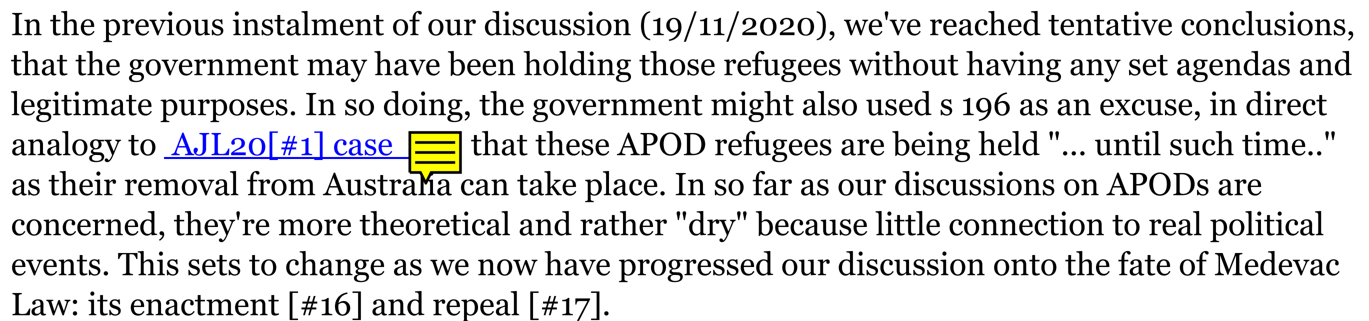
LAWFULNESS OF ADMINISTRATIVE DETENTIONS

(A Communication on Medical Evacuated Asylum-seekers in APODs)

V. APOD DETENTIONS ARBITRARY



In the previous instalment of our discussion (19/11/2020), we've reached tentative conclusions, that the government may have been holding those refugees without having any set agendas and legitimate purposes. In so doing, the government might also used s 196 as an excuse, in direct analogy to AJL20[#1] case that these APOD refugees are being held "... until such time.." as their removal from Australia can take place. In so far as our discussions on APODs are concerned, they're more theoretical and rather "dry" because little connection to real political events. This sets to change as we now have progressed our discussion onto the fate of Medevac Law: its enactment [#16] and repeal [#17].

The best ways to get quick overview of events, we may select to read the "Bills Digest" being prepared by the Parliamentary Office [#16, #17]. These digests can give us the best accounts as to how and why of the way things happened in the Parliament.

AUSTRALIA'S POLITICAL RESPONSE TO UMAs

On facing external event such as large-scale boat arrivals, the Australian polity --State and Government-- responded such crisis at three levels: (i) media rhetoric, (ii) public policy and (iii) statutory laws. Not all those responses, although being made by Ministers, Prime Ministers or any other government officials, are to be taken -- or are not to be seen -- as the viable or valid-lawful statutory responses. Example responses in order:

(i) Political & Media Rhetorical responses

The rhetorical statements are made out, largely, to communicate to the public. Such political rhetoric made against UMAs are intended to serve, mainly, to the local population. Although governments would often claim that they are aiming at 'would be asylum-seekers' and 'people smugglers' abroad. For example, in June 2013 Prime Minister Kevin Rudd announced UMA refugees would be resettled in PNG and they would never be allowed to resettle in Australia [BILLS DIGEST NO. 56, 2018; #16]. Clearly, PNG cannot and does not resettle refugees [#18] and to unilaterally send out the UMAs intercepted by Australia to any other countries will contravene the UN Refugee Convention. Whatever the rhetorical statements government may have made under any circumstances, at the end of the day, the government's action must conform to the statutory obligations within the constitution.

(ii) Public Policy responses

To speak of a properly formed asylum policy, the one provided by the Angus Houston's Expert Panel on Asylum Seekers under Gillard government in 2012 would come to our mind. The report recommended "offshore processing to be used as a short term ‘circuitbreaker’ with longer term cooperation seeking from regional partners"[#16]. One of its long-term policy components -- i.e. the regional cooperation framework in arranged bilateral boat turn-back

agreement with Indonesia -- had been implemented by Rudd and it does have fruitful outcomes. However, the successor LNP governments have failed to acknowledge that achievement for reasons [#19].

One attribute of the LNP Governments -- i.e Tony Abbott, Malcolm Turnbull and Scott Morrison -- is that they do not have the properly formed asylum policy. Because these LNP Governments' priorities on refugees have been to maintain popular opinion, in contrast to resolving any substantive issues, they mainly followed and adopted the media rhetoric as their policy directions. That practice has caused direct conflicts with government's statutory and constitutional obligations. The LNP Government's measures, such as processing refugee claims under PNG/Nauruan laws [#18] and sending refugees out to Cambodia or USA for resettlement, were likely to be found as unlawful and ultra vires in statutory and constitutional contexts.

(iii) Statutory responses

The Australian Parliament over the years has enacted various laws as the amendments to Migration Act of 1958, in order to manage the UMAs. As has been noted in (II. Statutory Laws ...), some of these laws were enacted in great haste, often trying to circumvent adverse legal challenges. As with AJL20[#1] case, the LNP government is facing further scrutiny, tested against the principle of legality, on the discharge of its statutory duties on detained "unlawful non-citizens".

In above three paragraphs, I've explained the existence of disastrous legal consequences that might be waiting for LNP government in current political settings. The LNP government's priority has therefore been "not to rock the boat" and to keep the "status quo" of Offshore Detention Regime. As for the Medevac evacuees, the LNP government will also try to keep the "status quo" of these individuals under the detention. Our examination of LNP Government's repeal of Medevac Law, the Bills Digest No. 34 2019-20 [#17], we must undertake with this contexts.

PURPOSE OF MEDEVAC REPAIR BILL

The stated purpose of LNP Government's bill is "... for the removal of people brought to Australia under the medical transfer provisions back to a regional processing country ..." [#17]. From the time the Medevac Bill had passed both Houses of Parliament in February 2019, the LNP Government have been "promising" to repeal the Medevac Law if they get re-elected. One stated reason by Government to repeal Medevac Law, which noted in Bills Digest [#17] is that:

"*... the Attorney-General, Christian Porter, announced that the Government had legal advice indicating that the new medical transfer provisions did not provide any power for the Government to return a person to a regional processing country once they no longer needed to be in Australia. The current Bill attempts to rectify this to ensure that people who have been brought to Australia under the medical transfer power are able to be returned to Nauru or PNG once they have received the necessary medical treatment, or are considered to no longer need to be in Australia....*"

And, therefore, the Government has inserted a clause into Section 198, "Removal from Australia of unlawful non-citizens, Migration Act of 1958", of which texts explicitly indicating those asylum-seekers who brought to Australia under Medevac Law as "..repealed section 198C for a temporary purpose".

"*SECT 198. (1A) In the case of an unlawful non-citizen who has been brought to Australia under section 198B or repealed section 198C for a temporary purpose, an officer must remove the person as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved).*"

GOVERNMENT'S ULTERIOR MOTIVES AND IMPLICATIONS (Coffee Cup Moments)

At this stage, we all really need to sit down and ponder about what are the real implications of repealing Medevac Law. This is because there is the practical fact that the APOD detainees were not removed after the repeal Medevac Law. Ostensibly, the Parliament has now empowered government with above-mentioned return power, and why does the government keep detaining UMAs ? And what prevents the government from exercising such return power ? Points to consider:

(a) If the LNP Government's only intention, as stated in Bills Digest[#17], is to enabled the government to empower the return of Medevac evacuees, the government does not necessarily need to repeal Medevac Law. The government could have just amended above-mentioned return power. By repealing the Medevac Law, the government has destroyed an independent process for bringing any asylum-seekers to Australia. This is because the Medevac Law posed a real threat to the existence of Offshore Detention facilities. Consequently, Medevac Law threatens the LNP Government's multi-billion dollar Offshore Entitlements [#21].

(b) By enacting this amendment, the government is creating "an otiose law", in order to have an excuse for keeping the evacuees in APOD detention. By having the "otiose removal powers", the government can have justification for keeping those evacuees in detention pending removal (whether or not the purpose has been achieved). Without this "otiose law", the government will be exposed to legal challenges for arbitrary detention.

This actually is in direct analogy to our observation on s 197C in the AJL20 Case [#1]. According to the s 197C, the removal duty would ostensibly arise regardless of the (refugee) person has been under the non-refoulement international obligation by Australia. There're suggestions that the Section 197C may have been enacted in order to circumvent High Court rulings [#20]. Whilst practical refouler for a refugee person with s 197 is impossible, that otiose law provision can be used for detaining the refugee person "pending removal".

APOD DETENTION ARBITRARY

Perhaps, above two reasons can sufficiently provide us with the conclusion that Medevac evacuees are being held arbitrarily in APODs. The most intriguing question in this Medevac repeal saga is "What reason(s) may have prevented the government from returning evacuees

?". To this, we might find some clues from Attorney-General Christian Porter's Press Release on 21 February 2019 [Fn. 36 of #17]. That Press Release indicates the Australian Government Solicitor's Office is advising the government has "no power" to return the evacuees who brought under the Medevac Law. And it states, "The Government has not yet identified any other power in the Migration Act allowing the return of Medivac transferees to Nauru or Manus. It is exploring all legislative and non-legislative options to fix this problem."

Even after the repeal of Medevac Law, the LNP government still cannot identify any other power to return the Medevac evacuees. As for Medevac evacuees, we can conclude that there are substantive reasons of which (i) fundamental in its nature; and (ii) profound in legal/constitutional implications that government may now be facing with. One of fundamental reasons might be that, if we are to look at for example, Section 198AH, "(1) Section 198AD applies, subject to sections 198AE, 198AF and 198AG, to a transitory person ...". The government is not allowed to remove evacuated persons when Nauru/PNG have not agreed to.

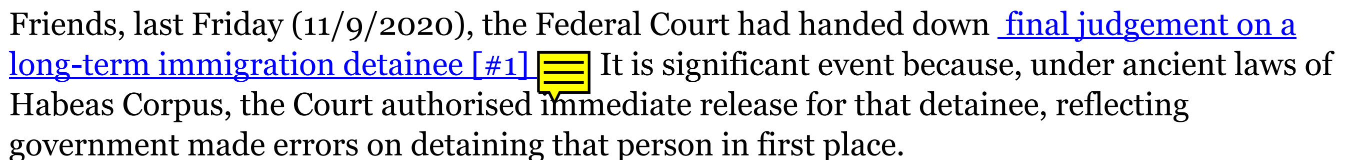
If we are to leave such fundamental reasons to a chance then, there can also be profound legal/constitutional implications that may arise out of Section 4, Object of Act [#22]. I would just leave our friends to ponder on this. But let me conclude this long series of discussion on the note that, to my observations, the Australian Government has been holding APOD detainees arbitrarily.

(This is the conclusion reached on 5 part series of discussion on lawfulness of the Australian Governments' detention of Offshore Asylum-seekers evacuated under Medevac Law. These discussions were initially held on Facebook Refugee Forums during September -- November 2020. Part (V) is the conclusion and Part I--IV are the detailed reasoning. Specific FB forum posting reference are also given and readers are invited to take part in any of those Facebook Refugee Discussion Forums. -- U Ne Oo, NetIPR.)

FACEBOOK OPEN DISCUSSION FORUMS ON REFUGEES

1. Australian Refugee Action Network (176 members)
2. Stop Offshore Processing of Asylum Seekers (127,000 members)
3. SOCIAL JUSTICE asylum seekers (62,000 members)
4. Close Manus Island Detention Center (949 members)

I. LAWFULNESS OF ADMINISTRATIVE IMMIGRATION DETENTIONS HISTORIC LIM'S 1992 CASE



Friends, last Friday (11/9/2020), the Federal Court had handed down final judgement on a long-term immigration detainee [#1]. It is significant event because, under ancient laws of Habeas Corpus, the Court authorised immediate release for that detainee, reflecting government made errors on detaining that person in first place.

The detainee is a Syrian national who came to Australia in 2005 as a dependent minor, of which his mother has been a Convention refugee. In October 2014, the Immigration Minister (Scott Morrison) cancelled his visa (Child Visa Subclass 101) on character grounds, on which he became an "unlawful non-citizen", and the government held him in the immigration detention since. In 2016, the Minister (Peter Dutton) rejected his application for protection visa XA, referring to failed character tests. In May 2017, the Federal Court ordered that the Minister be determining of his protection visa application in accordance with the law [#2]. The Minister appear to have taken ill of this Court order, no intervention ever made to grant detainee the Class XA visa, and efforts continued -- unsuccessfully -- to deport the detainee back to Syria.

COMMUNITY LAMENT

Friends, we are embarrassed by the way Australian government treat this individual. There are several points about which the community's expectation has not been met in this case. We expect our politicians and government to be benevolent in their consideration for the welfare of all individuals. What we see, in the stead, was just the victimisation of defenceless individual, as if they (the government Ministers) are "Petty Gods" playing powers with the life of vulnerable others to serve their own political ends. Such injustice being done, often, against government's own internal departmental advises -- it is learnt.

At the final stage of above mentioned detainee's saga, his tenacious team of lawyers were being able to tighten the noose around the Minister's clumsy actions. That was around July 2019. The Court finally established that the government holding of this "unlawful non-citizen" has been unconstitutional [#1, 11/9/2020].

JUDGE'S CONSIDERATION RELEVANT TO APOD DETAINEES

The suffering of this detainee in this case has been unfortunate, but it's not all in vain perhaps. If we are to look at bigger pictures, its fruitful outcomes can be found in the Court's judgement [#1]. The deciding judge, Bromberg J, carefully considered in details about this detention case. The judge explained with a great clarity, often drawing authorities from High Court and other historical cases, how such government detention of this person has become unconstitutional. I believe this judgement [#1] is directly relevant to the cases of APOD detainees. I would therefore earnestly invite all our friends to look at the content of this judgement in details [#1].

MUST DETAIN IN 'PURPOSE', NOT IN 'EXCUSE'

By looking a quick glance on judgement, any detention of "alien" or "unlawful non-citizen" must be for a "legitimate purpose". Otherwise, the government's detention of aliens would

become unconstitutional without any meaningful purpose. The onus of proof for "meaning" and "purpose" of any detention is for the government.

If we are to look at the APOD detainees, what has been the government's purpose ? Questions would arise, of course. In many ways, the considerations and tests would be parallel for our APOD detainees and this court case [#1]. I know most of my activist friends are busy and quite tired, and are not in law profession (myself have no qualification in law). But please do take time to have a look into details of this court judgement [#1].

EMERGING DIRECTION FOR APODs

Friends, since the Federal Court had ordered the release of a long-term immigration detainee AJL20 (2020 [#1])/DMH16 (2017 [#2]) under Heabeas Corpous act on 11/9/2020, I have been relishing on that Court's Reasons for Judgment [#1]. The Judgment contains discussion on the Government's practice on immigration detention, its legality and constitutional limitations. I believe these discussions are quite relevant to APOD detainees and applicable for their cases.

CURRENT STATUS OF APOD DETAINEES

The AJL20 is a case on prolonged detention of an "unlawful non-citizen" who’s Australian Visa had been revoked in 2014 by the government. The government's stated purpose of detention was to deport AJL20 back to Syria, where non-refoulement international obligation prevents the government to do so.

In comparison, the government doesn't have any "stated purpose" for APOD detainees who have been brought Australia under Medevac. In previous post "LEGAL REMEDY FOR DETAINEES [#5]", I've explained at length how the invalid processing that had taken place on PNG and Nauru rendered these APOD detainees having no valid entry visa in Australia. In fact, these APOD detainees remains in the status of "unauthorised maritime arrivals (UMA)" or "unlawful non-citizens". As you all know, the LNP Government had resisted [#3], so far, to remedy this situation by Immigration Minister invoking Section 195A and issue Class XA protection visas to all those concerned.

LEGAL RESOURCES FROM AJL20 CASE

Once the status of APOD detainees being identified either as "UMAs" or "unlawful non-citizens" or, with even more generic term "Aliens", we can start utilising legal resources found in the judgment of AJL20. In the followings, I would briefly outlined on the relevant parts in consideration of the APOD cases. I do hope this would generate a healthy discussion amongst our activist and refugee friends, which hoping to spurred on further practical actions. In followings, I've categorised the possible resources as:

(I) HISTORIC CONNECTION WITH LIM'S 1992 HIGH COURT CASE
(II) INTERPRETING STATUTORY LAWS IN ACCORDANCE WITH LEGAL PRINCIPLES
(III) THE HIGH COURT CASE OF S4/2014, ALLOWABLE PURPOSE AND LIMIT ON IMMIGRATION DETENTION

HISTORICAL LIM'S 1992 HIGH COURT CASE

In and around 1989, there were Cambodian boat people (UMAs) who had been detained by the government. "Lim Williams" is one of the infant born in detention, which High Court determine in 1992 the legality of government detention [#4]. Now quoted in as many Court judgments, the Honourable judges, BRENNAN, DEANE AND DAWSON JJ. said:

"*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. Nor, in the absence of legislative provision to the contrary, does an alien within the country lack standing or capacity to invoke the intervention of a domestic court of competent jurisdiction if he or she is unlawfully detained*"

This High Court judgment is clearly stating that "alien", who present in this country "lawfully or unlawfully" is not "an outlaw"; Meaning: must not be treated as criminals. Further, the Commonwealth Executive cannot just issued a "government order", i.e. lettre de cachet, and detain an "alien" without judicial warrant and statutory provision; that is not allowed by Constitution. Further more, such detained "alien" has "standing" -- i.e. officially allowed to legal challenge -- in the court(s) of this country.

At this point, we can ask ourselves (and government) questions ? For an APOD detainee, for being simply an "alien" or "unauthorised maritime arrival" or "unlawful non-citizen" could not possibly be the legitimate reason to be detained in this way. The government must be asked of why these asylum-seekers have been detained in these APODs.

WAR-TIME ALIEN DETENTION IS NOT ALLOWED

The presiding judge in AJL20's case also draws attention in Para 24 [#1] about the War Time Refugee removal act. The judge said, "..... the WRR Act did not confer a power to keep a deportee in custody for an unlimited period without relation to the purpose of the deportation." Obviously, the government is not allowed, even in wartime, to keep a displaced person (i.e. "alien, no visas") in detention for an indefinite period, even with the legitimate purpose of deporting that person.

CONNECTION WITH CURRENT LEGISLATIVE REGIME

The Judge also pointed out legislative connection in Lim's case and current statutory text contents in Para 23 [#1]:

"*23 Lim was decided in December 1992, in the same month that ss 189, 196 and 198 were inserted into the Act. However, those provisions did not come into force until 1 September 1994. ... In Lim, a declaration was sought that ss 54L, 54N and 54R of the Act were beyond the legislative power of the Commonwealth Parliament. .... Broadly speaking s 54L of the Act as considered in Lim corresponds to s 196 of the Act in its current form. Section 54N corresponds with s 189, s 54P(1) corresponds with s 198(1) of the Act in its present form and s 54P(3) with the current s 198(6). The significance of Lim is that the Court considered the validity of those provisions in light of the constitutional limitations on administrative detention which flow from Chapter III.*"

The Sections 196, 189 and 198 are current forms of legislation and, of course, we -- the non-lawyers -- cannot easily grapple about these statutory text connections. As Lim case has been crucial to immigration detention considerations, this legislative text connection information has been very valuable to us also.

II. APOD DETAINEES IN STATUTORY LAWS

Friends, in the previous post (Part I.), by ways of studying important Federal Court judgment on case of AJL20 (2020 [#1]) DMH16 (2017 [#2]), we've discussed about the Lim's 1992 High Court decision which may have direct impact upon the situation of APOD detainees. In this post, I'll continue to share my findings in the AJL20 judgment that may have the relevance to APOD detention cases.

INTERPRETING STATUTORY LAWS IN ACCORDANCE WITH LEGAL PRINCIPLES

Before starting our discussion, let's make a quick summary and non-exhaustive account on the contents of statutory laws that relate to APOD, UMA and Offshore processing. As you'll all know, these "statutory laws" are usually promoted by Executive Government of the day, debated in Parliament and then, being approved by the Parliament. For most statutory laws for Offshore Processing of UMAs & APOD detainees will be found amongst the five hundreds amendments that have been made to the Migration Act of 1958 [#7].

The Australian governments, over the years, made those amendments relating to UMAs mostly in a great haste, so as to avoid itself public humiliations, sometime ahead of pending legal actions or court outcomes. What we can certainly sense now has been that the incoherence and chaos within the reasoning and logic in law makings, just by looking at these legislative texts. There we can find in those texts various notable clauses like, "courts should not intervene" or "natural justice does not apply", including "enable minister to exercise personal and non-compellable powers".

SECTION 46A EXAMPLE

In any case, I've summarised in the Appendix some extract of texts from the Sections 46A, 196, 198AHA of which we may need further study. For example in Section 46A, there are clauses (enactments) that "appears to" prevent APOD detainees (UMAs) applying for visas, if we were to read that enactment laterally about which the current detainment situation could not be resolved. However, the AJL20 judgment has given us some lights to resolution of such situation.

In AJL20 judgment, the presiding judge had given certain direction as to interpret particular provision of s 196. That direction has been outlined in Para 16, 17, 18 of the judgment [#1]. By following that example and with the same reasoning, we can interpret any statutory provision such as of that in s 46A.

Firstly, the statutory provisions like s 46A, i.e. "An application for visa is not a valid if made by UMA", are not to be interpreted in isolation (see Para 16). Such provision must be "read in" together with all other statutory provisions, which forms part of Migration Act of 1958, for which Australia has the international obligation to provide protection to refugees. These related statutory provisions must be "read together as to get a harmonious goal" and in the end, which that is Australia must meet obligations on Refugee Convention. This fact -- i.e. Australia's requirement to meet Refugee Convention -- has also been highlighted in the M61/2010 HCA judgment [#11]:

"*70. .... But in order that Australia not breach the international obligations it had undertaken in the Refugees Convention and Refugees Protocol, consideration would be given, in every case, to the exercise of the only statutory powers available .... the powers given by ss 46A and 195A. Having decided that he should consider the exercise of power under s 46A or s 195A with respect to every offshore entry person who thereafter claimed that Australia owed that person protection obligations, the Minister required his Department to undertake the inquiries necessary to make an assessment and, if needs be, review the conclusion reached.*"

Therefore, those APOD detainees can apply, if they choose, for any visas including Class XA refugee visa, despite of what s 46A had said so above. This is because their applications being "valid" or "invalid" is not to be determined by the Immigration Minister or Prime Minister or ABF. It can only be determined by the court.

When we follow the second and third reasoning (Para 17 &18): If this provision of s 46A being applied to APOD detainees, that they would never get a chance to apply for visa and consequently result in indefinite detention. Principle of legality forbids such situation from taking place. Chief Justice Mason in Lim (1992) said, "[u]nless a clear and unambiguous intention to do so appears from a statute, it should not be construed so as to infringe the liberty of the subject" (see Para 18 [#1]). Again, in the same Para 18, various Judges noting that:

"*Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.*"

What it means for s 46A in above discussion is that, the provision "UMAs not allowed to apply for visa" has created the situation of persons being detained indefinitely. Taken as it stands, that provision adversely impacted upon the liberty of these APOD detainees/UMAs. This is forbidden by the virtue of the Principle of Legality. Therefore, we may ignore such statutory provision when concerning APOD detainees getting them their visas.

Friends, I believe our discussion has now been reaching to the pivotal point of Australian legal system: the inter-relationship between the statutory laws, the constitution and common laws. There are much more analysis to be done in regards to offshore processing laws, such as ss 189, 196, 198AHA. I shall continue to share what I find in those statutory provisions.

III. APOD DETENTION AND ITS PURPOSES

Friends, just last Friday (30/10/20), the Human Rights for All [#12], a pro-bono group of lawyers -- that of AJL20 [#1] -- had again secured freedom for another deserving soul, who had been detained in last six years. Hearing such success stories, for one thing, we can feel glad about it, and again be inspired by it. On reflection, we can certainly appreciate those individuals' courage to face such long days of detention. On one hand, we can also appreciate the tenacity of their lawyers with their hard work, looking into the intractable and often un-winnable cases. Such courage and tenacity, in good ways, are infectious to all of us -- the activists and refugee friends. We are, of course, on a hot trail on the discussion about APOD detainees' cases, based on AJL20's court decisions [#1].

S4/2014 HCA JUDGMENT ON ALLOWABLE PURPOSES OF DETENTION

The High Court case of S4/2014 concerned with a stateless person who came to Australia by boat in 2011 [#13], and who had been detained in Christmas Island. He applied for the protection visa Class XA, and the Department had made initial 'non-statutory' refugee assessment, known as "Protection Obligation Determination (POD) process", to ascertain whether he is a refugee. Then the Department made health and character checks and said that person is "visa grant ready". However, as him being unauthorised maritime arrival, the Minister had yet to lift the bar under s 46A, and considering whether to accept that person's asylum application. Whilst those events were taking place, that person had been kept in immigration detention.

On 2 years down the track, the LNP government had come into power. Not wanting to grant any protection visa Class XA under his government, the Immigration Minister supervene on his case and granted other forms of humanitarian stay visa (THC visa), under section 195A. The High Court considered that the Minister's supervening action has been unlawful.

The academic reviews indicate the S4/2014 as one of the significant High Court decisions [#14]; the Court became more asserting the ways towards its 1992 Lim's judgment. The way I understand, the S4/2014 addresses the Minister arbitrarily exercising broad powers he has within the Act (i.e. the Migration Act 1958), when a refugee application process still been pending, so as to achieve an outcome favourable for his political objectives. This kind of arbitrary exercise of governmental power will not be allowed by High Court; although the Minister may have had done everything within his valid statutory powers.

Normally, we all focus on "detention" as the only contestable point in concerning Offshore Detention Regime. However, the S4/2014 would have opened the doors, to my ways of thinking, challenging government's behaviour re: offshore processing on itself. Of course, there are many questionable areas where the Executive may found to have trespassed statutory limitations when implementing its offshore policies, in addition to current APOD cases of pure "detention", so to speak.

PURPOSES FOR IMMIGRATION DETENTION

The lawyers of AJL20 had mostly relied the judgment of S4/2014 in order to build up their case. In retrospect, that has been the right approach given that prediction already made by the academics who analyses S4/2014, indicating there may be constitutionally invalid immigration detention under the LNP government (See Pp. 652 [#13], Joyce Chia, NSW Law Journal, 2015):

-> Detention on grounds of security and character;
-> Detention in cases where processing is not being undertaken;
-> Cases of unduly lengthy detention; and
-> Other cases, including detention of recognised refugees for health and security checks, and those refused protection visas but not currently in the process of being removed.

The AJL20 [#1] has been the proof to such academic predictions being correct, so to speak.

As for the APOD detainees, the Judge in AJL20 [#1] states the Executive Government must not detain "unlawful non-citizens" arbitrarily (i.e. unconstrained discretion). The Executive Government may only detain in accordance with the law as [See Para.27, AJL20 #1]:

"*Para. 27 The High Court's discussion commenced at [22, #13] with the observation that "the Act does not authorise detention at the unconstrained discretion of the Executive". The power given to the Executive is the power "to detain non-citizens in the context, and for the purposes, of the Executive's statutory power to remove from Australia an alien who is an unlawful non-citizen". The Court then stated, "[t]he statutory power to remove an unlawful non-citizen is coupled with the statutory obligation (s 198) to effect that removal 'as soon as reasonably practicable'" (at [23, #13]).*"

In S4/2014, the High Court judges elaborated further on constitutionally allowable purpose for detention of unlawful non-citizens as [Para 26 #13]:

"*26 Importantly, the Court further held that the provisions of the Act which then authorised mandatory detention of certain aliens were valid laws if the detention which those laws required and authorised was limited to what was reasonably capable of being seen as necessary for the purposes of deportation or to enable an application for permission to enter and remain in Australia to be made and considered. It follows that detention under and for the purposes of the Act is limited by the purposes for which the detention is being effected. And it further follows that, when describing and justifying detention as being under and for the purposes of the Act, it will always be necessary to identify the purpose for the detention. Lawfully, that purpose can only be one of three purposes: the purpose of removal from Australia; the purpose of receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia; or, in a case such as the present, the purpose of determining whether to permit a valid application for a visa. (S4/2014, #13)*"

DETENTION FOR WHAT PURPOSE ? PLEASE EXPLAIN !

Evidently, the High Court said above that the Executive government could lawfully detain unlawful non-citizens only for following three purposes:

(i) The purpose of removal from Australia;
(ii) Investigating and determining an application for a visa permitting the alien to enter and remain in Australia;
(iii) The purpose of determining whether to permit a valid application for a visa.

For the detainees in KP, Mantra and other APODs, so far as I could see, none of above three purposes fit in government's detention scheme. Let's question ourselves what might have been the purposes for APOD detention:

(i) Can it be for the removal purposes? No. Almost all (80%) already found to be refugees. By law, the government cannot remove them from Australia.
(ii) Can it be for determining and investigating the refugee applications? No. The non-statutory POD processes had already been done.
(iii) Is it that the Minister determining whether to permit their application (granting of XA visa)? No. The government never said that they were undertaking that path!

On this account, the Morrison Government's detention of APOD detainees doesn't match any of above three purposes. Therefore, the detention of APOD detainees will found to be unconstitutional.

IV. APOD DETAINEES AND POSSIBLE GOVERNMENT RESPONSES

In the last update (31/10/2020), we have identified the three constitutionally permissible purposes for detention of "unlawful non-citizens" or UMAs. Remember, though, that the word "unlawful" practically meant "nothing" in legal or constitutional sense in our APOD detainee cases, if we are to revisit first and foremost part of our discussion, "(I) HISTORIC CONNECTION WITH LIM'S 1992 HIGH COURT CASE" [#6]. In fact, the word "unlawful" is rather of government created projection, trying to implicate the illegality. Of course, an individual could be "unlawful" if he/she doesn't have a valid visa in Australia. However, in any circumstances, by Constitution and under the common laws, neither the Government nor its Agents -- paid contractors included -- nor any other Australian persons, are being allowed that "unlawful individual" to:

(i) threatened and mistreated at,
(ii) conduct physical assault on,
(iii) arrest and arbitrarily detained,
(iv) deprived of personal liberty, or
(v) held in involuntary servitude -- of such person.

Needless to say, anyone who conspired and set up that "unlawful individual" to be remained --when weighted against all other available measures-- in that status of predicament should also be charged as a criminal.

In section "(III) HIGH COURT CASE S4/2014, ALLOWABLE PURPOSES FOR DETENTION" [#6], we identified the followings three purposes:

(i) the purpose of removal from Australia;(*)
(ii) investigating and determining an application for a visa permitting the alien to enter and remain in Australia;
(iii) the purpose of determining whether to permit a valid application for a visa.

In so far as the Government's possible purposes for APOD detentions, we have had ruled out all of three them above in our previous discussion. In this current discussion, we shall look at the statutory laws that may have direct relevance to APOD detention, such as Sections 198AH [#15] and 196 [#9]. We -- the activists and refugees -- of course may now said to have taken in a bit of "steroid", if you like, of the knowledge on statutory laws that flowed out from the judgements on AJL20[#1] and S4/2014[#13], for which we're now able to analyse much further insights into these legislative processes by the Parliament.

POSSIBLE GOVERNMENT EXCUSES

The Government "could" and "would" make excuses, both in political and legal arenas, if we were being able to put them into the corner. In so far as I can think of, the Government could make a legal excuse using s 196 and s 198, in similar to AJL20[#1] case, that the Government has been holding these UMAs in the APODs pending removal to regional processing country

under s 196AD. The Section 196 "... must be kept in immigration detention until he or she is removed from Australia ...". Whilst for the recognised refugees in APODs, the option for removal from Australia to their country of origin, of course, had already been ruled out as previously discussed in III [#6].

Following, I've given the gist of statutory Sections that may be applied to our current discussion. What I've understood was the Government had been promising or else mobilising, before the Medevac Law getting repealed, that the Government will seek the return of those evacuated asylum seekers back to the regional processing countries. But, after the repeal of Medevac, that hadn't appeared to happen. If there are no options being available to remove, then the Government may be charged for holding those APOD detainees arbitrarily. That, in fact, would become unlawful.

We may probably have to look into the enactment [#16] and repeal[#17] of Medevac Law in details, to ascertain that the Government may be holding these APOD detainees arbitrarily. We've got to keep in mind that APOD detainees' access to Courts can be limited, whereas only the Courts can compel the government to provide answers! None the less, the legal process outlined is found as follows AJL20 [#1]:

" *Para. 92 McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 416 concerned an application for a writ of habeas corpus. In that case, Anderson J helpfully set out a detailed analysis of the operation of the onus of proof at [101]-[105]. At [103] his Honour described a series of shifting onuses, whereby:*

->The applicant must first demonstrate his or her restraint by the respondent;

->The respondent must provide a prima facie justification for that restraint;

->The applicant then has an initial evidentiary onus to raise a prima facie question as to that justification; whereupon

->The respondent bears the final legal onus of proving the legality of the restraint."

The "respondent" in above paragraph referred to the Government/ABF, of course.

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[#6] LAWFULNESS OF ADMINISTRATIVE DETENTION (LIVE UPDATE NETIPR)
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