The Queen v Ahmad [2011] NTSC 71

PARTIES:	The Queen
	v
	AHMAD, Ahmad
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING CRIMINAL JURISDICTION
FILE NO:	21042169
DELIVERED:	22 September 2011
HEARING DATES:	19 and 20 September 2011
RULING OF:	BLOKLAND J

CATCHWORDS:

CRIMINAL LAW – MIGRATION ACT (CW) – question of law – were the 49 passengers persons to whom subsection 42(1) applied – question is directed to construction of s232A Migration Act – does the inclusions of s 42(1) within s232A create a requirement 'travel to Australia' that the Crown must prove – what is travel to Australia for the purpose of s 42(1) – s 42(1) as it applies to s 232A requires proof that the subject persons travel to Australia – there is a requirement that they cross the outer boundary of Australia's Territorial Sea – Crown will be unable to prove an offence against s 232A in this case.

Can the acts of facilitation committed outside of the Australian Contiguous zone constitute the offence under s 232A (1) – would application of the Migration Act beyond the contiguous zone breach international law – would criminalising the acts of facilitation beyond the contiguous zone breach international law – construction of s 232A (1) does allow general and wide spread extra-territorial reach in terms of acts of facilitation – by their nature

‘facilitating’ and ‘organising’ are likely to occur outside of Australia – acts of facilitation need not be shown to be within the territorial sea.

Do people seeking asylum from prosecution have a lawful right to come to Australia – not necessary to answer this question for the purpose of this trial.

Migration Act (CW) s 5, s 42(1), s 228A, s 232A, s 232A(1), s 245A, s 245B, s 245C

Acts Interpretation Act (CW) 15B(1)(4)

Evidence Act (NT) s 26L,

Seas and Submerged Lands Act (CW) s 7, s 10A, s 13A,

Crimes Act (CW) s 50BA, s 50BC

Tran v The Commonwealth (2010) 187 FCR 54; applied

Barcelo v Electrolytic Zinc Co of Australasia Ltd (1932) 48 CLR 391; *Bloxam v Favre* (1883) 8 P.D. 101; *XYZ v The Commonwealth* (2006) 227 CLR 532; *Zachariassen v The Commonwealth* (1917) 24 CLR 166; followed

Director of Public Prosecutions (NT) v WJI (2004) 219 CLR 43; *R v LK* (2010) 241 CLR 177; *Nguyen v R* [2005] WASCA 22; considered

Joyce v DPP [1946] AC 347; *Minister of Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1; *Payara v The Queen*, Ruling of 12 September 2011; *Rutu v Dalla* Costa (1997) 139 FLR 265; referred to

“Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels” (1986) 3 ICLQ 320, Professor Ivan Shearer,

REPRESENTATION:

Counsel:

Defendant:	Alistair Wyvill SC, Professor Les McCrimmon, Ian Read
Respondent:	Mr Batten

Solicitors:

Defendant:	Northern Territory Legal Aid Commission
Respondent:	Commonwealth Director of Public Prosecutions

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Ahmad [2011] NTSC 71
No. 21042169

BETWEEN:

AHMAD AHMAD
Defendant

AND:

THE QUEEN
Respondent

CORAM: BLOKLAND J

RULING ON PRE-TRIAL QUESTION

(Delivered 22 September 2011)

Introduction

[1] Mr Ahmad is charged with one count of facilitating the bringing of a group of non-citizens into Australia under s 232A *Migration Act* (CW). The date of the alleged offence is between 1 May 2010 and 11 May 2010. The location is within the Australian Exclusive Economic Zone between Scott Reef, Broome and "elsewhere". He has been in detention since the interception of the boat on 11 May 2010.

[2] Both parties initially indicated the pre-trial matters may need to be referred to the Full Court. One of the issues could have had implications for other cases. I initially favoured this course, alternatively, it seemed appropriate

to abide the answers to questions of law reserved to the Victorian Court of Appeal by Chief Judge Rozenes.[1] Both parties now seek to have the matters resolved without reference to the result of other proceedings in order to proceed to trial. This is firstly because of the time Mr Ahmad has spent in detention. Secondly because he intends to contest the charge on grounds unrelated to the pre-trial issues. Given the urgency; given s 232A *Migration Act* (CW) is now repealed and raises slightly different issues to those in the reserved questions of law,[2] I have endeavoured to resolve the issues under s 26L *Evidence Act* (NT) in the knowledge both parties' rights to appeal are preserved by this process. As will be seen, given the conclusion I have reached on the first issue, I will not proceed to answer the final issue raised as that is likely to be answered elsewhere and at this stage is not necessary to answer in the context of this trial.

Relevant Facts and Circumstances

[3] The facts sufficient to ground the rulings are drawn from particulars provided by the prosecution, supplemented by submissions.

[4] On or about 1 May 2011 Mr Ahmad was present on a boat in Indonesia in the capacity of crew or master. The boat was later designated SIEV 146. He assented to 49 persons boarding the boat near the shoreline of an Indonesian island. Acting as crew or master of the boat he began a journey by sea from Indonesia in the direction of Australia across the waters

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1 *Payara v The Queen*, Ruling of 12 September 2011.
2 *Payara v The Queen* will deal with s 233 *Migration Act*.

between the two countries; he indicated to one or more of the passengers by words and gestures that the boat was destined for Australia and would arrive in seven days.

[5] It is alleged that on a daily basis, (with another Indonesian person who then left the boat, but with whom he shared responsibility for the boat), Mr Ahmad stopped and started the engine; drove the boat; steered the boat; navigated the boat using a compass on a course of 120 degrees; steered the boat towards Australia; did jobs on the boat; and possessed or had access to a mobile phone. He did not ask any passenger whether they had permission or authorisation to come to Australia. Between about 9 and 11 May 2010 he was the only crew member; he was in charge of the boat; he told a passenger he was lost, then followed advice given to him by a passenger on the boat to head east.

[6] On 10 May 2010 the boat was detected by an Australian Customs Vessel. The boat was intercepted by Australian Customs Officers on 11 May 2010. Mr Ahmad made admissions to Australian Customs Officers that he was from Lombok; the boat was from Lombok; he was intending to go to Australia; he wished to leave the boat; and, he agreed to the boat being destroyed. The relevant conduct forming the basis of the charge, the location of the detection and interception, took place outside of Australia; outside of Australia's territorial sea and contiguous zone. It occurred within the Australian Exclusive Economic Zone.

[7] The 49 people on the boat at all relevant times were outside of Australia and the Australian contiguous zone. None had Australian entry visas. It is not alleged the accused brought the 49 persons into the "migration zone".[3] Mr Ahmad consented to boarding the Customs vessel. The Australian Customs authority to board and transfer the passengers was made under SOLAS.[4]

[8] There is little before the Court by way of facts about the purpose of the 49 persons making the voyage. It is not disputed their motivation was to seek asylum, or apply for protection visas in Australia. Mr Batten, counsel for the Crown informed the Court that all passengers have asked to be recognised as refugees and all have applied for protection visas. A number have been granted visas and are living in the community; there are at least five whose status has not yet been determined and are in detention.

Were the 49 passengers persons "to whom subsection 42(1) applies?"

[9] This question is directed to the construction of (the now repealed) s 232A *Migration Act* (CW). Unusually for an offence creating provision, embedded within s 232A *Migration Act* (CW) is a reference to persons "to whom s 42(1) *Migration Act* applies". Relevantly s 232A provides as follows:

> (1) A person who:
>
> (a) Organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more people to whom subsection 42(1) applies; and

[3] Defined in s 5 *Migration Act.*
[4] International Convention for the Safety of Life at Sea.

(b) does so reckless as to whether the people had, or have, a lawful right to come to Australia;

is guilty of an offence ... (penalty provisions omitted).

[10] Section 42(1) *Migration Act* (CW) provides:

(1) Subject to subsections (2), (2A) and (3)[5], a non-citizen must not travel to Australia without a visa that is in effect.

(i) Does the inclusion of s 42(1) Migration Act with s 232A create a requirement "travel to Australia" that the prosecution must prove?

[11] The Crown submits notwithstanding the reference to s 42(1) in s 232A *Migration Act*, all that is required to be proven by way of a circumstance, is that at least five of the non citizens did not have a valid visa to come to Australia. It is submitted there is no need to prove "travel to Australia" as that term is used in s 42(1). The Crown argues the physical and fault elements for s 232A *Migration Act* (CW) are as follows:

(a) The accused(D) facilitated to bringing to Australia of a group of 5 or more people (physical/conduct);

(b) D did so intentionally (fault/intention);

(c) At least 5 of the persons had no lawful right to come to Australia – that is to say, they were not citizens and did not have a visa that was in effect (physical/circumstance);

(d) D was reckless as to the fact that at least 5 of the persons had no lawful right to come to Australia – that is to say, they were non-citizens who did not have a visa that was in effect (fault/recklessness).

[5] The sub-sections are not relevant to these proceedings.

[12] The Crown's analysis is that 'recklessness' is the fault element applying to the physical element (c), a "circumstance". The "circumstance" on this argument is referrable to s 42(1) *Migration Act*. Section 42(1) however does not state merely that the persons "were not citizens and did not have a visa that was in effect". It states "a non-citizen must not travel to Australia without a visa that is in effect".

[13] Having expressly incorporated s 42(1) *Migration Act* as part of the definition of the offence, in accordance with long held rules on the interpretation of penal provisions, the provision must be strictly construed.

[14] Although recklessness is indeed the express fault element[6] as to the accused's mental state *vis a vis* the status of the people, that status must first be determined by application of s 42(1). The status of the people concerned, must be determined by force of s 232A *Migration Act* in accordance with s 42(1). The prohibition in s 42(1) is not merely not having a visa in effect, but not travelling to Australia without one.

[15] It has been argued s 42(1) represents a requirement that is not a physical element in the sense the High Court analysed the offence of conspiracy in *R v LK*.[7] There the plurality judgement held the physical element of conduct involving the entry into the agreement was the relevant conduct that was criminalised. The specifications of what would be expected to be amount to

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6 As has been comprehensively demonstrated by the legislative history of s 232A conveniently summarised by counsel for the Crown there was a legislative shift from "knowledge" to "recklessness".

7 (2010) 241 CLR 177 at [132].

an agreement were all considered referrable and subsumed in the physical element of the criminalised agreement. To import those requirements or specifications would produce highly technical and artificial "elements" of the offence.[8] In any event, citing *Director of Public Prosecutions (NT) v WJI,*[9] the plurality judgement adopted the observation "that the operation of those provisions of the Codes dealing with general principles can be worked out only by specific solutions of particular difficulties raised by the precise facts of given cases". In my view the reasoning of *R v LK* does not exclude treating here the words "travel to Australia" as at least a "requirement" that must be proved. It may be regarded a physical element, or as I prefer, a requirement that must be proven without necessity of proof of a separate fault element.

[16] Section 42(1), is central to s 232A and must be strictly applied. To prove guilt, it must be proven the subject persons "travel to Australia without a visa that is in effect".

[17] Although s 232A *Migration Act* (CW) has extra territorial application by the express provision of s 228A *Migration Act* "This subdivision applies in and outside Australia", s 42(1) does not. It is not in a part of the *Migration Act* that expressly provides for extra territorial application. While it is fair to suggest, as the prosecution have done, that there is no need for s 42(1) to be expressed in terms of applying "in and outside Australia", inherent in the

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8 *R v LK* at para [138].
9 (2004) 219 CLR 43 at 54, cited in *R v LK* at para [139].

nature of the prohibition, is that what is not lawful is travel to Australia in circumstances of not having a visa. It would make little sense for such a section to prohibit travel external to Australia, without a valid visa.

(ii) What is "travel to Australia" for the purpose of s 42(1)?

[18] If travel to Australia means travel to the territorial sea, the prohibition in this case cannot be made out.

[19] In the context of s 42(1), "Australia" extends, (at the maximum), to the "coastal sea" as defined in s 15B(1)(4) *Acts Interpretation Act* (CW). Relevantly, "coastal sea" means the "territorial sea".[10]

[20] The Crown referred the Court to *Nguyen v R*[11] as authority for the proposition s 42 'applies to' non-citizens without visas; that the section does not concern contravention. In *Nguyen v R* however, no significant point concerning the interpretation of s 42(1) appears to have been raised.

[21] The Full Federal Court decision in *Tran v The Commonwealth*[12] is relevant and persuasive on this point. *Tran* concerns forfeiture, a procedure that requires strict statutory construction and therefore has some parallels to this matter. There the appellant *Tran* was the Master of a boat that left Vietnam for Australia with 53 Vietnamese citizens and one Australian citizen on board. The boat was stopped by Australian Customs Service (ACS) in

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10 Section 7 *Seas and Submerged Lands Act* (CW), 12 nautical miles seaward of the base line, (note 2); Article 2, UNCLOS, (as scheduled to the *Seas and Submerged Lands Act),* provides the coastal state has full sovereignty in the "territorial sea"

11 [2005] WASCA 22.

12 (2010) 187 FCR 54.

Australia within the migration zone.[13] Tran was charged under s 232A *Migration Act* and acquitted on appeal on the basis of sudden extraordinary emergency. He sought compensation for the seizure and destruction of his ship that had occurred under the provisions of the *Customs Act* (CW). Although Tran and his boat had entered Australia's territorial sea, (and the judgements therefore need to be seen from that perspective), in the context of forfeiture, a number of propositions relevant to the application of s 42(1) were advanced.

[22] Justice Lander was of the opinion a contravention of s 42(1) would occur whenever a non-citizen enters Australia including Australia's territorial seas and waters without a visa that is in effect.[14] It is accepted Lander J was speaking "inclusively" hence the substance of what His Honour has said does not directly affect the determination here.

[23] Justice Rares rejected an argument put on behalf of the Commonwealth that s 42(1) would not apply to a person rescued and brought to the mainland because they would no longer be "travelling" in any ordinary sense. First His Honour noted "travel" may occur by a multitude of means by which a person may approach Australia. His Honour speaks of Australia in terms of an island, and gives examples relevant to the "land". In response to further argument that to avoid forfeiture a Master could cause their ship to wait outside the territorial sea awaiting "instructions from Australian

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13 Defined, s 5 *Migration Act*.
14 *Tran* (above) at para [14].

authorities", Rares J said: "However, unless those authorities issue visas to all non-citizens rescued by the Master who did not have a visa, the "instructions" would be useless to avoid forfeiture if a contravention of s 42(1) was comprehended by s 261A and the ship entered Australia's territorial waters". It appears, as submitted by counsel for Mr Ahmad, His Honour considered entry into territorial waters triggered s 42(1).

[24] Justice Besanko was clearly of the view that "travel to Australia" in the words of s 42(1) clearly means to travel to the territorial sea and coastal waters of Australia.[15]

[25] In my view a fair conclusion to be drawn from *Tran* on when s 42(1) "applies" means the criteria engaging s 42(1) has been fulfilled. Mr Wyvill also submitted the use of the word "travel" to Australia in s 42(1) rather than "enter Australia" is another indication s 42(1) can only be triggered in Australia's territorial sea. "Enter Australia" in the *Migration Act* means enter the "migration zone". The definition of "migration zone" does not include the Territorial sea.

[26] I accept s 42(1) *Migration Act* as it applies to s 232A requires proof that the subject persons travel to Australia which in turn requires they cross the outer boundary of Australia's territorial sea.

[27] As that did not occur in this case, the prosecution will be unable to prove an offence against s 232A *Migration Act*.

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15 *Tran* (above) at para [219].

[28] There is a qualification to my acceptance of the accused's argument in that regard. I accept s 42(1) can only apply in the circumstances described. As well as being supported by the rules of statutory interpretation, the construction is supported in a general way by what is contemplated in the *Seas and Submerged Lands Act* (CW) and the scheduled UNCLOS provisions. In brief, the Commonwealth exercises full sovereignty over the Territorial sea, so there are no issues in relation to enforcement of Commonwealth laws.

[29] As will be seen below, in my view s 232A may still operate extra-territorially on a person who "facilitates ... etc", although only if the non-citizens who have travelled have entered Australia's territorial sea. In my view s 232A may still inculpate an accused who performs acts of "facilitation ... etc" outside of the territorial sea and contiguous zone, given the terms of s 228A: "This subdivision applies in and outside Australia".

[30] This is not inconsistent with the conclusion that for this particular offence, the people must be found to travel to Australia in the relevant sense. The most likely context in which acts of facilitation will occur is prior to the entry of Australia's territorial sea. The construction offered here does not render s 232A unworkable. The "facilitation" is most likely to have occurred extra-territorially. If the passengers have not entered the territorial sea, there are other offences that may cover those circumstances, for example, s 233C *Migration Act*. If, as concluded here, the passengers have

not travelled to Australia in the sense of s 42(1) an offence against s 232A has not been committed.

Can the acts of facilitation committed outside of the Australian Contiguous zone, (in the Exclusive Economic Zone and beyond), constitute the offence under s 232A(1) *Migration Act*?

[31] On behalf of Mr Ahmad it is argued s 232A(1) *Migration Act* should be construed to limit its operation to the Australian territorial sea and the contiguous zone. Clearly it is not suggested the Commonwealth lacks legislative competence to pass valid laws with extra territorial reach. Rather, it is put that s 232A(1) *Migration Act* should not be construed to apply to conduct beyond the contiguous zone as it is suggested such an application would be in breach of international law and the legislature is not presumed to legislate contrary to the international law.

[32] Although a law with such a reach would be valid in terms of domestic law, it is said Parliament must make its intention clear. It is submitted if the Commonwealth legislates in purported exercise of extra territorial sovereignty it claims under international law, it is presumed unless clearly demonstrated to the contrary that the Commonwealth intends to comply with the principles of international law applicable to the exercise of that sovereignty.

[33] The principle of statutory construction relied on is drawn from Dixon J in *Barcelo v Electrolytic Zinc Co of Australasia Ltd*[16] citing Hannon P in *Bloxam v Favre*:[17]

> It is always to be understood and implied that the legislature of a country is not intending to deal with persons or matters over which, according to the comity of nations the jurisdiction probably belongs to some other sovereign or state.

[34] Support for the same principle of interpretation is taken from Gleeson CJ in *XYZ v The Commonwealth*.[18] *XYZ* concerned ss 50BA and 50BC *Crimes Act* (CW) prohibiting a person while outside Australia, from engaging in sexual intercourse or committing an act of indecency with a person under 16. It applied only to Australian citizens or residents. The case concerned whether the provisions were laws with respect to external affairs within the Commonwealth Constitution. The majority held that they were. Gleeson CJ discusses the requirement to construe legislation in a case of ambiguity in conformity with international law.

> Although the present case is not concerned with legislation governing, or purporting to govern, the conduct of foreigners in foreign countries, there are well-known examples of assertions by states legislative competence of that kind, extending to conduct of foreigners which is lawful where it occurred. Antitrust legislation of the United States of America is one such case. In cases of ambiguity, rules of construction may guide the interpretation of legislation so as to conform to international law. In this Court, in *Meyer Heine Pty Ltd v China Navigation Co Ltd,* early Commonwealth legislation against anti-competitive conduct was construed as applying only to conduct within Australia. Three aspects of that decision should be noted. First, the legislation was

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16 (1932) 48 CLR 391 at [424].
17 (1883) 8 P.D. 101 at 107.
18 (2006) 227 CLR 532.

enacted in 1906, and amended in 1910, at a time when there was still "an uncertain shadow upon the competence of the Australian Parliament to pass an Act having extra-territorial operation". Secondly, there was in the language of the legislation itself a very clear indication that its operation was territorially confined. That was a decisive consideration in the reasoning of the majority. Thirdly, Taylor J said that the presumption of territoriality was a rule of interpretation only "and, if by a local statute otherwise within power, provision is made 'in contravention of generally acknowledged principles of international law' it is binding upon and must be enforced by the courts of this country". Anti-terrorist legislation provides another example of circumstances in which many states are concerned to legislate with respect to conduct occurring outside their territorial borders, and with respect to conduct of foreigners.

Where a state legislates with respect to the conduct aboard of its citizens and residents, and exercises judicial power only upon their return, there is ordinarily no invasion of the domestic concerns of the place where the conduct occurred. Plainly, however it may be otherwise when other jurisdictional principles are invoked in aid of extra-territorial legislative competence. Professor Brownlie has summarised the effect of international law as follows:

> "Extra-territorial acts can only lawfully be the object of jurisdiction if certain general principles are observed:
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> (i) that there should be a substantial and bona fide connection between the subject-matter and the source of the jurisdiction;
> (ii) that the principle of non-intervention in the domestic or territorial jurisdiction of other states should be observed;
> (iii) that a principle based on elements of accommodation, mutuality, and proportionality should be applied. Thus nationals resident abroad should not be constrained to violate the law of the place of residence."

No doubt the provisions of s 50AD of the *Crimes Act*, confining (so far as is presently relevant) the operation of the legislation to the conduct of Australian citizens and residents, are explained in part by a desire on the part of the Parliament to conform to international expectations, and to confine the operation of extra-territorial legislation to a basis that is internationally accepted. As was noted earlier, we are not here concerned with a problem of construction of

> the *Crimes Act*. Legislation, including criminal legislation, is commonly expressed without territorial reference, and is construed and applied on the understanding "that the legislature of a country is not intending to deal with persons or matters over which, according to the comity of nations, the jurisdiction properly belongs to some other sovereign or State". This legislation is expressed to apply to conduct outside Australia, but only where engaged in by persons over whom Australia, according to the comity of nations, has jurisdiction. Nor are we concerned with legislation which manifests a clear intention to reach beyond bounds that would be regarded as acceptable according to the comity of nations. (footnotes omitted)

[35] Earlier recognition of the principle is found in *Zachariassen v The Commonwealth*[19] in the joint judgment of Barton, Isaacs and Rich JJ stated:

> It is trite law that statutes should be construed, so far as their language permits, so as not to clash with international comity.

[36] *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004*[20] was a decision in the context of a person who had been found to no longer be a refugee after the expiration of a first temporary protection visa. It was said by reason of s 15AB(2)(d) of the *Acts Interpretation Act* (CW), the Refugee Convention in that instance could be considered. Further, the approach of Australian Courts was said to endeavour to adopt a construction of an Act and Regulations which conforms to the Convention if that construction is available. This includes construing the Convention by reference to the principles stated in the Vienna Convention on the Law of Treatys even though the Vienna Convention has not been enacted as part of the law of Australia.

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19 (1917) 24 CLR 166 at [181].
20 (2006) 231 CLR 1.

[37] The territorial sea, the contiguous zone, and the exclusive economic zone have been proclaimed under the *Seas and Submerged Lands Act* (CW). Scheduled to the *Seas and Submerged Lands Act* are Parts II, V and VI of the United Nations Convention on the Law of the Sea (UNCLOS). In relation to the limits of the territorial sea, the *Seas and Submerged Lands Act* (CW) provides the proclamation of the limits of the territorial sea is not to be inconsistent with Section 2 of Part II of UNCLOS. Similarly the proclamation in relation to the limits of the contiguous zone is not to be inconsistent with Section 4 of Part II of the UNCLOS or other relevant international agreements. Section 4 of Part II of the Convention, (Article 33) provides:

Contiguous Zone

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

   (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;

   (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

[38] The note to s 13A *Seas and Submerged Lands Act* (CW) declaring the contiguous zone states “the rights of control that Australia, as a coastal

state, has in respect of the contiguous zone of Australia are exercisable in accordance with applicable Commonwealth, State and Territory law".

[39] Similarly, s 10A *Seas and Submerged Lands Act* declares the rights and jurisdiction of Australia in its exclusive economic zone are vested in and exercisable by the Crown in the right of the Commonwealth. Section 10B permits proclamation not inconsistent with Article 55 or 57 of the Convention or other relevant international agreement on the limits of the whole or any part of the exclusive economic zone. Article 55 UNCLOS provides:

> *Specific legal regime of the exclusive economic zone*
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> The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

[40] Article 57 provides:

> *Breadth of the exclusive economic zone*
>
> The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

[41] Article 58 of the Convention provides for the rights and duties of other States in the exclusive economic zone. Article 58 is not referred to in the *Seas and Submerged Lands Act* (CW). Article 58 refers to freedom of navigation and overflight and other internationally lawful uses referred to in

Article 87 of the Convention. Article 87 is not scheduled to the *Seas and Submerged Lands Act.* Article 58 paragraph 3 obliges States exercising their rights and performing their duties in the exclusive economic zone to have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the Convention and other rules of international law in so far as they are not incompatible with that Part. Article 59 provides the basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone. Article 59 is not referred to in the *Seas and Submerged Lands Act* (CW).

[42] On behalf of the accused it is said criminalising the acts of facilitation under s 232A(1) beyond the contiguous zone breaches international law. If s 232A(1) is interpreted mean it applies immigration and border control laws beyond the contiguous zone this too would breach international law. Even within the contiguous zone it is argued the relevant infringement to be dealt with must be "within [the State's] territory or territorial sea".[21]

[43] Similarly, and more fundamentally it is submitted the reach of this offence into the exclusive economic zone conflicts with Australia's international obligations as the coastal state's rights to the exclusive economic zone are limited to natural resources and other incidental matters set out in Article 56. Further, under Article 56, the coastal State shall have due regard to the

[21] Article 33 UNCLOS (above).

rights and duties of other States and shall act in a manner compatible with the provisions of the Convention.

[44] Professor Ivan Shearer[22] has pointed out in respect of the contiguous zone that it is not a zone of extended coastal state jurisdiction, (unlike the territorial sea). The matters numerated in Article 33: customs, fiscal, immigration and sanitation reveals that the coastal state may only exercise "control" to prevent infringement of laws within its territory or territorial sea. The first limb of Article 33 applies to inward bound ships and is anticipatory or preventive in character. The second limb applies to outbound ships and gives more extensive power as it is analogous to the doctrine of *hot pursuit*. Professor Shearer makes the point that enforcement cannot occur in the contiguous zone save for limited measures such as inspections and warnings. Arrest or forcible taking cannot occur in the contiguous zone. Professor Shearer's view is that as the substantive subject of customs and immigration cannot be applied to the contiguous zone, it follows that an offence cannot be committed until the boundary of territorial waters is crossed by inward bound ships.

[45] In terms of the exclusive economic zone Professor Shearer points out the exclusive economic zone is viewed in the Convention as a zone *sui generis*, neither high seas nor territorial waters. He describes it as "juridically" high seas with a reservation of certain special competences to the adjacent coastal state which preserves high seas freedoms that are not incompatible with the

22 "Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels" (1986) 3 ICLQ 320.

exclusive economic zone. In the International Legal Notes[23] Professor Shearer points out the exclusive economic zone does not give states power to apply or enforce all of their laws. The context of that discussion is primarily concerned with enforcement, hence the discussion on "hot pursuit".

[46] On behalf of the accused it is argued the extra-territorial provision[24] relevant to s 232A *Migration Act* should be limited as otherwise there is no geographical limit to s 232A. This is emphasized in submissions in reply where it is said that if the offences apply "to Indonesians on the shores and lands of Indonesia, they must also apply theoretically to Norwegians on the shores and lands of Norway. The international controversy which might flow from accepting a construction which makes such an extensive claim to international legislative power is obvious".

[47] I am not persuaded a construction of s 232A(1) Migration Act that allows general and wide spread extra-territorial reach in terms of the acts of facilitation has been shown to breach international law. If it is in breach, Parliament has made its intention clear that the law applies outside of Australia. The context of the offence of organising or facilitating subject persons to come to Australia without permission by its very nature must occur externally, not limited to the territorial sea or contiguous zone. In relation to this particular offence against s 232A(1), as has been concluded

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23 (1995) 69 ALJ 26.
24 Section 228A.

above, the offence is not complete until the subject persons enter the territorial sea. But in my view, that does not mean the impugned conduct cannot occur outside of the contiguous zone. In none of the authorities provided is there any reference to a state being in breach of international law on the basis of the reach of criminal laws whether on migration matters or otherwise. I cannot discern in the literature referred to any general prohibition against States extending their legislative jurisdiction to persons, property and events taking place outside of their territory. The Commonwealth has, in my view made its intention clear to legislate in this manner by virtue of s 228A.

[48] It is accepted the strongest claim to jurisdiction a state can possess is territorial followed by nationality. Nothing that has been put diminishes the general principle that a state is entirely free to protect its jurisdiction over any matter taking place outside its territory, so long as this is not prohibited by a contrary rule of international law. The power of a state to assert its national law to any person, property, territory or event wherever it occurs reflects the prescriptive jurisdiction recognised in international law. In the classic *Lotus* case[25] the almost unlimited prescriptive jurisdiction of a state was recognised, save that the other side to the principle is there may be international obligations accepted by the state that limit its competence. The limitations at international law to prescribe are curtailed by the jurisdiction to enforce. A state can generally only enforce its laws within its

[25] (1927) PCIJ Ser. A No.10.

own territory, or in some circumstances on its own nationals. The legislature has provided facilitation is an offence "both within and out of Australia". Parliament has intended to legislate in such a way that this section can apply generally externally, however it is the enforcement that will be limited in the circumstances where a person suspected of committing the offence is not in the territorial sea or contiguous zone.

[49] I mentioned in argument the old case of *Joyce v DPP*.[26] In *Joyce* it was made clear the offence of treason could be committed by any person owing allegiance to the Crown who has done a treasonable act, wherever it took place. All of the alleged acts in *Joyce* had occurred outside of the UK. It is when a person over whom the state has prescribed jurisdiction enters the territory, the state may proceed to exercise its powers as occurred in *Joyce v DPP*.

[50] In my view the acts of "facilitating and organising" by their very nature are likely to occur outside of Australian territory. Aside from what is permissible in the contiguous zone (checking, inspecting etc), enforcement cannot generally occur until the suspect has entered the jurisdiction. This offence shares similarities with the offence of conspiracy. The agreement can readily occur outside of territorial jurisdiction however because the offence is completed or directed to the state's territory, there is no issue with the affected State claiming jurisdiction. "Facilitating" in the sense of this offence has some parallels with an offence of conspiracy.

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[26] [1946] AC 347.

[51] I am not persuaded an offence involving facilitating or organising, notwithstanding it is perpetrated by non-nationals and not within Australian territory is a breach of international law. If the acts are committed with the relevant intention then it is complete. I see no reason to depart from the approach of Angel J said in *Rutu v Dalla Costa*,[27] although I acknowledge the particular offence in *Rutu* was in different terms.

[52] Enforcement is a completely different matter. I note in this case the interception and transfer of persons onto the Australian Customs vessel took place under the SOLAS Convention. It was not an arrest or other enforcement in the exclusive economic zone. It is not a circumstance where there is likely to be a dispute over assertion of jurisdiction if the laws are enforced only within territory, albeit the acts take place externally. It can hardly be said to interfere with the rights of other states in terms of freedom of navigation and pursuit of other lawful activities in the contiguous zone, the exclusive economic zone and beyond.

[53] Mr Wyvill pointed out that in Division 12A *Migration Act*, s 245A, s 245B and s 245C are very clear in defining the extra territorial reach and cross referencing to the various parts of UNCLOS. In my view that is because those parts of the *Migration Act* deal with the power and jurisdiction to enforce. It is in those circumstances that if there is non-compliance with UNCLOS, there is potential for a breach of international law.

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[27] (1997) 139 FLR 265 at 272.

[54] I was referred to Article 8(2) of the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*. Article 8(2) requires a State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request authorization from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State to board the vessel; search the vessel and if evidence is found of smuggling migrants at sea, take appropriate measures as authorized by the flag State.

[55] This does not advance the argument in favour of the accused. This concerns enforcement, not the reach of the laws; nor any prohibition against prosecuting any suspected person who arrives in the territory of the State Party.

[56] Because of the extra requirement of "travel to Australia" with this particular offence, the subject persons must be shown to be within the territorial sea however the acts of facilitation need not be.

Do people seeking asylum from prosecution have a 'lawful right to come to Australia' within the meaning of s 232A(b) Migration Act? (The alternative question)

[57] Although I fully respect the arguments put on behalf of both the accused and the prosecution in relation to this question, the question is posed as an

alternative to the first two arguments and is likely to be resolved elsewhere; either by Judges of this Court or the Victorian Court of Appeal.

[58] Given my conclusion in relation to issue (1); it is no longer strictly necessary to answer this question for the purpose of this trial and I decline to do so at this time.

Conclusion

[59] The group of "five or more people" are not people to whom s 42(1) *Migration Act* applies within s 232A *Migration Act*. Section 232A has extra-territorial reach and is capable of applying beyond the territorial sea and the contiguous zone.

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