



Précis Paper

The Foreigner is a Mutable Figure: the Changing Interpretation of Australia's Migration Law

In the early 1990s author Eve Lester and migration barrister Nick Poynder were young lawyers working to protect the rights of refugees arriving in Australia. They discuss changing concepts and decisions in Australia's migration law as examined by Eve in her book *Making Migration Law: The Foreigner, Sovereignty, and the Case of Australia*.

Discussion Includes

- How have we got into this mess?
- Concept of sovereignty
- Detention centre life in 1992
- Racial aspect to law
- The language of 'unlawful'
- What is the answer?
- Inside the Chu Kheng Lim case

Précis Paper

The Foreigner is a Mutable Figure: the Changing Interpretation of Australia's Migration Law

1. In this edition of BenchTV, refugee lawyer and author Eve Lester and migration barrister Nick Poynder (Frederick Jordan Chambers) discuss Australia's migration law and cases as examined in Eve's book *Making Migration Law: The Foreigner, Sovereignty, and the Case of Australia*,

How have we got into this mess?

2. To examine this, in her book, Eve looked at two problems. The first was the introduction of mandatory detention legislation, indelibly on her mind, about 4 o'clock in the afternoon on 5 May 1992.
3. The other question is what happens to people while they're waiting for their case to be processed – planned destitution.

Concept of sovereignty

4. How did international law construct the idea of sovereignty and the power of the state to exclude aliens. That idea lies at the heart of both mandatory detention and destitution.

Detention centre life in 1992

5. At Port Hedland it changed at the end of 1992.
6. A second perimeter fence was built and things started to get oppressive.
7. Mandatory detention was part of that change. It has a punitive quality to it.
8. It is a power that has come to be seen as impenetrable.
9. There's a perverse logic to what has happened.

Racial aspect to law

10. It was the foundation of the White Australia policy.
11. There has never been a rupture that has moved us out of that racialized history.

The language of 'unlawful'

12. There are themes that emerge when we look at mandatory detention and at planned destitution.

13. The first theme is to do with state control – 'we're reluctant to do this but we have to do this'.
14. The second is the individual – there's a message of them being opportunistic and they're criminalized. Blame can then be imposed on the asylum seekers.
15. There is also institutional silence.
16. Mandatory detention is decisionless. As is planned destitution. There is a discretion on whether to apply support.

What is the answer?

17. Is crossing the border illegal? - It breaches provisions of the Migration Act. We have recognized as a nation there is a right to seek asylum but as far as our domestic law is concerned it is a breach.
18. We need to think differently about ourselves. We need to think differently about people needing protection. We need to think differently about how we fit in the world.

Inside the Chu Kheng Lim case

19. This is really early days of pro bono lawyering.
20. A landmark case. The extraordinary thing is the High Court found the mandatory detention legislation was constitutional but the detention they'd all experienced prior to that since their arrival was unlawful.
21. It was a key moment.

BIOGRAPHY

Eve Lester

Independent researcher and consultant, Melbourne

Author of *Making Migration Law: The Foreigner, Sovereignty and the Case of Australia* (Cambridge University Press, 2018) Eve Lester is an Associate Member of the Institute for International Law and the Humanities at Melbourne Law School. She is a public and international lawyer with a background in refugee, migration and human rights law, policy and practice spanning more than 25 years. Eve has worked in Africa, the Americas, Asia, Australia, Europe and the Pacific in a range of capacities in the non-government sector, with the UN, and as an independent adviser to governments. She has taught at the Australian Catholic University, the Australian National University, the International Institute for Humanitarian Law in San Remo, Italy, New York University, and the University of New South Wales.

Nicholas Poynder

Barrister, Frederick Jordan Chambers, Sydney

Consistently recognised in the Immigration Category of the Australian Financial Review Best Lawyers in Australia from 2012 to 2017, Nick maintains a solid migration law practice. He also practises in anti-discrimination law and family law. Nick has appeared as junior counsel in notable decisions in the High Court of Australia and provides high quality advice and representation as sole counsel in other courts and tribunals, including the Federal Circuit Court, Federal Court of Australia, and the Administrative Appeals Tribunal (General Division and Migration & Refugee Division). Prior to being called the Bar, he practised as a legal adviser to asylum-seekers in Port Hedland (Western Australia), locum practitioner with the Central Australian Aboriginal Legal Aid Service in Alice Springs (Northern Territory) and later co-ordinator of the Refugee Advice and Casework Service in Sydney.

BIBLIOGRAPHY

Focus Case

Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs [1992] HCA 64

Judgment Link

<http://eresources.hcourt.gov.au/showbyHandle/1/9838>

Cases

Al-Kateb v Godwin [2004] HCA 37

Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs [1992] HCA 64

CPCF v Minister for Immigration and Border Protection & Anor [2015] HCA 1 (28 January 2015)

Plaintiff S157/2002 v Commonwealth of Australia [2003] HCA 2

Plaintiff S195/2016 v Minister for Immigration and Border Protection [2017] HCA 31

Legislation

Commonwealth of Australia Constitution Act

Racial Discrimination Act 1975 (Cth)

Migration Act 1958 (Cth)

Migration Amendment Act 1992 (Cth)

Migration Regulations 1994 (Cth)