

The use of template paragraphs in a manner that would cause a fair minded and informed person to reasonably apprehend that the Reviewer might not have brought an impartial mind to bear on the decision

# Mr Al Jenabi v Commonwealth of Australia (Department of Immigration and Citizenship) [2011] AusHRC 45

- The failure of the Commonwealth to place Mr Al Jenabi in community detention or another less restrictive form of detention was inconsistent with the prohibition of arbitrary detention in article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).
- Mr Al Jenabi should have been removed from VIDC through either the grant of a bridging visa or residence determination on or about 10 October 2006 when Mr Al Jenabi cleared his Australian Security Intelligence Organisation (ASIO) assessment. This is particularly so given there was no realistic prospect of removing Mr Al Jenabi to Iraq at that time.
- Payment of compensation in the amount of \$ 450 000 would be appropriate.
- In addition to compensation, it is appropriate that the Commonwealth provide a formal written apology to Mr Al Jenabi for the breaches of his human rights. Apologies are important remedies for breaches of human rights. They, at least to some extent, alleviate the suffering of those who have been wronged. [\[](#)

# Rule of Law and Tyranny



- 56 refugees have received adverse security assessments
- No reasons provided
- Indefinite detention
- No right of review
- Children have been in detention for over 2 years