PEOPLE SMUGGLING IN NSW

HISTORY AND BACKGROUND:

Prosecutions for allegations of people smuggling conducted by the Commonwealth commenced in NSW sometime late in 2010. Prosecutions in other Australian states and territories commencedwell before NSW prosecutions.

Legal Aid NSW has granted aid for approximately 116 Indonesian crew members charged with aggravated people smuggling. At one point, there were three separate people smuggling trials running concurrently in NSW at Campbelltown, Parramatta and the city.

The people accused of people smuggling generally fell into one of two categories:

1. An *organiser* who is allegedly involved in the operations and organisation of people smuggling; or

2. An *Indonesian crew member* who was on-board the vessel during the voyage from Indonesian to Australian territorial waters. The role fulfilled by the crewmembersvaried from steering the vessel ultimately into Australian water to simply distributing food and water and generally assisting with the comfort of the "passengers" on the boat.

The large majority of prosecutions (with very few exceptions) were people who fell into the second category mentioned above. There have been very few prosecutions of actual "people smugglers".

Of the trials in NSWthat were the subject of a grant of Legal Aid:

- 38 accused persons were found not guilty by a jury;
- 43 accused persons entered a plea of guilty or were convicted after trial;
- 34 accused persons were either no billed or had the charges withdrawn;

- The matters that were no billed/withdrawn were matters where either:
    - Age was in issue (as young as 12 years old); or
    - The offender was extended the benefit of a Direction of the Attorney-General.

Since 27 August 2012, as a result of a Direction to the Commonwealth DPP from the Attorney-General Nicola Roxon, the number of people smuggling prosecutions for offences contrary to section 233C have significantly declined.

There is presently only 1 matter listed for trial in NSWwhich is scheduled to commence in April 2013.

ATTORNEY-GENERAL'S DIRECTION:

On 27 August 2012, and pursuant to section 8 (1) of the *Director of Public Prosecutions Act* 1983, the Attorney-General gave the Commonwealth DPP a *Direction* as to the institution and continuation of prosecutions contrary to section 233C *Migration Act* 1958.

The Direction is to the effect that:

- The CDPP **must not** institute, carry on, or continue prosecutions for an offence under section 233C;
- Against a "*member of the crew*";
- Unless satisfied that:
    - The person has committed a "repeat offence"; or
    - The person's role extended beyond that of a crew member; or
    - A death occurred in relation to the people smuggling venture.
- In matters to which the above applies, the CDPP must consider instituting proceedings contrary to section 233A.

The definition of "*member of the crew*" includes the captain or master of a vessel.

Unfortunately, the Direction does **not** apply to any proceedings, including appeals, for a person sentenced prior to 27 August 2012.

The Direction applies to a person who has been convicted or pleaded guilty to an offence, but who has not yet been sentenced, prior to 27 August 2012.

The obvious benefit of the above Direction is the avoidance of the application of the mandatory minimum sentencing provisions that attach to an offence contrary to section 233C.

LEGISLATIVE PROVISIONS:

Offences:

The*Migration Act* 1958 presently provides for four different people smuggling offences:

- Section 233A - People smuggling;
- Section 233B - aggravated people smuggling by virtue of exploitation/danger/death/serious harm;
- Section 233C -aggravated people smuggling by virtue of there being at least 5 people;
- Section 233D – supporting the offence of people smuggling.

Maximum and mandatory minimum penalty:

The maximum penalties for each of the above people smuggling offences are as follows:

- Section 233A – imprisonment for 10 years or 1000 penalty units[1].
- Section 233B – imprisonment for 20 years or 2000 penalty units.
- Section 233C – imprisonment for 20 years or 2000 penalty units.
- Section 233D – imprisonment for 10 years or 1000 penalty units.

[1]This offence can be dealt with summarily with the consent of the prosecution and defence.

In addition to the maximum penalty prescribed by the legislation, section 236B of the *Migration Act* 1958 prescribes a **mandatory minimum** sentence for persons convicted of an offence against section 233B and 233C.

The mandatory minimum sentence for a conviction in respect to section 233B is 8 years imprisonment with a non-parole period of 5 years.

The mandatory minimum sentence for a conviction in respect to section 233C is:

- First offence - 5 years imprisonment with a non-parole period of 3 years.
- Repeat offence[2] – 8 years imprisonment with a non-parole period of 5 years.

The mandatory minimum sentencing regime does not apply if an offender, establishes on the balance of probabilities that he/she is under the age of 18 years: section 236(2) *Migration Act* 1958.

In relation to section 233B and 233C offences, the legislation specifically prohibits the court from discharging the offender without proceeding to a conviction unless it is established on the balance of probabilities that the person charged is under 18 years at the time of the alleged offence. The effect of this section is that the Commonwealth equivalent of a “section 10” is not available.

Generally in sentence proceedings for all people smuggling offences, the sentence of imprisonmentthat is imposed commences on the date that the boat was intercepted by the Royal Australia Navy or the Australia Customs and Border Protection Service. There is no specific legislative provision that requires this commencement date, but this date is usually conceded by the Commonwealth – possibly because of the very arbitrary nature of the date of charge (persons are frequently detained in Immigration Centre(s) for months before charge).

In these sentence proceedings, the Commonwealth DPP in NSW have generally conceded that time in Immigration custody (both before and after charge) is time in custody for the purpose of backdating the sentence. There has been no distinction

[2] Repeat offence is defined in section 236B(5) *Migration Act* 1958.

drawn between time in Immigration custody verses time in Corrective Services custody.

ISSUE OF PAROLE[3]:

Prior to 4 October 2012, a Federal offender would be granted automatic Parole at the expiration of the non-parole period if the term of imprisonment was 10 years or less.

On 4 October 2012, section 19AL *Crimes Act* 1914, commenced. Section 19AL *Crimes Act* 1914 provides:

> **Release on parole--making of parole order**
>
> (1) The Attorney-General must, before the end of a non-parole period fixed for one or more federal sentences imposed on a person, either make, or refuse to make, an order directing that the person be released from prison on parole (a ***parole order***).
>
> Note 1: For when a person is released on parole in accordance with a parole order, see section 19AM.
>
> Note 2: A person released on parole must comply with any conditions of the parole order during the parole period (see sections 19AMA, 19AN and 19AU).
>
> Note 3: Subsection (4) of this section affects the operation of subsection (1) if the person will be serving a State or Territory sentence at the end of the non-parole period.
>
> (2) If the Attorney-General refuses to make a parole order for a person under subsection (1) or paragraph (b) of this subsection, the Attorney-General must:
>
> (a) give the person a written notice, within 14 days after the refusal, that:
>
> (i) informs the person of the refusal; and
>
> (ii) includes a statement of reasons for the refusal; and
>
> (iii) sets out the effect of paragraph (b) of this subsection; and
>
> (b) reconsider the making of a paroleorder for the person and either make, or refuse to make, such an order, within 12 months after the refusal.

[3]Special thanks to Juliana Crofts from the Commonwealth Crime Unit, Legal Aid NSW for sharing her insight on this topic.

(3) A parole order must:

(a) be in writing; and

(b) specify whether or not the person is to be released subject to supervision; and

(c) if it is proposed that the supervision period for a person released on parole subject to supervision should end before the end of the person's parole period--specify the day on which the supervision period ends.

(4) Despite subsection (1), if the person will be serving a State or Territory sentence on the day after the end of the non-parole period, the requirement under that subsection to make, or refuse to make, a parole order does not apply:

(a) for a federal sentence, or federal sentences, that do not include a life sentence--if the parole period would end while the person would still be imprisoned for the State or Territory offence; and

(b) for a federal sentence, or federal sentences, that include a life sentence--until the release of the person from prison for the State or Territory offence (but a decision may be made under that subsection at any time during the 3 month period before the person's expected release); and

(c) in any case--if the State or Territory sentence is a life sentence for which a non-parole period has not been fixed.

Note: The effect of this subsection and subsection 19AM(2) is that a parole order may sometimes still be made for a person while the person is serving a State or Territory sentence, but the person will not be released in accordance with the parole order until the person is released from prison for the State or Territory sentence.

This provision effectively provides that, in the case of a Federal offender, who has a sentence specifying a non-parole period and parole period, the Attorney-General **must** make or refuse an order directing that the person should be released from prison to parole.

This provision appears to only apply to sentences of 3 years or more because section 19AC *Crimes Act* 1914 provides that if a person receives a sentence of less than three years the court must fix a recognisance release order and must not fix a non-period period.

Section 19AL *Crimes Act* 1914, applies to all persons presently serving a Federal sentence. Unfortunately, the effect of this provision is that all persons presently serving a sentence for section 233C people smuggling offence will be required to

appear before the Commonwealth equivalent of the Parole Authority (which is understood to be the Federal Offenders Unit).

APPLICATION FOR "RELEASE ON LICENCE":

Section 19AP(1) *Crimes Act* 1914, permits the Attorney-General to grant a licence releasing person from prison who is serving a federal sentence.

Section 19AP(4) provides that the Attorney-General may only grant such a licence if satisfied that "exceptional circumstances" exist to justify the grant of the licence.

Such an application, must be made in writing and specify the exceptional circumstances relied on to justify the grant of the licence.

The lawyers in the Commonwealth Crimes Unit, Legal Aid NSW[4] diligently submitted applications for "Release on Licence" on behalf of many offenders who are presently serving the mandatory minimum sentence for offences contrary to section 233C. It is understood that every application has unfortunately been unsuccessful. The options as to an administrative law challenge to the licence refusal, is presently being considered. Further administrative challenge will be pursued if it is available.

RECENT NSW COURT OF CRIMINAL APPEAL CASES:

Conviction appeals re elements of the offence:

There have been two recent NSW authorities that considered the elements of the offence, and in particular, that the Crown must prove beyond a reasonable doubt that accused person knew that they were taking people to a destination that was part of Australia, and, that the *accused knew* was part of Australia. The NSW authorities relied upon the Victorian decision of *PJ v The Queen* [2012] VSCA 146.

[4]Led by Ms Frith Way, Solicitor in charge

A common feature in the evidence in these trials is the alleged use of the words "Christmas", "Ashmore", "Ashmore Reef" or "Palau Pasir" (Ashmore Reef in the Bahasa Indonesian language) by the Indonesian crew. The issue in a number of trials has been whether the use of those words may be sufficient to establish that the accused person knew that they were facilitating the bringing or coming of people to Australia. A jury direction was frequently sought by those representing the accused, to the effect that the jury had to be satisfied that the accused knew that they were taking people to Ashmore **and** that the accused knew that Ashmore was a part of Australia. As a matter of law, various places - such as Ashmore Island, Christmas Island, Browse Island – are part of Australia but the issue was whether the Crown had to prove that the *accused knew* that those places were part of Australia.

In *Sunada v R; Jaru v R* [2012] NSWCCA 187 the Court (Macfarlan JA, Price, McCallum JJ) said (at [5]):

> "In their grounds of appeal against conviction filed on 3 May 2012, the appellants contended that the trial judge's direction was erroneous. On 29 June 2012 the Victorian Supreme Court delivered judgment in *PJ v R* [2012] VSCA 146, holding that proof of an offence under s 233C of the *Migration Act* requires proof that the accused intended that relevant persons be brought to a destination that was a part of Australia **and that the accused knew was a part of Australia** ([5] and [44])." (emphasis added)

In *PJ v The Queen* [2012] VSCA 146 the Court (Maxwell P, Redlich and Hansen JJA) said (at [5]):

> "5 For reasons which follow, we would grant leave to appeal and allow the appeal. For the applicant to be found guilty of the offence under s 233C, he must be shown to have intended that the relevant persons be brought to Australia. That is, he must have been aware that Australia was the intended destination."

And later (at [44]:

> "44 Unsurprisingly, this definition of 'no lawful right to come to Australia' is concerned with – and only with – rights of entry into Australia. It follows, in our view, that by requiring proof of the defendant's recklessness as to the absence of that lawful right, Parliament intended to require proof that the accused was 'aware of a substantial risk' that none of the relevant persons had a lawful right to come to Australia. That is,

> the defendant must have turned his mind to the existence of that risk, in relation to that particular country, and decided, unjustifiably, to take the risk. On this view, the word 'Australia' when used in paragraph (c) does not mean 'the intended destination of the voyage, provided that it is in fact part of Australia'. **It means a place known to the accused as Australia**". (emphasis added)

In *Amomalu v R* [2012] NSWCCA 255 the jury were told that the relevant intention would be proved if "the accused knew that he was helping to take people to Australia". The court (MClellan CJ at CL, Rothman and Adamson JJ) said (at [82]):

> 82. To my mind his Honour's direction was not sufficient to effectively isolate the issue the jury had to determine …… Although it was correct to instruct the jury that they must be satisfied that the appellant knew that he was helping take people to Australia, **the issue in this case was whether, although he knew the boat was going to a place called Ashmore Reef, he knew that Ashmore Reef was a part of Australia.** The emphasis in both *Sunada* and *PJ* was on the accused knowing that the intended destination of the voyage was **a place known to the accused as Australia.** His Honour's direction did not achieve that objective". (emphasis added)

<u>Conviction appeal re: refusal of directed verdict:</u>

The Full Court of the Supreme Court of South Australia in *R v Zainudin* [2012] SASCF 133 (14 December 2012) considered as a ground of appeal, the refusal by the trial judge to give a directed verdict. The ground of appeal was that there was no basis on which an inference was capable of being drawn or a finding was capable of being made that the appellant knew the intended destination of the passengers was Australia.

The Crown case against the appellant was not that he knew that the Island, which the boat was approaching was part of Australia, but rather that he knew in a more general sense that the destination of the passengers was Australia. The appellant was a member of the crew. The passengers knew the ultimate destination was Australia and spoke to each other about "Australia". However, there was no evidence in the trial that the Indonesian crew used the word(s) "Australia" or "Christmas Island". Nor that these words were said in sufficient proximity to the Indonesian crew that they would hear. The Indonesian Captain of the vessel jumped overboard and

swam to another boat saying “you have now arrived in Australia” – there was no evidence that this was heard by the Indonesian crew.

At trial the Crown relied upon the following in submissions against a directed verdict:

1. The journey was a “purposeful journey” with a specific destination as opposed to an “aimless cruise”.
2. Christmas Island is 200 NM south of Indonesian mainland and that south of Indonesia there were no other Islands apart from Australia.
3. The conversation of the passengers where the word Australia was used.
4. The jumping overboard and words used by the Captain.
5. The inherent likelihood, as a matter of human nature, that the Indonesian crew and Captain would discuss the destination and that the crew would have been informed by the Captain that the destination was Australia.

The Full Court of the Supreme Court of South Australia allowed the appeal on this ground of the appeal. The jury’s verdict was set aside and substituted with a verdict of acquittal. In respect to the matters relied upon by the Crown in answer to the directed verdict argument, the Full Court noted the following:

1. Whilst the purposeful nature of a journey coupled with other circumstances may lead to an inference that the boat was involved in “people smuggling”, there was no basis to infer merely from the “purposeful nature of the journey” that the appellant knew that the island was Christmas Island or that it as part of Australia.

2. Contrast was drawn to the distance of Christmas Island from Australian mainland (700NM). It was noted:
    - One would not “naturally assume” that CI is an Australian territory rather than Indonesian or the territory of some other nation.
    - There is no basis to find that the general knowledge amongst Australians was that the island in the position of CI is named CI or is part of Australia.

- There is no basis to attribute to an Indonesian crew the general knowledge of Australians.
- It was an agreed fact in the trial that Indonesia comprises over 17,500 islands. There was discussion as to an Australian-centric view verses the Indonesian-centric view.

3. In response to the Crown submission that there is no other island/ land mass south of Indonesia than Australia, the Full Court corrected and qualified the geographical facts noting:
    - If one proceeds due south of the western half of Java one would not reach land until Antarctica.
    - If one proceeds generally southerly of Java, New Zealand is also south of Java.
    - The boat was not proceeding south but rather South-West.

4. In relation to the conversations of the passengers and words/ action of the Captain – there was no evidence that the appellant heard or understood those words.

5. In relation to the submission that it was "human nature" to discuss the destination, the Full Court noted the absence of evidence as to the cultural position of the appellant and that there was no basis to draw such an inference.

Sentence appeal:

The NSW Court of Criminal Appeal in *Karim v R; Magaming v R; Bin Lahaiya v R; Bayi v R; Alomalu v R* [2013] NSWCCA 23 considered a challenge to the Constitutional validity of the provisions of the *Migration Act* that provide for the mandatory minimum sentencing scheme.

In determining the appeal, the court considered the following:

- The court noted the increase in the maximum penalty and that the clear policy of Parliament was to increase penalties and express a view as to the seriousness of the offending [23 and 25].

- The court recognised the seriousness of the conduct in these offences [30] and that deterrence of the illicit trade in smuggling people was both a legitimate and important public policy of the Australian Parliament [31].

- The court rejected the argument challenging the Constitutional validity of the mandatory minimum sentencing regime considering itself bound by the High Court authorities of *Fraser Henleins* (which attacked an identical legislative structure in section 4 of the *Black Marketing Act*) and *Palling v Corfield*.

- The Court considered that the High Court authorities provided "unequivocal words supporting the legitimacy of mandatory sentences and the removal of discretionary sentencing authority from the court" [87].

Allsop P with Bathurst CJ agreeing said:

> **[116] The mandatory minimum penalties are severe, indeed harsh. That is the will of Parliament: for other than a repeat offence, say a first offence, imprisonment for five years (with a three year non-parole period), which may be inflicted upon an illiterate and indigent deckhand, in circumstances where he or she or someone like him or her could have been prosecuted under a provision whereby the sentencing judge would have the duty to assess all the offender's circumstances, including the objective seriousness of his or her offending before deciding on an appropriate sentence**.
>
> [117] The offender (thus incarcerated for 3 to 5 years) could be **justified** in concluding, in a simple way, that, as a matter of substance, he or she had his or her **sentence in a significant respect dictated, in advance, by a decision of the Australian executive government by its choice of one of two alternative charges**, and that his or her stay in prison has been determined out of public view for reasons of administrative or **political choice, and not law**. The offender could think that he or she has been treated in a way that was unequal to either someone charged under the other provision or to his or her legal responsibilities to the Australian community under the other provision.

[118]That simple approach attracted the support in 1944 of Sir Frederick Jordan. To use and paraphrase the words of Sir Frederick Jordan, **in a civilised community the exercise of such power to incarcerate should not be so transparently a choice for the Executive without the existence of any relevant differentiating factor between the two provisions, both dealing with substantially the same conduct.** As reasoning to a legal consequence, however, this approach is precluded by the authorities to which I have referred.

[119] The norms and conceptions inhering in the exercise of judicial power incorporate from their roots in the common law the norms that now characterise international human rights - a rejection of inequality, arbitrariness, discrimination, unfairness, injustice and cruelty. That the common law and legal punishment in earlier eras exhibited a severity that might shock today, does not mean that by the values and political and legal structures of the time any severity could not be justified, nor does it mean that contemporary conceptions of punishment need embrace any such severity. Indeed, these considerations reveal the effect of changing circumstances on the content of law and its informing norms.

[120] For mandatory minimum sentences to be unconstitutional, a Constitutional constraint upon Parliament must be recognised that the assessment of a just and appropriate sentence is ultimately a judicial task, by the deployment of judicial method. The reconciliation of such a proposition with the authority of the Parliament to set societal norms involves deep questions of the relationship between Parliament's power and the inhering essence of law and judicial power. The source of an affirmative answer to the question of the existence of such constraint may lie in the rooted strength of the conception of equal justice and of the rejection of any power in Parliament to require courts to make orders that are arbitrary, grossly disproportionate or cruel by reference to inhering norms of fairness, justice and equality.

[121]**Here, in relation to these offences, an illiterate and indigent deckhand having little or no knowledge of, or contact with, the organisers of the smuggling, and knowing little about the voyage in respect of which he or she was charged, pondering his or her incarceration for five years for a first offence, could legitimately conclude that, at a human level, he or she had been treated arbitrarily or grossly disproportionately or cruelly.**

[122]**Once again, existing authority precludes such notions informing reasoning to a relevant legal consequence**.

[123] If I may respectfully say, it may be that a view as to the potential injustice of the operation of mandatory minimum sentences led to the direction on 27 August 2012 by the Commonwealth Attorney-General to the Director of Public Prosecutions under the Director of Public Prosecutions Act 1983 (Cth), s 8(1) that prosecutions under new s 233C were not to be instituted, carried on or continued against a crew member, unless it was a repeat offence, or the person's role extended beyond being a crew member or a death had occurred on the

> voyage. If I may also respectfully say, the salutary amelioration of the potential arbitrary and harsh effect of s 233C on illiterate and indigent foreign seafarers by such direction rather makes Sir Frederick Jordan's point as to the central place of the Executive in the sentencing outcome under the section's operation with two overlapping provisions.

JUVENILE ALLEGED PEOPLE SMUGGLERS – CIVIL ACTION

There were approximately 16 persons charged in NSW who claimed to be under the age of 18.

With the exception of one accused person, all were charged as adults and processed through the Local Court/ District Court[5].

With the exception of the previously mentioned matter, all were bail refused in an adult Corrective Services facility. Many had been held in adult areas of Immigration Detention Centres also.

Eventually, all persons who claimed to be juveniles (with the exception of the one who was prosecuted in the Children's Court of NSW) were no billed and returned to Indonesia sometime later. In most cases, this occurred after various trips by defence lawyers to Indonesia (funded by Legal Aid NSW) where birth records, school records and affidavit evidence on the issue of age were sourced and obtained by defence lawyers.

Civil action in respect to this issue is presently being pursued on behalf of a number of the juveniles charged in NSW.

[5] If an accused person was charged as a juvenile there is a presumption of summary jurisdiction because the offence is not a "serious children's indictable offence".

RESOURCE SHARING:

You are very welcome to contact us via the email address below if you are appearing for a person charged with people smuggling and would like to share our resources or discuss your matter in any way.

Phillip Boulten SC
Forbes Chambers

Angela Cook
Forbes Chambers
Angela.cook@forbeschambers.com.au

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