BOOK LAUNCH
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FACULTY OF LAW, SYDNEY UNIVERSITY

Rayner Thwaites, *The Liberty of Non-citizens: Indefinite Detention in Commonwealth Countries*

The Hon Justice John Basten
Judge of Appeal

The two defining features of an effective nation state are commonly thought to be the power to imprison or even to execute its own citizens and to exclude all non-citizens or aliens. Of course those criteria will identify a totalitarian state as much as a liberal democracy.

The distinction, for present purposes, is that in a liberal democracy the constitutional compact accords rights and freedoms to citizens which impose constraints on the power of the state. If, but only if, such rights and freedoms extend to non-citizens, we have a potential clash between our defining features. But basic rights and freedoms *do* extend to non-citizens, if we accept that human rights are universal and inalienable; and that is the principle accepted by the international human rights conventions, at least since the Universal Declaration of 1948.

The potential conflict crystallises with those aliens who arrive without permission or enter on conditions which expire and who cannot be returned whence they came. To imprison them indefinitely may seem disproportionate to any offence they have committed: indeed, there may be no offence. To require them to have internal freedom may seem to contradict the right to control borders. I need hardly say here that these tensions are not merely the concerns of a handful of affected individuals, nor the playthings of international lawyers: they inform much broader public debate and may affect the outcome of elections. On this basis alone we would welcome the clearly expressed thoughtful analysis of Rayner Thwaites.

But there is more. A second element of the constitutional compact is found in the institutional arrangements for the exercise and control of state power. Controls over removal and detention of aliens do not merely engage the tension between the exercises of judicial and executive power; they focus attention on constitutionally contestable aspects of the boundary. How willing should a court be to protect an

individual from a perceived excess of executive power to determine who should be allowed to enter the country and on what conditions? Should a court determine the realistic prospects of removal? Is the power to refuse entry confined at all? Are the reasons for removal of a non-citizen (which may be relevant to what happens to the person awaiting removal) open to review by a court?

At a more mundane level, questions of indefinite detention involve a search for control of an exercise of state power which must generally require justification. Unjustified detention is a form of unlawful imprisonment and thus a trespass to the person. As such it carries with it an entitlement to damages in tort. Absent a relevant basis in statute, a finding of a court on judicial review that a decision is invalid will not give rise to a claim for damages. The circumstances with respect to detention are therefore different and, on one view, anomalous. What is special with respect to indefinite detention is the need to do more than the usual exercise of identifying the statutory basis for detention (which, in the case of police, may be arrest based on a reasonable suspicion that the person has committed an offence) and the application of the principle to the facts of the case. By contrast, indefinite detention will raise questions as to whether the statute does indeed authorise such an unattractive exercise of power and, if it purports to, whether there is some constitutional basis for denying it that effect.

As Dr Thwaites clearly articulates, the anxiety to avoid indefinite detention can lead to challenging searches for an alternative course. One possibility (that contemplated in the local case of *Al-Kateb*[1]) posited release into the Australian community. Where the individual is not said to pose a security threat to the local community, the pressure against release is limited to the more abstract principle of the right of the government to determine who enters the country.

In other circumstances, the proposed alternative may be to return the individual to a country where he or she faces persecution, including persecution amounting to torture. That was the problem faced by the Canadian Supreme Court in the matter of *Suresh*. As Dr Thwaites explains, deportation to a place where a person may be tortured involves a contravention of the Torture Convention. An assessment of the

[1] *Al-Kateb v Godwin* [2004] HCA 37; 219 CLR 562.

factual question as to whether the person is likely to face torture may either be a question for the courts, or a question in the first instance for the executive government with a power of review by the courts. If the latter, it may involve strict scrutiny or a more deferential standard.

Exercises in comparative jurisprudence are often fascinating but ultimately reveal the practical limitations on their use in domestic jurisprudence. When I opened this book, I expected to confirm that view. For a country like ours, working with limited constitutional protections of individual rights, I feared that the lessons from Canada, (with its Charter) and the UK (operating in the shadow of the European Convention on Human Rights, incorporated into domestic law by the *Human Rights Act 1998*) could provide only remote lessons, we being dependent primarily on principles of statutory interpretation.

My expectation, however, proved false. Without wishing to intrude on your patience, or the time allotted to the commentators who are to follow, may I briefly explain how that comes about? Rayner Thwaites devotes a significant part of the book to the *Belmarsh* litigation in the UK. The litigation concerned legislation empowering the Secretary of State to certify that a named individual was a threat to national security and was suspected of being a terrorist. If the person could not be removed from the UK, he or she could be detained, whether temporarily or indefinitely. Indefinite detention arguably infringed Article 5(1)(f) of the European Convention. That required an order derogating from Article 5(1), a procedure permitted under Article 15, but in limited circumstances. Those circumstances required a public emergency and that the derogating measures be “strictly required” by the exigencies of the situation. A finding by the merit review body that this condition was not satisfied was subject to an appeal limited to a question of law. The manner in which the Court of Appeal dealt (at least in principle) with the scope of an appeal in such circumstances was intriguing, although it is not the primary focus of Thwaites argument. His primary interest lies in the proposition, rather crudely stated, that to detain aliens thought to constitute a security threat, but not citizens who could be so categorised, required a further justification to avoid being arbitrary and discriminatory interference with individual rights on the ground of nationality. The further justification proffered by the government was that aliens could be removed or deported. The question, not

dissimilar to that raised by a purposive construction of the *Migration Act* in *Al-Kateb*, was whether the purpose of deportation could be relied upon in circumstances where there was no immediate likelihood of deportation occurring. To an Australian ear, there are immediate echoes in both statutory and constitutional interpretation in the discussion of purpose and proportionality which follows.

The book is not limited to consideration of the leading cases in the three countries. It also deals with alternative statutory responses. Schemes for conditional release into the community, including with "control orders", are discussed. Detention which does not involve punishment is usually directed to preventing flight or the commission of crimes. Broadly speaking, flight is not an issue in these cases. Rather, we are dealing with a form of preventative detention which is not unknown in domestic law. Nevertheless, there are gradations of control which may be imposed.

These issues are examined by Rayner Thwaites with care and insight. The litigation is reviewed in its statutory and historical context, with attention to both precursors and subsequent events. These accounts are instructive, without being overladen with detail; the lessons to be drawn are explicitly stated and justified. Important points of principle are raised at each stage of the discussion.

This is an important text which deserves a wide readership. People wishing to understand better the response of Western democracies to domestic terrorism, and to the persecution and torture from which aliens arriving on our shores have fled, will almost certainly obtain novel insights from this book, which I am now honoured to launch.