High Court validates maritime interception powers but watch this space!

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On the 28 January 2015, the High Court delivered its much anticipated judgment on the scope and extent of Australia’s maritime interception powers. The Court held, by a majority (4:3) that the detention of a Sri Lankan asylum seeker intercepted en route to Australia with another 156 passengers was lawful under the Maritime Powers Act 2013 (the MPA). In doing so, their Honours also confirmed that the asylum seekers were not entitled to be consulted as to the desirability or otherwise of the destination to which they were to be taken (in this case India) and the Government was not required to have secured an agreement in advance with the country to which they were likely to be taken. In so finding, the High Court relied on Australian domestic legislation (the MPA) which it said was drafted so clearly and unambiguously that it left no doubt as to its operation.

The MPA was introduced by the former Labor Government and opposed by the Coalition Opposition in the Senate on the basis that officers of the Attorney-General’s Department had been unable to unequivocally confirm that the legislation would in fact preserve the ability of the Commonwealth to turn back boats carrying asylum seekers. In the course of the debate on the MPA, Senator Brandis moved amendments designed to make it absolutely clear that the Government would retain the power, but in the end, the Bill secured passage without amendment, almost a year after it was first introduced.

Although the MPA was clearly intended to preserve the maritime interception powers originally inserted into the Migration Act 1958 by the former Howard Government, it was not until the High Court’s judgment was delivered that that result, supported by both sides of politics, was confirmed. To guarantee its continued ability to turn back asylum seeker vessels in the event that the High Court decision had gone the other way, the Government introduced amendments late last year to ‘clarify’ the intended operation of the MPA. Though Labor ultimately opposed these amendments, on the question of turning back asylum seeker vessels, Labor stated that it remained open to any measure which saves lives at sea.

In relation to the policy behind the laws that the High Court was called upon to adjudicate, Justice Gageler rightly pointed out that ‘the wisdom of the policy is not for a court to judge’. However, he also observed that ‘it is the Australian Government, more precisely the executive government of the Commonwealth, which is in ultimate command of the exercise of maritime powers…and it is the Australian Government which is responsible to other nation states in international law for their exercise’.

On the same day as the High Court was giving the Government the green light to proceed with its turn-back policy, the Immigration Minister issued a press release advising that a total of 15 vessels containing 429 asylum seekers had been successfully intercepted and returned since Operation Sovereign Borders commenced in December 2013. It is not publicly known where all the occupants of these vessels have been taken though we do know that most have been returned to their country of departure, and that at least four have involved the use of lifeboats.

Though the High Court took a restrictive and technical interpretation of the statutory provisions governing Australia’s maritime intercations, it is relevant to mention that the Court also identified a number of
statutory and practical limitations on the exercise of MPA powers. Most significantly, section 74 of the MPA, which provides ‘a maritime officer must not place or keep a person in a place, unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place’. As Chief Justice French relevantly observed ‘a place which presents a substantial risk that the person, if taken there, will be exposed to persecution or torture would be unlikely to meet the criterion’.

He further noted that ‘the existence of such risks may therefore amount to a mandatory relevant consideration in the exercise of the [detention] power under s 72(4) because they enliven the limit on that power which is imposed by s 74 at the point of discharge in the country to which the person is taken’.

There was nothing in the agreed facts of the Special Case before the High Court that indicated India was not a safe place for the plaintiff to be taken.

Though section 74 was not repealed as part of the suite of amendments to the MPA late last year, it remains to be seen whether it will be capable of providing the type of protections envisaged by the High Court and if so, whether it will ultimately withstand future amendment.