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Indefinite detention of refugees ruled unconstitutional by the High Court of Australia – an opportunity for Europe to pause for thought?

by

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Abstract

The High Court of Australia recently handed down the landmark decision of *NZYQ*, ruling the policy of indefinitely detaining non-citizen, non-visa holders with no prospects of resettlement to be unconstitutional. As governments around the world grapple with the challenges posed by mass migration, this article considers the consequences of the High Court decision in the context of the European immigration and refugee debate, focusing upon the constitutional and human rights-related lessons that may be learned.

Key-words

immigration, refugees, detention, constitutional law, European Union law, human rights

1. Introduction

On 8 November 2023, the High Court of Australia, the final court of appeal in the Australian judicial hierarchy, handed down a decision in the case of *NZYQ*, declaring the long-practiced policy of indefinitely detaining non-citizen, non-visa holders to be constitutionally invalid. As a result, over 140 individuals held in immigration detention were ordered by the Minister for Immigration to be immediately released. The decision overturned a 20-year legal precedent, coming just before the Supreme Court of the United Kingdom ruled that the legislation establishing the offshore processing deal between the British Government and their Rwandan counterparts was also unlawful, and the Albanian constitutional court's interim decision with respect to the refugee processing deal struck with Italy.

The purpose of this article is to consider the High Court decision in the context of the ongoing global conversation regarding the legality of policies and proposals aimed at addressing the challenges posed by the mass movement of people across sovereign borders. More specifically, this article seeks to contribute to the debate raging in Europe with respect to the constitutional and rights-based consequences of pursuing certain policy prescriptions to address the large numbers of migrants and asylum seekers arriving on the EU's southern and eastern borders and making their way to other European countries, by posing the following question: what constitutional and human rights lessons can be drawn from the Australian High Court's ruling that indefinite detention of non-citizens is unconstitutional?

In posing the above question, it must be recognised that the High Court decision derives from and relates to the specific constitutional and legal settings of Australia. Given the complexities involved in seeking to compare the Australian constitutional and administrative order to that of the EU or any of its member states, and the limits imposed on the authors in preparing this piece, the scope of the aim of this article is also limited – to raise points of conceptual comparison worthy of further future detailed exploration. In saying this, we argue that this topic is ripe for comparison, given that many politicians in Europe have specifically referred to Australia's deterrent-based policy settings as the model for how to establish an orderly refugee intake process in the face of high arrival numbers and large claim processing backlogs. Indeed, the 'stop the boats' slogan utilised by the British Sunak Government is an Australian invention, with the same political figures who put together Australia's refugee

processing regime working as advisers to the current British Government and appearing at far-right immigration conferences in European countries such as Hungary. As such, the High Court decision could be viewed as a glimpse into the future for those European leaders, and other leaders of liberal democratic countries, currently pondering the policy options available to them, and the consequences that might flow depending on what they choose to pursue.

This article is structured to first consider the legal and policy background to the High Court decision before then going on to analyse the reasons for the decision. The comparative conceptual analysis is then split into a constitutional section and a human rights section, followed by a conclusion.

2. Legal and policy background to the case

Australia's immigration policy settings have long been considered amongst the most restrictive and harsh in the developed world. Australia's externalisation and detention practices have served as inspiration for other countries,[II] and have been heavily criticised by the UN Human Rights Committee for breaching international obligations.[III]

The *Migration Act 1958* serves as the legislative basis for Australia's border protection policies. Since 1958 there have been a series of amendments, including the *Migration Legislation Amendment Act 1989* and the *Migration Reform Act 1992*. The former empowered officials to arrest and detain individuals suspected of entering 'illegally', while the latter made administrative detention mandatory for those lacking a valid visa (Section 189) and removed the maximum detention limit of 273 days.

The 'Tampa Affair' in 2001, marked a turning point in the politics of immigration in Australia.[IV] As part of a concerted election strategy to weaponise the issue of asylum seekers arriving by boat, the then government implemented a range of policy measures, including the 'Pacific Solution' – the Government's offshore processing regime. The Pacific Solution mandated that asylum seekers who arrive by boat in Australia be sent offshore to be processed, with processing centres setup on Nauru and Manus Island (Papua New Guinea) to ensure these individuals would be outside Australia's migration zone.[V] This policy was dismantled in 2008, and then re-established (albeit in a slightly different form) in 2011/12, along with the policy of turning boats back to their point of origin.

According to the Refugee Council of Australia, as of August 2023, the average number of days spent in detention under these policies was 703 days (almost two years). There are also a number of examples of individuals who have been held in detention for in excess of five years (Amnesty International, 2005). The conditions within detention centres both onshore and offshore have long faced criticism for their failure to ensure humane treatment.[VI]

The High Court of Australia has generally upheld the legality of Australia's restrictive policies. The case of *Lim*, concerning the detention of Cambodian refugees who arrived in Australia by boat in 1989, saw the Court grapple with where to draw the line between the Commonwealth Government's constitutionally enshrined power to formulate policies with respect to the entry and removal of non-citizens, and protection against arbitrary executive ordered detention. Specifically, the Court sought to determine when administrative detention crosses the border into punitive detention, which according to the doctrine of the separation of powers, is a power necessarily limited to be exercised by the judiciary. The principles relied-upon by the Court will be referred to later in this article. What serves as important background information, is that the Court ultimately found the core components underpinning legislation to be lawful, as it could not be construed as forming the basis for a punitive form of administrative detention – the Act imposed limits on detention periods and provided opportunities for the detainees to seek their release via removal.[VII]

In 2004, in the case of *Al-Kateb v Godwin*, the High Court held that so long as the purpose underlying the detention of an individual is linked to deportation or removal, whether either of these purposes can actually be given effect to at a particular moment in time is immaterial. To put arbitrary limits on what are complex policy issues, involving factors both within and out of the Government's control is to unnecessarily restrict the Commonwealth's constitutionally enshrined immigration powers. In coming to this decision, the Court gave short shrift to Australia's international legal obligations.[VIII]

Subsequent decisions have further strengthened the legal basis for what became known as the policy of 'indefinite detention', with the case of *Commonwealth v AJL20* going so far as to suggest that constitutional review ought to be limited to a consideration of the legality of formal legislation, and not the actions of the executive who give effect to it. As such, when the case of *NZYQ* came before the High Court, the reasoning of the majority of the Court in *Al-Kateb* – that it was legally permissible for an individual who had not been granted a

valid visa, who could not be deported, nor removed, to be held in immigration detention indefinitely on order of the relevant Minister – was the accepted and settled precedent governing this area of Australian migration law.

3. NZYQ v Minister for Immigration, Citizenship and Home Affairs and Anor

3.1 Facts

NZYQ is the pseudonym used to refer to the plaintiff in the case, a Rohingya man, who arrived in Australia by boat in 2012. Although he was assessed by the Australian Government as having a well-founded fear of persecution in Myanmar, under the Government's policy of refusing the granting of permanent settlement pathways for asylum seekers who arrive by boat, the individual was granted a temporary visa.[IX] After being convicted of child sex offences in 2015, his temporary visa was cancelled by the Minister for Immigration in accordance with his powers under the Act.[X]

As a non-citizen, non-visa holder, who was not able to be returned to Myanmar due to Australia's non-refoulement obligations, and who would be unlikely to be granted asylum in an appropriate third country due to his conviction, the Minister determined to hold the individual in immigration detention. Under sections 189 and 196 of the Migration Act, NZYQ could be held in detention until his removal, deportation, or the regularisation of his immigration status (the granting of a visa). These sections of the Act failed to provide specific timeframes or limits for when one of these three options had to be carried out.

The arguments put to the Court by the Plaintiff were two-fold: first, that the relevant section of the Immigration Act that gives the Minister the power to detain a non-citizen must be read in light of the possibility of removal, which was not possible in this instance; and/or, that in accordance with the doctrine of the separation of powers, the power to detain an individual involuntarily and indefinitely is a judicial and not an executive function (as it is punitive in nature), and therefore the section of the Act facilitating this ought to be deemed invalid. [XI]

The Government opposed the application, arguing that the previous decisions of the Court upholding the policy of indefinite detention, built-upon the precedent of *Al-Kateb*,

should be followed. The Government indicated that there were more than 90 individuals in a similar situation to that of the Plaintiff (including other individuals who had committed serious crimes) who would be released into the Australian community should the Court find in favour of the Plaintiff.[XII]

3.2 Decision of the Court

At a hearing on 8 November 2023, the Court delivered its orders, with reasons to follow, and issued the writ of habeas corpus (an order for the immediate release of NZYQ). The basis for its decision was that the sections of the Act giving the Minister the power to indefinitely detain an individual was in breach of the doctrine of the separation of powers and was therefore constitutionally invalid. It is for the judicial branch to punish, not the executive, and detention without real prospects of re-settlement or removal constitutes a form of punishment.

On 29 November 2023, the Court unanimously handed down its reasons for the orders made on 8 November.[XIII] It approached the questions before it in three steps. The first, related to whether the Court ought to reconsider the precedent set by the 2004 *Al-Kateb* decision, which served as the legal basis for the policy of indefinite administrative detention. The second, related to the question of how *Al-Kateb* ought to be reconsidered, in light of the decision to reconsider the precedent. The third, saw the Court construct the new test to be applied to determine whether executive ordered detention meets the substantive requirements stemming from the doctrine of the separation of powers: '...the constitutionally permissible period of executive detention of an alien who has failed to obtain permission to remain in Australia as coming to an end when there is no real prospect of removal of the alien from Australia becoming practicable in the reasonably foreseeable future...'.

The core principles underlying this decision, which are a re-interpretation of the principles set out in the High Court case of *Lim,* can be summarised as follows: first, in accordance with the principle of the separation of powers '[non judicially-ordered] detention is penal or punitive unless justified as otherwise'; second, 'for an identified legislative objective to amount to a legitimate and non-punitive purpose, the legislative objective must be capable of being achieved in fact. The purpose must also be both legitimate *and* non-punitive. "Legitimate" refers to the need for the purpose said to justify detention to be compatible with the constitutionally prescribed system of government'; and third, 'the

legitimate purposes of detention – those purposes which are capable of displacing the default characterisation of detention as punitive – must be regarded as exceptional.'

The Court found that while the legislative objectives underlying administrative immigration detention were constitutionally valid – holding aliens pending deportation/preventing aliens from entering the Australian community pending a visa determination – these objectives must have factual and temporal limitations to avoid falling foul of the abovementioned principles. The facts of this case demonstrated that the relevant legislation failed to anticipate a situation where 'there is no real prospect of the removal of the alien from Australia becoming practicable in the reasonably foreseeable future' and where their visa had cancelled, meaning that the legislative objectives could not be met, rendering the provisions punitive, in contravention of the doctrine of the separation of powers and therefore constitutionally invalid.

Interestingly, the Court signalled that although the policy arrangements in question are unconstitutional, there is nothing to prevent the Government from legislating an alternative preventative basis for detaining those considered to be a serious risk to the Australian community. One where the justification for continued detention is determined by a court. Such legislation already existed at the time of the Court's decision for individuals convicted of terrorist offences, for instance.

4. The response by the Australian Government to the High Court decision

In swift response to the High Court's decision, and without waiting for the detailed reasons, the Australian Government announced the need for new legislative measures to be passed by the Parliament 'to ensure community safety is protected'.[XIV] The new hastily drafted legislation, the *Migration Amendment (Bridging Visa Constitutions) Act 2023*, created a bespoke bridging visa for detainees who were in similar situations to NZYQ, and therefore had to be released from detention into the Australian community. Under this legislation all individuals released are obliged to respect a regime consisting of a number of conditions restricting both their conduct and movement. Whilst allowed in the community, they are subject to strict curfews, must wear tracking bracelets, are subject to restrictions on where

they are able to live, on their ability to work and face gaol time should they breach any of the visa conditions. This legislation is already facing several High Court challenges.[XV]

The Migration Act was subsequently amended further by the *Migration Amendment (Bridging Visa Conditions and Other Measures) Act 2023*, introduced on 16 November 2023. The amendment creates new criminal offences for those who fail to comply with certain visa conditions. In addition, it obliges visa holders to communicate specific personal information to authorities, limiting their right to privacy.

After the High Court published the reasons for its decision, the Government took steps to amend the *Criminal Code Act 1995* to establish a preventative detention regime. The *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* gives the relevant Minister the ability to apply to a court for a 'community safety order'. This order allows the continued detention, pending removal or deportation for up to three years of specific individuals previously convicted of serious crimes. It is modelled on a pre-existing preventative detention regime that has been in place for a number of years for individuals convicted for terrorist-related offences, who are deemed to be too risky to release into the community post-completion of their sentence.

5. Reflections

5.1 Constitutional

By making the connection between indefinite administrative detention, punishment, and the important distinction between the powers of the executive and those of the judiciary, the High Court has drawn attention to the link between protection against arbitrary detention, the rule of law (in particular, the concept of legality) and the doctrine of the separation of powers. The reliance on constitutional principle for substantive rights and obligations is important in the Australian context, as there is no specific domestic human rights framework to rely-upon as a basis for legally enforcing well-established principles that exist in the EU and the Council of Europe (see the caselaw on Art 5 of the ECHR, for instance).[XVI] That being said, as the doctrine of the separation of powers is recognised as a fundamental component of the rule of law in the jurisprudence of the ECtHR,[XVII] and the CJEU (see A.K. and Others),[XVIII] European Member States of both jurisdictions ought to be aware of the

potential constitutional and human rights-based limitations to current policy efforts to replicate policies similar to those struck down by the Australian High Court.

The response of the Australian Government and the main Australian opposition party to the High Court decision,[XIX] possess similarities in both tone and substance to that of the UK Government to the Supreme Court decision.[XX] From a constitutional perspective, what is most striking in the reactionary discourse is the veiled disregard for what these courts have had to say. A shift from respectful deference to judicial rulings, to a posture of indifference and at times open hostility. We have seen the Australian Government pass legislation without having received the reasons for the High Court decision and the British Government using legislation to overturn what were findings of fact by the UK Supreme Court (deeming Rwanda to be a 'safe country') and undermine the jurisdiction of the European Court of Human Rights (ECHR). The customary references to the importance of judicial review to democracy, and our pride in adherence to the rule of law, in response to these sorts of judgments is no longer the discursive norm. Instead, we hear the political leadership of these countries employing populist metaphorical language to justify their deliberate disregard for what the courts have to say – equating harshness in approach with political strength and referring to the courts as 'roadblocks'.[XXI]

This then links to the meta-constitutional issue that liberal democracies across the globe currently face, including in the EU, which is how courts can continue to play their important role as protectors of minority rights in the face of a wave of policy proposals rooted in populist politics. That is, whether the authority of the judiciary, which is also reliant on popular support for its legitimacy (or at the very least a relationship of respect with the government of the day and the parliament), can withstand this kind of populist politicking. Such issues are even more pressing in jurisdictions such as the European Union, which has already seen the Court of Justice of the European Union's (CJEU) power to enforce adherence to core liberal democratic constitutional principles and norms challenged by the Governments of Hungary and Poland. The same can be said with respect to the blow-back received by the European Court of Human Rights (ECtHR) in response to a number of its decisions on similar issues. These flareups have had the effect of undermining the authority of these courts and in the eyes of some, their legitimacy.[XXII]

With the rule of law crisis in Europe in-part stemming from national constitutional identity arguments which were, as in the example of Hungary, built on the back of the politics

of immigration, it is not hard to foresee other traditionally less human rights-hostile European Governments testing the bounds of minority protection before the CJEU and the ECHR to give effect to their policy prescriptions.[XXIII] Indeed, with the European Parliamentary elections this year likely to be shaped by immigration and refugee issues, there is the real potential for 2024 to herald in a new EU politico-legal dynamic – one where the courts are called upon to consider the legality of EU agreements and policies developed and passed by EU institutions that undermine those rights currently protected by the Charter and the Convention. Or, in the case of Italy's agreement with Albania, EU Commission endorsed Member State policies.[XXIV]

As such, in many respects, the future legitimacy of the CJEU, the ECtHR, and with them, the fundamental and convention-based rights regimes, will be determined by how these courts manage to navigate the dangers that lurk in this policy field. If the situation in Australia is anything to go by, the courts will not be able to do it on their own – they will need advocates in the political realm to navigate through the choppy waters that lie ahead.

5.2 Human Rights/Immigration Law

While the High Court judgment is welcome, from a human rights perspective, the Australian Government's response raises a host of issues, the first of which is Australia's continued violation of international law. As a party to the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention against Torture* and the *Refugee Convention*, Australia is obliged to respect, protect and fulfil the right to liberty and security of person (Art 9 ICCPR), the right to humane treatment in detention (Art 10 ICCPR), the right to freedom of movement (Art 12 ICCPR), the right to a fair trial and certain rights in criminal proceedings (Art 14 ICCPR), and the right to seek asylum (Art 1 of the Refugee Convention), and the right not to be penalised on account of an individual claiming asylums' illegal entry (Art 31 of the Refugee Convention).

Despite having been repeatedly admonished by the UN Human Rights Committee for failing to adhere to the abovementioned articles, Australia is set to continue breaching its obligations with respect to its treatment of asylum seekers by continuing its practice of mandatorily detaining individuals seeking asylum (whether it be indefinite or not).[XXV] That is, detaining asylum seekers while their applications are being processed, which directly infringes the right of these individuals to liberty, security and freedom of movement

(Commonwealth Ombudsman 2023; Committee against Torture 2022). This system has long been described as arbitrary (*Shafiq v. Australia* 2006), with the deterrent-based policy justification for locking people up relating to issues that go beyond the individual circumstances of the asylum claimants, which is contrary to Australia's human rights obligations with respect to the processing of refugee claims (*A v. Australia* 1997). While the High Court went some way in *NZYQ* to acknowledging Australia's human rights obligations concerning refugees, it did not invoke them as justification for its ruling, nor it did not go so far as to question the legality of using detention as a policy for deterring other asylum seekers from seeking to enter Australia.

Of equal and novel concern, also from a comparative perspective, is the legislation passed in response to the High Court decision. The Australia Government has decided to deal with the legal issues stemming from the decision by making rights-based distinctions based on citizenship status (which, it must be said, has long been the conceptual basis for its detention regime). While Australian citizens who have been convicted of serious crimes will be able to freely re-enter the community at the conclusion of their sentence, those in similar situations to NZYQ face the prospect of either being placed in court-ordered 'preventative detention' or being subject to draconian visa conditions. Individuals who have committed the same category of offence could be subject to different post-sentence regimes purely based on their citizenship status. It is an unfortunate extension of the 'good' versus 'bad' immigrant narrative, which seems to be fuelling similar discriminatory policies put forward in the United Kingdom and France. In the United Kingdom the recently introduced 'Safety of Rwanda (Asylum and Immigration) Bill 2023' severely limits the legal rights of those seeking asylum by preventing such individuals from challenging certain contested facts (Singer, 2023). In France, until it was challenged, the 'Bill to control immigration, improve integration' (n°1855) sought to restrict migrant access to certain government services.

The above discussion raises the more general question of whether legislated or constitutionally enshrined bills/conventions on human rights will act as a check on the harshest forms of policies adopted in Australia taking root in Europe. The answer, as hinted at by the French and British examples, is seemingly mixed. Despite constitutionally enshrined human rights protections being in place, EU Member States are not properly held accountable for violations or for deviating from established legal norms, like the principle of non-refoulement.[XXVI] That being the case, at least with respect to those seeking asylum in an

EU Member State, unlike Australia, in the EU there is a presumption against detention and a maximum limit on the length of such detention: 18 months according to Article 15(5) and 15(6) of the Return Directive. While the institutionalisation of the hotspot approach in the EU has called into question the force of the principle of the presumption against detention,[XXVII] the existence of such a presumption provides another important point of difference to the Australian system of mandatory detention.

With the EU Commission endorsing Italy's agreement with Albania to externalise refugee processing, along with the recent Dutch elections,[XXVIII] ongoing French legislative developments, British legislative developments, policy proposals put forward by the Germans,[XXIX] and ongoing heated debates around immigration policies in Hungary,[XXX] Poland,[XXXI] and even Sweden,[XXXII] there is no doubting that Europe is at a turning point with respect to how it ought to approach the processing and integration of those who seek to enter and stay. Mixed signals are being delivered at the judicial level as to just how willing/able courts are to step in and obstruct the implementation of these policies on human rights, constitutional or other grounds. On the one hand, the Albanian Constitutional Court ruling giving green light to the agreement with Italy eliminates any glimmer of hope of it being paralysed.[XXXIII] On the other hand, the French *Conseil Constitutionnel* has rejected a third of the articles of the migration law reform, which sought to introduce differences in the level of access to basic public services and work rights for non-French nationals, although most of them were disregarded on procedural grounds.[XXXIV]

While the implementation of more restrictive immigration measures may lead to short-term political gain for those in power or seeking it, such policies and actions will undermine two of the essential myths upon which the post- Second World War rights-based political discourse, and with it, liberal democratic constitutionalism are based – the fact that human rights are fundamental, and the fact that they are universal. How this debate plays out therefore clearly has ramifications beyond the topics of migration and immigration.

6. Conclusion

Australia has long been at the forefront of testing the constitutional and rights-based limits of immigration policies. Cited by leaders around the world, including in Europe, as an example of how to do things, what the High Court of Australia has had to say in *NZYQ* and

how the Australian Government has responded should therefore be of real interest to all countries seeking to address this area of public policy. As this article has established, while the generalisability of the court decision is somewhat limited by the peculiarities of Australia's legal system, the legal issues addressed, and the legal issues generated by the response to the decision offer European leaders the opportunity to consider the consequences of at least one of the policy paths currently open to them.

Constitutionally, the High Court decision demonstrates the potential for structural arguments (separation of powers) to be employed to challenge policies that push the boundaries of executive power vis-à-vis the treatment of non-citizens. Through the political response to the court decision, we also, however, get an insight into the consequences, both human and legal, of an undermining of the established, liberal democratic interinstitutional dynamic between courts and the elected polity, by populist politics. With the European courts (CJEU and ECHR) constantly battling claims of illegitimacy, this article has suggested that their inevitable involvement in the legal questions arising from immigration policies currently being formulated across Europe, creates a potentially explosive dynamic. One that has the potential to shape the future legal order of the EU.

From a human rights perspective, while it is more difficult to draw direct lessons from the decision of *NZYQ* and apply them globally (given Australia does not have a bill or charter of rights), the case is still usefully demonstrative of the limits of human rights protection in the face of populist policies. Australia has continuously ignored international rulings declaring its immigration policies to be in contravention of its international treaty obligations, with little domestic political or legal consequence. In response to the High Court decision, the Government has taken reactive steps that are arguably even more draconian in their human impact than that which existed prior. Whilst the EU, individual members states, and other countries may possess stronger domestic human rights protections, there are real questions to be asked as to just how robust they will prove to be in the face of the same populist political sentiment that has driven how the Australian Government has chosen to respond to what its highest court has had to say.

With so much at stake – constitutionally, the protection of rights, and in terms of the human lives involved – let us hope the Australian High Court decision, and the reactions that flowed, provide Europe with the impetus to pause for thought.

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[II] For instance, the 'stop the boats' slogan, which featured prominently in the 2013 Australian federal election campaign, was used by the Sunak Government to justify the introduction of the Illegal Immigration Bill 2023. This legislative measure prevents individuals arriving in the UK via the English Channel from seeking asylum by detaining them, sending them back to their country of origin or a 'safe' third country. Furthermore, Australia's establishment of offshore detention centers for asylum seekers (beginning in 2012) and the practice of turning boats around and sending them back to their point of origin (beginning in 2013) has been cited and copied by various European governments, including the UK, Denmark, Greece, and Italy. For further insights, see Matera et al. (2023).

[III] See, for instance, Human Rights Committee, A v Australia, 3 April 1997, Communication no. 560/1993.

[IV] The Tampa Affair, occurring in 2001, was a significant incident in Australian immigration history. It unfolded when the Norwegian freighter MV Tampa rescued a group of distressed asylum seekers from a sinking boat near Christmas Island. The Australian Government controversially refused to allow the rescued individuals entry into Australian waters, sparking a heated political and humanitarian debate. See Feld, 2002.

[V] The Migration Legislation Amendment (Excision from the Migration Zone) (Consequential Provisions) Act 2001 amended the 1957 Migration Act allowing "offshore entry persons" to be transferred to "declared countries", namely Nauru and Papua New Guinea.

[VI] The UN Human Rights Committee verdicts in A. vs. Australia (1997), C vs. Australia (2002), Omar Sharif Baban v. Australia (2003), Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v. Australia (2003), Danyal Shafiq v. Australia (2006), D and E, and their two children v. Australia (2006), Shams et al v. Australia (2007), Kwok Yin Fong vs. Australia (2009), M.G.C. vs. Australia (2015), Hicks vs. Australia (2015), F.J. et al. vs. Australia (2016), and Nasir vs. Australia (2016) have collectively found Australia guilty of violating Article 9 of the International Covenant on Civil and Political Rights.

[VII] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; see analysis by Crock, 1993.

[VIII] In his dissenting opinion, Judge Kirby stood alone in advocating for the application of human rights principles from the international legal order to interpret the Australian Constitution. See Kirby, 2020.

[IX] K. Connell, 'Asylum Seekers Finally Free from Limbo' Law Council of Australia https://lawcouncil.au/media/media-releases/asylum-seekers-finally-free-from-limbo (14 February 2023).

[X] See section 501 *Migration Act 1958* (Cth).

[XI] See Plaintiffs 'Notice of Filing' <https://www.hcourt.gov.au/assets/cases/08-Sydney/s28-2023/NZYQ-MICMA-Pltf.pdf> (1 September 2023).

[XII] See the arguments of Commonwealth Solicitor-General Donaghue, *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCATrans 154.

[XIII] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37

[XIV] These words belong to the joint media released by the Minister for Home Affairs and Minister for Cyber Security, Clare O'Neil, in response to NZYQ High Court decision on 14 November 2023. It is available online on https://minister.homeaffairs.gov.au/AndrewGiles/Pages/government-action-response-nzyq-high-court-decision-14112023.aspx.

[XV] According to the Australian Parliament, at least three challenges have been raised at the High Court, see Ferris & Love, 2023.

[XVI] European Court of Human Rights, 'Guide on Article 5 of the European Convention on Human Rights', 31 August 2022, 30-32.

[XVII] A. Tsampi, 'The Importance of the Rule of Law case-law of the European Court of Human Rights: an importance that finally…grew?' https://blogdroiteuropeen.com/2022/06/02/the-importance-of-separation-of-powers-in-the-case-law-of-the-european-court-of-human-rights-an-importance-that-finally-grew-by-aikaterini-tsampi/ BlogDroitEuropean, 2 June 2022

[XVIII] Judgment of the Court of Justice on 19 November 2019, *A.K. and Others v Sadownictwa and Others*, C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982.

[XIX] L. Tingle, 'The 12-hour rush to push through laws concerning the end of indefinite detention was alarming in its chaos' https://www.abc.net.au/news/2023-11-18/confusion-over-high-court-indefinite-detention-ruling-response/103119836 Australian Broadcasting Corporation, 17 November 2023.

[XX] R. Sagoo, 'A Supreme Court ruling on the Rwanda Policy need not lead to conflict with the ECHR'

https://www.chathamhouse.org/2023/10/supreme-court-ruling-uks-rwanda-policy-need-not-lead-conflict-echr Chatham House, 14 November 2023.

[xxi] See T. Harris, 'To stop the boats, Britain needs to take control (again)' https://www.telegraph.co.uk/news/2023/11/17/rwanda-plan-small-boats-channel-crossings-suella/ The Times, 12 November 2023.

[xxii] See a good discussion of these issues in U.A. Kos, 'Signalling in European Rule of Law Cases: Hungary and Poland as Case Studies' (2023) 23(4) *Human Rights Law Review,* 1-37.

[xxiii] See the discussion of the underlying conceptual basis for this line of reasoning in J. Scholtes, *The Abuse of Constitutional Identity in the European Union* (Oxford Academic Books, 2023), Chapter 5.

[xxiv] L. Cook, 'Top EU Official lauds Italy-Albania Migration Deal but a Court and a Rights Commissioner have Doubts' https://apnews.com/article/eu-italy-albania-migration-asylum-rescue-court-91a92ebe5a0ea0e4273609a7ad0eed47 Associated Press, 14 December 2023.

[xxv] Australia has been found to have breached its obligations by the UN Human Rights Committee on five occasions, see D & E v Australia, Communication No 1050/2002 UN Doc CCPR/C/87/2D/1050/2002 (25 July 2006).; Baban v. Australia, Communication No. 1014/2001, U.N. Doc. CCPR/C/78/D/1014/2001 (2003); Bakhtiyari v Australia, Communication No 1069/2002, UN Doc CCPR/C/79/D/1069/2002, 6 November 2003; C. v. Australia, Communication No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999 (2002); A v. Australia, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997).

[xxvi] The principle of non-refoulement prevents states from returning persons to territories where they may be subjected to persecution or serious harm, or where their life or freedom would be threatened (Article 33 Refugee Convention). Some EU Member States have been found guilty of violating this principle under the European Convention on Human Rights (see for instance Safi and Others v. Greece, Hirsi Jamaa and Others v. Italy). For more information on recent legal developments in Europe that could hinder the application of this principle, see Jakulevičienė, 2023.

[xxvii] The hotspot approach, launched by the European Commission in May 2015, provides a platform to facilitate the collaboration between national authorities and European agencies in frontline Member States facing significant migratory challenges at their borders.

[xxviii] See the analysis of S. van Oosten, 'Why did the Netherlands vote for Wilders PPV? Implications for Migration Policy' https://www.compas.ox.ac.uk/2023/why-did-the-netherlands-vote-for-wilders-pvv-implications-for-migration-policy/ Oxford Centre on Migration Policy Society (Compas), 4 December 2023.

[xxix] See discussion of these in K. Connolly, 'CDU seeks to win back German voters with its own Rwanda asylum plan' https://www.theguardian.com/world/2023/dec/17/cdu-german-voters-rwanda-asylum-plan-refugees-immigration The Guardian Online, 17 December 2023.

[xxx] For instance, see H. Segarra, 'Dismantling the reception of asylum seekers: Hungary's illiberal asylum policies and EU responses' (2022) East European Politics https://doi.org/10.1080/21599165.2023.2180732.

[xxxi] See the debate that took place in the lead up to the last general election G. Baranowska, 'Poland's Sham 'Migration' Referendum' https://verfassungsblog.de/polands-sham-migration-referendum/ Verfassungsblog, 11 October 2023.

[xxxii] See analysis by A. Bailey-Morely and C. Kumar, 'The rise of the far rights in Sweden – and why it's vital to change the narrative on immigration' https://odi.org/en/insights/the-rise-of-the-far-right-in-denmark-and-sweden-and-why-its-vital-to-change-the-narrative-on-immigration/ Overseas Development Institute, 14 December 2022.

[xxxiii] Despite the opposition party challenging the agreement before the Constitutional Court, the Court ultimately determined that the agreement did not encroach upon Albania's territorial integrity or jurisdiction, thus deeming it consistent with the constitutional framework. Within Italy, the agreement successfully secured approval from both the Chamber of Deputies and the Senate, pending only ratification by the Albanian parliament. The original version of the official press release can be found at https://www.gjk.gov.al/web/Njoftim_per_shtyp_3025_1.php.

[xxxiv] The 'Bill to control immigration, improve integration' (n°1855) was passed in December 2023, after a negotiation process between the government and the opposition. The right and far-right successfully introduced restrictive measures. Some of the provisions included restrictions on immigrants' access to social benefits and citizenship for their French-born children and the introduction of immigration quotas. Aware of the likely unconstitutionality of some of the provisions, President Macron asked the *Conseil Constitutionnel* to examine the text. The Court rejected 35 articles, most of them because they were not deemed to be connected to the purpose of the law. See Decision no. 2023-863 DC of the French *Conseil Constitutionnel* at https://www.conseil-constitutionnel.fr/decision/2024/2023863DC.htm.

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