"Migration Reform and the Rule of Law"

***Migration Reform Act* Forum,**

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MIGRATION REFORM AND THE RULE OF LAW

The Hon Justice M D Kirby AC CMG *

QUALIFICATIONS TO SPEAK ON MIGRATION LAW

My qualifications to speak on a forum dedicated to the *Migration Reform Act* 1992 (Cth) are limited. In my judicial life, I do not administer the *Migration Act* 1958. That statute, like most other law relating to migrants as such, falls within the province of the Federal Court of Australia - or has done so until now. These are federal concerns and the responsibility of officers of the Commonwealth.

Why then, I ask myself, was I requested to open this forum? My qualifications, and my entitlement to have your ear I suppose, are these:

1. For a decade between 1974 and 1984 I served as Chairman of the Australian Law Reform Commission. Many of the tasks of that Commission have been concerned with reform of federal law affecting migrants. Arising out of my role in that Commission I was invited to serve on the Australian Institute of Multicultural Affairs. I became, and still am, a strong proponent of the concept of multiculturalism and respect for cultural diversity within our robust nation. *Ex officio*, I also served on the Administrative Review Council in the early days. That body superintended the introduction of important reforms of Federal administrative law. It saw the creation of the Federal Court of Australia; the passage of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), the establishment of the Administrative Appeals Tribunal; the passage of freedom of information and privacy legislation and much

administrative reform as well. I was obliged to deal with migration issues in one or other of my federal responsibilities. But for ten years I have left these things behind. Although frequently concerned with the application of administrative law outside the specifically federal sphere, I have not been in daily contact with migration legislation. It has not been my pleasure to live with that legislation and the many intricate challenges it presents to lawyers;

2 My involvement in the International Commission of Jurists has concerned me with the objectives of that global body: the defence of fundamental human rights; the protection of the independence of the judiciary and of lawyers; and upholding the rule of law. By the rule of law, I mean the obligation, which civilized countries accept, ultimately to submit the decisions and actions of people affecting others to the test of lawfulness determined if necessary in independent courts of law. Be you ever so high, the law (as it is said) is still above you. This is the standard which we have accepted in Australia. It is upheld by the Australian *Constitution*. The machinery for its protection is found in Chapter III of the *Constitution* establishing the judicial branch of government in our Commonwealth. The specific means of ensuring that every officer of the Commonwealth conforms to the rule of law is ultimately found in s 75(v) of the *Constitution*. By that provision, the ancient writs of *Mandamus* and *Prohibition* and injunctions lie from the original jurisdiction of the High Court of Australia to every officer of the Commonwealth to keep him or her within the law. My interests in the International Commission of Jurists, and my current post as Chairman of that body, attracts me to any issue in this country which concerns the protection of human rights, the maintenance of the independence of the judiciary and of lawyers and the assertion of the rule of law which is the very cornerstone of the Australian polity;

3 Lately, I have become involved in a number of international activities which require my particular attention to the rights of migrants and refugees. Most especially, as Special Representative of the Secretary-General of the United

Nations on Human Rights in Cambodia, I have had to deal with a country whose judicial branch has been shattered by war and revolution, whose migration law is rudimentary and whose institutions lack the means to uphold fundamental rights and to protect the lawful entitlements of those who stand to be thrown out of the country. There are many people living in Cambodia today who are refugees. There are many of the ethnic Vietnamese community who are living on boats on the border with Vietnam for want of a clear law and an authoritative tribunal to decide their status. These are some of the special problems of human rights in Cambodia. But it is not much good seeking to uphold human rights elsewhere, if we do not attend to them in our own country;

4. My ultimate responsibility in respect of the *Migration Reform Act* is as a citizen of this free country. To his credit, the Minister for Immigration has delayed the coming into force of the Act until 1 September 1994. That delay, approved by Parliament in the *Migration Legislation Amendment Act* 1994 (Cth), has been afforded to permit community debate about the *Migration Reform Act* and the important changes to migration law which it introduces in this country. This is a most desirable procedure. It is unfortunate that there is now such a short time before the Act comes into force. Sheer bureaucratic forces usually require that legislation of such size, complexity and controversy should sail uninterrupted into operation. It is very difficult to reverse that process, as I well know from my own days as an officer of the Commonwealth. But we should take the Minister's invitation at face value and accept the invitation to contribute to discussion of the Act and of the changes it introduces. It is in that spirit that I offer these comments to this timely forum; and

5. There is, however, an unexpected and further reason why I felt compelled to accept the invitation. I am possibly the only person at the forum who has been arrested as an illegal immigrant. It happened on the eve of my 40th birthday. I was invited to Madrid by someone who had migrated to Australia and then

returned to Spain. At the time I was chairing an OECD Committee in Paris. I arrived at the barrier at Madrid airport. An immigration official, at a time before I had received immigration clearance, and whilst I was at the barrier and before I had passed into Spain, flicked through my passport looking for a visa. This was during an *interregnum* when visas were required for Australian citizens entering Spain. Finding no visa, the official said bluntly "No visa, no entrada". Naturally, I appealed. I pointed to my extremely high civil status, green passport and golden American Express card. But alas these availed me not. I was arrested, frog marched along the airport and deported from Spain. The lesson of what happened has never been lost on me. It made me sensitive to arbitrary administrative decisions generally - but particularly migration decisions. In a country of migrants, such as Australia, where all of us, save for the Aboriginals, are the descendants of boat people or their modern equivalents, we must be specially sensitive to the rights and expectations of migrants and those secondary persons connected with them. Otherwise, our boasts about a multicultural society will be shallow indeed;

There is, of course, much that is good in the *Migration Reform Act*. It simplifies and clarifies the law in many respects. It extends the rights of review. It enhances the obligation to notify people of their right to review. It introduces important codes of procedure for decision-making which will, I expect, be beneficial. It improves the decision-making process in many ways.

However, there are three areas of special concern to me. It is about them that I wish to speak:

1. The removal in certain cases of judicial review from the Federal Court of Australia;
2. The provision for conclusive Ministerial certificates to exclude review in certain cases by the Refugee Review Tribunal; and

3. The introduction of a system of special visas for New Zealand citizens, for the first time in our Australasian history.

None of these concerns has been adequately debated in the Australian community. Each of them deserves particular attention.

REMOVAL OF FEDERAL COURT REVIEW JURISDICTION

I have already pointed to the fundamental tenant of the rule of law which underlies the Australian *Constitution*. In the past two decades we have seen a most remarkable extension of the rule of law to the Federal administration. That area of activity which was hitherto in large part practically exempt from lawful scrutiny has been brought under judicial review. This beneficial development has occurred both as a result of legislation (not least in the Federal sphere in Australia) and by important decisions of the common law. One great English judge declared that the growth of administrative law had been the most remarkable development of the law in his lifetime. A leading New Zealand judge (Sir Robin Cooke) has declared that, despite its complexity, the basal objects of administrative law - at least as developed in the common law - are to ensure that decisions made by officials (whether Ministers or bureaucrats) conform to three requirements:

1. That they are lawful;
2. That they have been made fairly; and
3. That they are not manifestly unreasonable.

These three requirements: lawfulness, fairness and reasonableness, sum up the entire body of administrative law. In the Federal sphere, and in the context of migration decisions, they have led to important and beneficial scrutiny by the Federal Court of Australia of migration decisions by Ministers and officials of the Immigration Department. The power of the Federal Court was both defined and enhanced in the *Administrative Decisions (Judicial Review) Act* 1977. The grounds of review

provided by that Act repeated, in large part, the developing principles of the common law by which the courts of England and Australia (including my own Court) had asserted the obligation of judges to ensure that all those who enjoyed power, directly or indirectly, under legislation made in the name of the people conformed to the obligations of lawfulness, fair procedure and reasonable decision-making.

There was a time, not so long ago, when Australia's attitude to the availability of judicial review in migration decisions was quite narrow. The high point of the classic exposition of this narrow view may be found in the judgment of Chief Justice Barwick in *The Queen v MacKellar; Ex parte Ratu.*[1] See also *Salemi v MacKeller [No 2].*[2] However, in 1985, in *Kioa and Ors v West and Anor,*[3] the High Court of Australia held that, following the *Administrative Decisions (Judicial Review) Act,* there was neither statutory nor common law support for a general proposition that the requirements of natural justice or procedural unfairness did not have to be observed in relation to a deportation order under the *Migration Act*. The High Court held that two Tongan citizens, whose daughter was an Australian citizen by birth, were entitled, in keeping with the ordinary rules of procedural fairness, to be heard before the making of a deportation decision against them. This entitlement was provided by Australian law to ensure that they could deal with matters prejudicial to them which had not been put to them by the decision-maker and which might affect the decision on their deportation. In this way, the rights of the proposed deportees were upheld. But so also was the obligation of the public official to make a decision that was lawful, fairly arrived at and not unreasonable in the circumstances. *Kioa* became a charter for judicial decisions upholding in migration cases, often against the resistance of opinionated officials, the requirements of procedural fairness and natural justice.

The *Migration Reform Act* 1992 will change this, unless it is, in turn, reformed from its present provisions. The Act inserts Part 4B into the Act: limiting review of decisions by the Federal Court of Australia. Over simplifying the provisions of that Part somewhat, its purpose is to take migration decisions out of the ordinary course of the *Judiciary Act* and the *Administrative Decisions (Judicial Review) Act* and to place

them within the *Migration Act* - in a little category all of their own. Whereas many of the provisions of judicial review stated under the *Administrative Decisions (Judicial Review) Act* are repeated in the *Migration Reform Act*, two notable grounds for review have been deleted. These relate to review on the grounds of natural justice (or procedural fairness) and on the grounds of the unreasonableness of the decision-maker's decision. Whereas in the past those grounds were available for challenge to migration decisions, in the future they will not be available in the Federal Court if the *Migration Reform Act* achieves its apparent objective.

The reasons given for the deletion of these two grounds of review are:

(a) That non-citizens are not entitled to the same rights as Australian citizens and hence that those rights can be reduced and circumscribed where they are migrants;

(b) That, in the past, migration cases have been fragmented between officials and tribunals providing merit review (on the one hand) and the Federal Court (on the other);

(c) That the rights of merit review have been expanded and migrants should be encouraged, and if necessary required, to pursue that right rather than judicial review with its typical focus upon matters of detail and procedure; and

(d) The costs and delays of proceedings in the Federal Court have put a burden on the public purse and on decision-making, including upon the scarce funds available for legal aid.

There is, of course, force in some of these concerns. However, I fear that they will not achieve their stated objective:

1. If a person in this country, entitled to the protection of its laws, can show relevant defects in the lawfulness, fairness and reasonableness of an official procedure, carried out by officials under the law of the land, it is inherent in a rule of law society that such defects should be answerable in the courts in token

of the submission of all, high and low, to the rule of law otherwise we condone and ignore breaches of the law by those sworn to uphold it. If breaches of the rules of natural justice (procedural fairness) and of reasonable decision-making can be demonstrated, the question is posed why such decisions should *not* be accountable in the Federal Court?

2. Whilst it is reasonable in many cases, as a matter of discretion, to require that parties seeking judicial review should first exhaust review on the merits, it is not universally appropriate that that should be so. There is a need to reserve a residual right to leapfrog the procedures and to go directly to a court able to provide urgent relief. The common law ordinarily reserves that right. The *Migration Reform Act* will withdraw it in the case of the Federal Court and migration decisions where natural justice or reasonable decision-making are concerned;

3. Often, judicial review will deal not only with the case before the Court but, by the examination of procedures, policies and conduct of officials, expose flaws in the general administration of the law which require attention and improvement. To the extent that judicial review is terminated or diminished, the important facility of judicial scrutiny of administration is withdrawn;

4. But it is not terminated. Parliament cannot, and does not purport, to withdraw the protection of the constitutional writs provided by s 75(v) of the Australian *Constitution*. Such writs are available from the High Court of Australia in its original jurisdiction. A consequence of the deletion of the Federal Court's jurisdiction in matters of natural justice and *Wednesbury* unreasonableness is the virtually certain application in many cases for relief against officers of the Commonwealth in the High Court of Australia. The facility of transferring those cases to the Federal Court will not be available. The High Court of Australia, to put it bluntly, does not have the time to become the ordinary court of such cases. Effectively, therefore, either such cases will be log-jammed in the High Court of Australia or litigants will be deflected from bringing them

although by law they might be entitled to do so. Such a derogation from the rule of law is quite exceptional; and

5 A question is posed by such withdrawal of jurisdiction from the Federal Court. Who will be next? Which powerful and opinionated bureaucracy will be able to persuade Ministers to submit to Parliament the withdrawal of effective judicial review in the case of other vulnerable and even unpopular minorities who have no loud voice in our society. Will the next group to be removed from the judicial review legislation be the handicapped or the unemployed under social security law? Will it be unpopular corporations? Will it be taxpayers? Once you provide a precedent of the kind found in the *Migration Reform Act*, it is always tempting for officials to propose to Ministers the comfortable removal of judicial review. One must not think only of the current Administration which may indeed regard this as truly exceptional. One must think down the track (as twenty years of service has taught me to do) to future Ministers and future Governments which may conceive the *Migration Reform Act* as a very useful precedent to follow to exclude lawful scrutiny in the Federal Court.

I regard it as a bad precedent and a most unfortunate departure from the rule of law. I see no sufficient justification for it. The ostensible reasons provided for it are not convincing. The new codes or procedure do not, as sometimes claimed, exhaust the many requirements of natural justice inherent in the common law. Better by far to amend the procedures of the Federal Court - perhaps to permit or require (if that be lawful) that defined cases be dealt with "on the papers", within a certain time, or subject to defined constraints - rather than to abolish judicial review altogether in serious cases of unfair procedures or unreasonable decisions.

I predict that many cases will clog the High Court of Australia as the constitutional writs are invoked. This will not be good for the administration of justice or for the provision of justice to individuals who want no more than to test the lawfulness, fairness and reasonableness of a decision vitally affecting their status.

Never forget that decisions in individual cases also affect the due observance of the law in other cases by those who are donees of powers conferred by Parliament.

CONCLUSIVE CERTIFICATES

Another matter of concern is in the came class. I refer to the provisions of s 411(2)(b) of the *Migration Reform Act* which states that the Refugee Review Tribunal may not review "decisions in relation to which the Minister has issued a conclusive certificate ...". By s 411(3) it is provided:

> *"(3) The Minister may issue a conclusive certificate in relation to a decision if the Minister believes that:*
>
> *(a) It will be contrary to the public interest to change the decision, because any change in the decision would prejudice the security, defence or international relations of Australia; or*
>
> *(b) It will be contrary to the public interest for the decision to be reviewed because such review would require consideration by the Tribunal of deliberations or decisions of the Cabinet or of a Committee of the Cabinet."*

It is unfortunate to see the proliferation of conclusive certificates in modern legislation. There are other provisions of the *Migration Reform Act* which are to the same effect, eg provisions forbidding the Secretary of the Department of Immigration from giving documents and information to the Refugee Review Tribunal. I consider this to be a retrograde legislative step. It is one enacted without the protections which have tended to accompany similar legislation in the past.

The lineage of conclusive certificates can be traced to the old provisions of the common law by which Ministers sought, in claims of access to documents, to provide certificates, purportedly conclusive, which courts of the past would meekly and abjectly observe, thereupon terminating their judicial review.

An important development of the common law in the past twenty years has seen the insistence by courts of their entitlement to scrutinize documents and to go behind purported "conclusive certificates" so as to ensure that the Executive Government did not put itself beyond the reach of the law and that nobody was above the law. For those who are interested, a useful exposition of this development of the common law can be found in the decision of the High Court of Australia in *Sankey v Whitlam and Ors.*[5]

In harmony with this development of the common law, such statutory provisions as the Federal Parliament enacted providing for certificates by Ministers normally reserved the power of the courts to make orders of discovery of documents and to require the production to the court of such documents. Thus s 14 of the *Administrative Decisions (Judicial Review) Act* 1977 provided for a certificate by the Attorney-General on grounds similar to those found in s 411(2)(b) of the *Migration Reform Act*. Such decisions have been, at least until recently, extremely rare.[6] Where made, the power of the court to require the production of the document to the court was reserved. There is no equivalent provision in respect of the Refugee Review Tribunal. It is to be simply rebuffed by the mere issuance by the Minister of a "conclusive certificate".

The provision can also be traced to s 36 of the *Freedom of Information Act* 1989. That Act also provides for certificates and in circumstances not dissimilar to those in s 411(2) of the *Migration Reform Act*. But there are important qualifications. These include a power of scrutiny of documents and of reference of applications to presidential members of the Administrative Appeals Tribunal to consider making a recommendation to the Minister that, notwithstanding a certificate, the document should be produced. In this regard, section 36 is by no means a dead letter as a recent decision of the Administrative Appeals Tribunal demonstrates.[7] In that case, after reviewing certain documents, the Tribunal determined that a letter from the then Minister (Mr Howe) to the then Treasurer (Mr Keating) contained only factual material and, as such, could not be the subject of an exemption under s 36, let alone a

conclusive certificate claim under that section. The high desirability of scrutiny of such claims is demonstrated by such cases and by many cases in the common law.

Conclusive certificates are an attempt to circumvent the rule of law. It is doubly unfortunate to see them in the context of what is otherwise an important reform in the provisions governing the Refugee Review Tribunal.

THE SPECIAL CASE OF NEW ZEALAND

The final matter which is one of regret to me is the further change of the longstanding special arrangements which Australia has enjoyed with New Zealand. Those special arrangements date back to our history as two nations which have shared common blood, common causes in peace and war and, recently, common economic interests in the CER Treaty. New Zealand's special link with Australia is recognised in our *Constitution*. It was, for a time, hoped that New Zealand would become part of our Commonwealth. Although this did not transpire, we have survived for the better part of our Federation without the necessity of passports in the case of New Zealand citizens entering this country. Of course, such an exception caused no end of irritation to migration officials.

When passports were introduced, New Zealanders at least required no visa to enter this country. They required no permit although they could be deported for offences against the criminal law.

Now, the *Migration Reform Act* changes all this. A special category visa has been introduced for New Zealand citizens. The criteria adopted are expressed, horribly enough, as requiring that the New Zealand citizen should not be "a health concern non-citizen" or a "behavioural concern non-citizen". Put in simple language this means that the New Zealand citizen should not fail health or criminal law requirements. Introducing the obligation of a visa, even a "special category visa" for New Zealand citizens renders them liable to cancellation of their visa and thus, although permanent residents, to deportation from Australia. This "reform" runs counter to the specially intertwined history of Australia and New Zealand. It

contradicts the amity which the leaders of both countries repeatedly express. It runs counter to the economic ties which are being established to reinforce the relationship with New Zealand. It is typical of a country whose migration officials tend to operate on the principle that "if it moves - require a visa".

It will virtually force many New Zealanders in Australia to take out Australian citizenship. I believe that this is contrary to the spirit of the *Citizenship Act* of this country under which citizenship should be a free choice of allegiance and association with Australia: not a forced choice for self-protection and guaranteed re-entry.

I hope that there will be second thoughts about the New Zealand provision. I do not believe that it gained sufficient attention in public debate. We may, if we like, destroy the special and peculiar link between Australia and New Zealand. But if this is to happen, let it be after full and thorough discussion and a clear-sighted recognition of the damage which such changes introduce.

There is much else in the *Migration Reform Act* that I would criticise. There is a great enhancement of the powers of non-police officials and their power of effective arrest and detention. There is an effective abolition of the right to silence. There is a curtailment of protections which have hitherto existed. I am not convinced that these are "reforms" as the Act asserts. Reform is change for the better. Whilst there is some change for the better in the *Migration Reform Act*, there is (as I hope I have demonstrated) much that is change for the worse.

In the spirit of the Minister's invitation to public debate and criticism, I offer these words. I do so as a former officer of the Commonwealth; as Chairman of the International Commission of Jurists; as an international official concerned with human rights and the rule of law; as a citizen and as a person once arrested as an illegal immigrant.

If I - with all of the vast resources of the Commonwealth of Australia and of QANTAS Airways could make a mistake and enter a country illegally - it could happen to others. In the reform of our migration law we should tread warily. We should have our eyes constantly fixed upon the obligations of administrative law in an

enlightened society. To act lawfully. To proceed fairly. And to make decisions which are not so unreasonable as to offend the sense of reasonableness which prevails in our civilized and multicultural society.

On my last visit to Cambodia, a fortnight ago, the last official I saw was advising the government on the drafting of its migration law. I counselled how important it was that Cambodia should enact a law which conformed to its international obligations and to fundamental human rights. I stressed the importance of having clear procedures and an authoritative tribunal to determine the claims to Cambodian citizenship or permanent residence. The official acknowledged this advice. He said that he had conceived an excellent procedure which could achieve these ends. It involved a dictation test. All applicants would be tested in their capacity to read and write the Khmer language. I had to tell him how unjust such a procedure could be - particularly to those who were illiterate in every language or who were old and had not developed these skills in wartime Cambodia. I also told him of how we, in Australia, had administered our former laws of migration discrimination (White Australia) by a dictation test.[8] Only an administrator of evangelical enthusiasm and fiendish imagination could have conceived *our* dictation test.

We need constantly to remind ourselves of the errors of the past and of the excesses of past administration. That reminder will underline the importance of avoiding new errors and of removing external scrutiny which will occasionally call error and injustice to our notice and require us to correct the same and avoid repetition.

ENDNOTES

* Chairman of the Executive Committee, International Commission of Jurists. President of the New South Wales Court of Appeal. Personal views.

1. (1977) 137 CLR 461.

2. (1977) 137 CLR 396.

3. (1985) 159 CLR 550.

4. See P J Bayne, *Freedom of Information*, Law Book Co, Sydney, 1984, 13, 115, 147; M Aronson, *Review of Administrative Action*, Law Book Co, Sydney, 1987, 294f.

5. See (1988) 142 CLR 1, 41 citing *Duncan v Cammell, Laird and Co* [1942] AC 624 (HL), 638; *Conway v Rimmer* [1968] AC 910 (HL); *Attorney General v Jonathan Cape Limited* [1976] QB 752 (CA), 764.

6. See R Tomasic and D Fleming, *Australian Administrative Law*, Law Book Co, Sydney, 1991, 243 at 245.

7. See *Australian Doctors Fund and Department of Treasury* (Case Number N 92/102), (1993) 46 *FOI Review* 51.

8. See *Chia Gee v Martin* (1905) 3 CLR 649; *R v Wilson; Ex parte Kisch* (1935) 52 CLR 234; *O'Keefe v Calwell* (1949) 77 CLR 261.