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AUSTRALIA'S POWER TO DETAIN: A FOREIGN NATIONAL'S PLANNED REMOVAL OPERATION TO A THIRD COUNTRY

DR MEGUMI OGAWA*

The removal operation of a detainee by the Australian Department of Immigration is surrounded by secrecy. This article considers a document revealing the Department's intention to detain a Japanese national in Thailand during transit to the national's home destination, Japan. The Japanese national in question is the author of this article, thereby presenting a first-hand account of her experience. The article discusses the legal issues arising from this situation, namely, the power of Australian Government officials to detain a foreign national in another country in the process of their removal from Australia. In doing so, it examines the relevance of various statutory provisions, common law principles, and bilateral agreements. Although the author's planned removal did not eventuate, this article highlights the existence of a legal issue and calls for urgent law reform.

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I INTRODUCTION

On 4 September 2014, following the tabling in the Federal Parliament by the Commonwealth Attorney-General under s 46 of the *Australian Human Rights Commission Act 1986* (Cth), the Australian Human Rights Commission published a report in which the President of the Commission, Professor Gillian Triggs, found that the Department of Immigration had arbitrarily detained an overseas student in an attempt to remove her from Australia.¹ The overseas student in question is the author of this article and, as a result, possesses a number of documents that reveal certain practices concerning the removal of detainees from Australia by the Department of Immigration. The removal or deportation of a foreign national, whether ordered under s 198 of the *Migration Act 1958* (Cth) or not, is often surrounded by secrecy. The Australian Government can refuse to release documents that disclose the process of deportation by arguing that releasing the documents would 'have a substantial adverse effect on the proper and efficient conduct of the operation' of the agency, pursuant to s 47E of the

¹ Australian Human Rights Commission, 'President reports on *Ogawa v Commonwealth* (DIAC) [2014] AusHRC 69' (Media Release, 4 September 2014) <<https://www.humanrights.gov.au/news/media-releases/president-reports-ogawa-v-commonwealth-diac-2013-aushrc-69>>; see also Australian Human Rights Commission, 'Ogawa v Commonwealth (Department of Immigration and Citizenship)' [2014] AusHRC 69' (Report into Arbitrary Detention, 27 February 2014) <https://www.humanrights.gov.au/sites/default/files/document/publication/2013%20AusHRC%2069%20Ogawa%20v%20Cth%20%28DIAC%29_Web.pdf>.

Freedom of Information Act 1982 (Cth). Consequently, there are few documents concerning the operation of removal or deportation publicly available. One of the objects of this article is to place one such document in the public domain. As will be seen, the document raises a legal issue, namely the power of Australian Government officials to detain a person in another country. The primary aim of this article is to draw attention to this legal issue.

II THE FOI DOCUMENT

The Freedom Of Information ('FOI') document was obtained by the author of this article while being held in the Villawood Immigration Detention Centre pending removal in 2006. The fairly complex background to the detention was explained in the Federal Magistrates Court judgment of *Ogawa v Minister for Immigration*.² However, for the purpose of this article, it suffices to say that I came to Australia with a valid visa but the Department of Immigration — as soon as I won an interlocutory proceeding in the Federal Court against the University of Melbourne — suddenly started alleging that my visa had expired a long time earlier. I contested the issue. However, the Department of Immigration insisted that: i) I was an unlawful non-citizen;³ and ii) an unlawful non-citizen must be detained and removed;⁴ and so I ended up being detained.

While in detention, I made an FOI application and swiftly received a pile of documents in the detention centre before the Department of Immigration had to abort the planned removal because I managed to successfully apply for another visa.⁵ This means that the intended operation of the Department of Immigration, which the FOI document illustrates, did not eventuate in the end. Nevertheless, the document provides us with an idea of the intended removal operation by the Department of Immigration.

The FOI document is an email starting with the designation of the sender, an officer of the Department of Immigration, and the time stamp of the email:

²[2006] FMCA 1039.

³ See the *Migration Act 1958* (Cth) ss 13, 14.

⁴*Ibid* ss 189, 198.

⁵ For further details of my relevant migration history, see Australian Human Rights Commission, 'Ogawa v Commonwealth (Department of Immigration and Citizenship)' [2014] AusHRC 69' (Report into Arbitrary Detention, 27 February 2014)

<https://www.humanrights.gov.au/sites/default/files/document/publication/2013%20AusHRC%2069%20Ogawa%20v%20Cth%20%28DIAC%29_Web.pdf>.

Vivienne Ellis/NSW/IMMI/AU

18/07/2006 12:07 PM

Next to these are the recipient and the subject line of the email. It appears that the recipient was either: a) an officer of the Department of Foreign Affairs and Trade; or b) an officer of some agency of the Australian Government, including the Department of Immigration working in an Australian Embassy (presumably in Thailand).

To: Neil Faithfull/People/DFATL@DFATL

cc

bcc

Subject Escorted Removal of Megumi OGAWA Japanese citiz on 25//7/06 [SEC=UNCLASSIFIED]'

Below these is the classification of the email. It states:

Protective mark UNCLASSIFIED

UNCLASSIFIED

In the body of the email, four parts were redacted for various reasons. These parts will be indicated in this article as [redacted].

Hi Neil

[redacted] As you may be aware I am scheduled to be the lead escort in the removal of a Japanese female from VIDC to Japan next week. There is every possibility this removal may not go ahead as this woman is a law graduate and is likely to lodge injunctions to prevent her removal. However, she has upset a few of the top brass in NatO& they want her out so I am planning as if it will still go ahead. Karen Kinman will assist me & we have a cast of thousands, three NSW Police (2 x female, 1x male) also a medical escort. Ogawa has psychological issues but is not on any medication. She does not want to remain in Australia but I think it's the whole Japanese pride thing. She keeps saying removal is not an option to her. She has published her Thesis but has issues with the University of Melbourne who will not allow her to present it for some reason and she has personal litigation with them not due to be heard until later this year.

What I am writing to you for is we will be transiting through Bangkok, (I'll paste a copy of the flight itinerary below), Arriving in Bangkok at 06.35 hrs on 26 July and flying out at 11.20 hrs 26 July. Tony has told me about the cells available in the airport but also advised me that they would not be a suitable holding place for a female. However, he has suggested that there is a holding type room which would be more suitable for us to wait until departure time. [redacted]

[redacted]

As you can see we will only spend one night in Japan (due to the high cost of accommodation etc. there) and will fly back into Bangkok on Thursday 27 until Sunday.

[redacted]

I still have the same departmental mobile phone, the number is [redacted]

Well I best close I am still waiting to hear if the Minister has signed off on Ogawa's s351 request.

Take care.

I look forward [sic] to hearing from you and hopefully meeting up next week.

Love Viv.

From this FOI document it appears that when there is a transit in the course of removal of a foreign national by the Department of Immigration, the Department officers detain a person who has just been removed from Australia in the transit country.

III THE QUESTION: COULD I BE LEGALLY DETAINED IN A THIRD COUNTRY?

The question which immediately came to my mind when I saw the email was whether it would be lawful for the Australian Government, via its officials of the Department of Immigration, to detain me in a cell or a holding room after leaving Australia.

This question involves two distinct issues:

1. Is there any law that confers power on the Department of Immigration (of the Commonwealth of Australia) to lock up a person (namely me) in Thailand?
2. If there is some law that confers power onto the Department of Immigration to lock up a person in Thailand, am I (a Japanese national) required to observe that law in Thailand?

If both issues are answered in the negative, a further question follows (at least to my mind), that is, whether or not I could seek assistance from the Thai police alleging that I had been kidnapped and unlawfully imprisoned. However, it is plain that the last question falls within the exclusive jurisdiction of Thai law and so I will not consider it in this article.

IV THE CONSIDERATIONS: WHAT LAW CONFERS THE POWER TO DETAIN IN A THIRD COUNTRY?

A Statutory Law

My attempted removal by the Department of Immigration was supposed to have been based on s 198 of the *Migration Act 1958* (Cth) which requires 'an officer' to 'remove as soon as reasonably practicable an unlawful non-citizen'.⁶ The provision appears to confer the power to 'remove' a certain person from Australia but it does not appear to confer the power to 'detain' any person outside Australia. There appears to be no other provision in the *Migration Act 1958* (Cth) which is concerned with the removal stipulated under s 198 (nor with a deportation under s 200 of the *Act*).

If the *Migration Act 1958* (Cth) does not confer power on the Department of Immigration to detain me outside Australia, and since I did not agree to be detained in Thailand (or be removed from Australia in the first place), some other law allowing the Department of Immigration to detain me outside Australia would have been needed unless the airport in Thailand was subject to Australian jurisdiction. Thailand is a sovereign nation with its own law and therefore the latter does not seem to be a possibility. This means that I should be able to find some law that gives the Department of Immigration or perhaps the NSW Police (who were called in to accompany my case officer from the Department of Immigration and myself) legal authority to do so.

One of the possibilities might be some kind of law relating to prisoner transfer. The Commonwealth had and has in place the *Extradition Act 1988* (Cth) and the *International Transfer of Prisoners Act 1997* (Cth). However, the *Extradition Act 1988* (Cth) is concerned with the transfer of a person whom either Australia requested another country to transfer to Australia or where Australia has been requested by another country to transfer to the country because of an alleged or convicted offence. Removal under s 198 of the *Migration Act 1958* (Cth) does not involve any country other than Australia and has nothing to do with a criminal offence. Therefore, the *Extradition Act 1988* (Cth) is unlikely to be applicable to a removal under the *Migration Act 1958* (Cth). The *International Transfer of Prisoners Act 1997* (Cth) is concerned with the transfer of a prisoner serving a sentence of imprisonment in Australia to their own country to serve

⁶*Migration Act 1958* (Cth) s 198.

out their remaining sentence or with an Australian prisoner serving a sentence in another country to serve out their remaining sentence in Australia. Again, removal under s 198 of the *Migration Act 1958* (Cth) is not a transfer of custody of a person to another country and does not involve any dealing with a criminal offence. Therefore, the *International Transfer of Prisoners Act 1997* (Cth) is also unlikely to be relevant to the planned removal operation by the Department of Immigration.

Interestingly, both the *Extradition Act 1988* (Cth) and the *International Transfer of Prisoners Act 1997* (Cth) set out a similar provision giving authority to an escort officer to transport a prisoner in custody outside Australia.⁷ For example, s 26(1) of the *Extradition Act 1988* (Cth) provides:

A surrender warrant or a temporary surrender warrant in relation to a person (in this subsection called the *eligible person*) shall: ... (e) authorise the escort officer to transport the eligible person in custody out of Australia to a place in the extradition country for the purpose of surrendering the eligible person to a person appointed by the extradition country to receive the eligible person.⁸

These provisions suggest that even though an agreement exists between Australia and another country to send a person in Australia's custody to that country, and a provision of an Act allows the Australian Government to send a person in Australia's custody to that country, power or authority is not automatically conferred on an escort officer to keep the person in custody outside Australia.

B Common Law

Should this analysis be correct, with no provision in Commonwealth legislation allowing detention by an Australian Government officer overseas, there should be a common law principle making detention by an Australian Government officer overseas lawful. This could be the reason why the NSW Police Force were called in for my removal operation. However, enforcement of the *Migration Act 1958* (Cth) is not vested in the States under the *Migration Act 1957* (Cth) or, as far as I am aware, under any other Commonwealth Act. Therefore, unless there is some common law principle concurrently existing with

⁷*Extradition Act 1988* (Cth) s 26; *International Transfer of Prisoners Act 1997* (Cth) s 22.

⁸*Extradition Act 1988* (Cth) s 26 (emphasis in original).

the *Migration Act 1958* (Cth) to remove a person from Australia upon the expiry of the person's visa, there appears to be no room to consider State police power to transport a person overseas. I have not come across such a common law principle.

As my legal research has brought forth no existing provisions or common law principles conferring the power to detain overseas, it appears Australian Government officers do not have the power or authority to undertake the course of action outlined in the FOI document during transit in Thailand. In light of this conclusion, I do not need to address the second legal question of whether or not I, as a Japanese national, am required to respect such power or authority exercised by the Australian Government. In the event that power or authority *was* conferred on Australian Government officials to detain me under some Australian law, there would be no connection between Australian law and myself once I was removed from Australia. Obviously, I would have to abide by Thai law while in Thailand, not Australian law.

C Further Investigation: A Bilateral Agreement?

Even if Australian Government officials have no power to detain a person in Thailand, Thai authorities have such power. In this regard, a search revealed that the German Government, for example, established bilateral agreements with transit countries regarding co-operation for deportation at airports.⁹ I made an enquiry to the Consulate-General of Thailand in Australia and received a prompt reply from an official informing me that he was not aware of any agreement between the Thai Government and the Australian Government to cooperate in an operation by the Australian Government to deport a third country's national through Thailand. Since the Thai Government does not involve itself in a removal operation by the Australian Government of a national of a third country, the planned (though aborted) detention of myself in Thailand by Australian Government officials could not have been based on lawful power or authority.

⁹ Axel Kreienbrink, 'Voluntary and Forced Return of Third Country Nationals from Germany: Research Study 2006 in the Framework of the European Migration Network' (Research Study, Bundesamt für Migration und Flüchtlinge, 30 April 2007) 93.

IV THE FINAL PRESUMPTION

It does not seem uncommon for the Australian Government to virtually exercise a power of detention while removing a foreign national. A direct flight from Australia to the country of the foreign national certainly has the same effect as the continuing detention of the foreign national by Australian Government officials outside Australia. However, if such a direct flight cannot be arranged, the legality under Australian law of the acts of Australian officials surely comes to the fore.

Another document I was given by the Department of Immigration while I was detained in the Villawood Immigration Detention Centre was a list of airlines that did not accept a passenger from the Villawood Immigration Detention Centre. The list included Japan Airlines and Qantas Airways and therefore a transit was necessary. The Department of Immigration apparently considered for some reason that it had to keep detaining me even after removing me from Australia to Thailand. This was the origin of the problematic issue of Australian Government officials' (possibly illegal) exercise of a power of overseas detention in Thailand.

Finally, one might be intrigued by the fact revealed by the FOI document that the Australian Government officials planned to board a plane from Thailand to Tokyo, Japan with me notwithstanding that the flight was a non-stop direct flight. In other words, I would not be able to jump off the plane regardless of the presence of the Australian Government officials. It is unknown whether the Australian Government officials' keen exercise of their power of detention of a foreign national outside Australia has any relevance to the country of origin of the removed foreign national; that is, the final destination of the removal travel operation.

In any event, urgent law reform appears to be required either to prevent Australian Government officials from detaining a foreign national in a third country when removing him or her under the *Migration Act 1958* (Cth), or to confer power or authority on Australian Government officials to detain a foreign national in a third country when removing him or her under the latter Act.

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