High Court gets another chance to have the final word on regional processing

Posted 18/06/2014 by Elibritt Karlsen

On 18 June 2014, the High Court unanimously ruled that the statutory scheme under which Papua New Guinea (PNG) was designated as a regional processing country is constitutionally valid. This FlagPost examines the events that led up to the Court's decision.

In May 2011, in the context of increasing numbers of unauthorised maritime arrivals (UMAs), former Prime Minister, Julia Gillard announced that Australia would enter into an agreement with Malaysia that would see 800 UMAs transferred to Malaysia for refugee status determination; while Australia would resettle 4000 recognised refugees already in Malaysia. The Government also abandoned its previous plan to build a regional processing centre in East Timor and announced that it was instead investigating alternative options, including PNG. Two months later, an Arrangement between the Governments of Australia and Malaysia was signed and by 19 August 2011, an MOU had been signed with the Government of PNG for the establishment of an assessment centre on Manus Island.

However, on 31 August 2011 the High Court declared the Minister’s Malaysia Declaration, made pursuant to section 198A of the Migration Act 1958, invalid. In brief, the Court found that under section 198A, the Minister could not validly declare a country (as a country to which asylum seekers could be taken for processing) unless that country satisfied three criteria. Namely, the country had to be legally bound by international law or its own domestic law to: provide access for asylum seekers to effective procedures for assessing their need for protection; provide protection for asylum seekers pending determination of their refugee status; and provide protection for persons given refugee status pending their voluntary return to their country of origin or their resettlement in another country. In addition to these criteria, the Migration Act required that the country meet certain human rights standards in providing that protection. The Court held that Malaysia was not legally...
bound to provide the access and protections the Migration Act required for a valid declaration and thus Australia was precluded from transferring UMAs there. Less than a fortnight after the High Court delivered its ruling the Prime Minister announced that the Government would introduce legislation to enable the transfer of UMAs to third countries for the processing of their asylum claims. On 21 September 2011, the Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011 was introduced which made ‘national interest’ the only expressed pre-condition for the exercise of the Minister’s power to designate a regional processing country. A day later, then Opposition Leader, Tony Abbott confirmed that although the Opposition supported offshore processing, it would only support the Bill if the Government agreed to its proposed amendment requiring the offshore processing country to be a signatory to the 1951 Refugee Convention. This led to an impasse between the two major political parties because if the Government agreed to such an amendment it would not be able to proceed with its Malaysia Arrangement (as Malaysia was not a signatory to the Convention). The Bill did not proceed to the Senate.

On 13 February 2012, former Independent MP, Rob Oakeshott tried to resolve the impasse by introducing the Migration Legislation Amendment (The Bali Process) Bill 2012. Under this Bill the Government would only be able to designate countries that were party to the Bali Process. This would incorporate Malaysia, Nauru, and PNG. Though the Bill passed successfully through the House of Representatives it was subsequently voted down in the Senate. In an attempt to resolve the impasse, the Government then announced that it had invited the former chief of Australia’s Defence Force to lead an Expert Panel to advise on options to prevent asylum seekers risking their lives on dangerous boat journeys to Australia.

Six weeks later, on 13 August 2012, the Report of the Expert Panel was released, containing 22 recommendations, including the introduction of legislation to support the transfer of people to regional processing arrangements. It was the Panel’s view that the legislation should require that any future designation of a country as an appropriate place for processing be achieved through a legislative instrument that was open to disallowance by the Australian Parliament.

The very next day, debate resumed on the Government’s 2011 Bill—now known as the Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012. The Act as passed did not expressly require a designation country to be a signatory to the Refugee Convention. Arguably the most significant amendment to the Bill was the insertion of subsection 198AB(1B) which meant that each House of Parliament could veto any designation before it came into effect. The Bill secured passage in both houses of Parliament within three days after debate resumed.

Prime Minister Gillard subsequently announced that Australia and PNG had entered into a new MOU in relation to processing on Manus Island. When, on 9 October 2012 then Minister Bowen tabled for Parliament’s approval the instrument of designation of PNG as a regional processing country, only the Australian Greens and Independent MP, Andrew Wilkie opposed it. Both major political parties thus endorsed the designation of PNG as a regional processing country and by mid-November some asylum seekers began to be transferred from Christmas Island.
It was not until 19 July 2013, in the lead up to the last Federal election, that former Prime Minister, Kevin Rudd announced a Regional Resettlement Arrangement between Australia and PNG that would see all UMAs sent to PNG for refugee status determination and, if necessary, resettlement, thereby removing any prospect of them being settled in Australia. Proceedings were again commenced in the High Court challenging the validity of the new statutory scheme. The Court ruled that the scheme is constitutionally valid (under the aliens power). It also decided that Minister Bowen’s designation of PNG as a regional processing country and his direction that people such as the plaintiff were to be removed there, were valid.