
TRANSCRIPT OF PROCEEDINGS

REFUGEE REVIEW

INTERVIEW CONDUCTED BY: FIONA MCLEOD

INTERVIEWEE: RON MERKEL

1 MS MCLEOD: This is Fiona McLeod interviewing Ron Merkel.

2 Okay, thanks Ron Merkel. The first question I want to ask
3 you is a general one which is that you'd observed inside
4 court and outside, that the scope of administrative review
5 is very important as a check on executive power and that
6 particularly, with a Migration Act that scope has been
7 very limited in the last few years. Is there any general
8 comment you'd like to make at the outset about importance
9 of administrative review?

10 MR MERKEL: Yes, administrative review as you just said is
11 probably the most important check on untrammelled use of
12 executive power that we have. Particularly, in this
13 federal sphere with which we're concerned in migration.
14 It's the check, and of course, when it gets whittled down
15 and it's circumstances are narrowed and limited by
16 Parliament, then it becomes less of a check and at the
17 same time gives more authority to those in the executive
18 to do two things. One is to exercise power in a way
19 that's not checked and secondly, to do so behind closed
20 doors, which again is a big problem because as has always
21 being said, I think said by Sir Gerard Brennan the Chief
22 Justice 'abuse of executive power flourishes in the dark'.
23 So, they're matters of real concern in this area.

24 MS MCLEOD: As a judge you're confined of course, to the
25 individual cases that come before you so, where issues
26 have a political momentum if you like, is that somewhat
27 frustrating as a judge?

28 MR MERKEL: No, I think the role of the judge is just to
29 adjudicate on cases according to the law as it's
30 prescribed. I don't think we are frustrated by political
31 outcomes, we may have strong views about the way the law

1 should be framed but I don't think they really intrude on
2 - to the decision making process. So, when we're limited
3 in our decision making by the grounds of review being
4 restricted that's accepted and that's acted upon and
5 that's the way the law should be.

6 MS MCLEOD: In the case of the Migration Act there have been
7 over the last few years amendments or rolling series of
8 amendments to reduce that power of review even further,
9 has there been any personal sense of frustration about
10 that?

11 MR MERKEL: Well, if you talk about my thoughts as a person who
12 has an interest in human rights, I can express one view.
13 If you talk about my thoughts as a judge I'll express
14 another view because as I said as judge our role is purely
15 to interpret and apply the law and if Parliament decides
16 to lay down the law in a restrictive way then that's the
17 way we must deal with it. As long as the restrictions are
18 within the constitutional limits. As a person who has an
19 interest in human rights I may have a totally different
20 view, that doesn't intrude onto my decision making that's
21 something that I might express if you want extra-
22 judicially or since I've left the bench.

23 MS MCLEOD: As a barrister now again practicing in the area of
24 human rights do you have a view or would you express a
25 view about our compliance with international conventions?

26 MR MERKEL: Yeah, I think that we have not complied very well
27 with the kind of criteria that the conventions lay down or
28 intend. One of the parts of refugee law and migration law
29 that is disturbing, is that initially it started off as an
30 area of broad, judicial review with the broadest of
31 grounds that would apply to most administrative decisions.

1 So, that if you have decisions concerning your property
2 rights, Custom's Act decisions, tax decisions, a whole
3 raft of administrative decisions in the federal arena,
4 you're given a fairly broad right of administrative
5 challenge and in fact, Australia was probably leading the
6 world in it's development of administrative law through
7 the Administrative Decision Judicial Review Act, the RRT
8 Act. That applied to migration decisions as well until
9 natural justice was found to apply to migration decisions
10 and the government then decided to codify migration law.
11 So, all visa's were given the category, were given
12 requirements, but at the - and that meant it took
13 discretion out and it became very reviewable as a matter
14 of administrative law. But then from the early 90's
15 onwards governments seemed to single out refugee law and
16 migration law, as areas where administrative decision
17 making was going to be progressively immunised from
18 review. I think the sad things is that developed
19 progressively without an appreciation that these are the
20 areas which touch upon peoples human rights and personal
21 rights very deeply and very directly. Much more so than
22 for example property rights and property interest which
23 were always given great protection for administrative
24 review. So, the irony was that the government in the area
25 where it should be most concerned were protecting
26 administrative decision making as a pragmatic measure but
27 in other areas allowing it to be challenged in a fairly
28 unfettered and a fairly reasonable way. So, I think it
29 was that departure that caused all of the problems that
30 we've seen in our migration law over the last 15 or so
31 years.

1 MS MCLEOD: Yes, in terms of the cases that have come before
2 you there was one particular case where the Minister was
3 unable to deport a person back to the Gaza, the Gaza
4 Strip, because he couldn't transit neighbouring countries
5 to get there and the issues that case arose concerned the
6 Minister not only undertaking reasonable steps to return
7 someone home but not being able to detain them
8 indefinitely unless that could be achieved. That case
9 look liked - first of all I will ask if you can comment on
10 the obligation on the Minister under the Act, not to detain
11 someone unless there's a real attempt to return them home
12 in a general sense?

13 MR MERKEL: Look, the problem of indefinite detention came
14 about for two reasons. One is that the government
15 departed from the fundamental principle of detention,
16 which is usually to stop abscondment. So, the idea of
17 detention, of someone pending a particular role that the
18 government may play in respect of that person is not to
19 punish them but merely to ensure that what the government
20 is going to do with that person will be able to be done.
21 So, we know it very well in bail and criminal proceedings
22 where there's a risk of abscondment before trial, the
23 courts can keep people in detention pending trial to
24 prevent abscondment. The same kind of analysis applies to
25 migration or refugees. If a person is unlawful or has no
26 right to be in Australia and there's a reasonable basis
27 for fearing that if that person is not kept in detention
28 they might abscond so you cannot deport them if they are
29 found to have no right e.g. after a refugee claim has been
30 refused, it's quite appropriate to use the detention
31 power. What the government did is forgot that fundamental

1 principal which is fairly basic to any human rights you
2 don't keep people in detention unless they've done
3 something wrong or it's for a particular purpose that the
4 government's entitled to have. What they really did is
5 just totally removed any discretion and said there shall
6 be mandatory detention of everybody. So, that there'd be
7 no discretionary decision that moved them into detention
8 that could be challenged because it was a duty, and
9 therefore they were then available to be deported. What
10 the indefinite detention cases threw up is the problem
11 that the government hadn't foreseen which is that they
12 would not be able to deport people. So, by their
13 restrictive regime they then created a regime where people
14 could be kept in detention indefinitely because they were
15 no longer able to be deported. So, they violated two
16 principles, abscondment was never an issue because they
17 put that to one side and deportation was never possible.
18 Now, that outcome I don't think was ever anticipated and
19 there was a great dispute in the courts in respect of my
20 decision, full Federal Court decision, and even a split
21 High Court, on whether the act should be interpreted to
22 permit indefinite detention in those circumstances. But
23 the problem was never really a problem for the courts the
24 problem was really with a highly restrictive codified
25 regime that had lost a sense of what the purpose of
26 detention was really to be about.

27 MS MCLEOD: And that prompts a question about another case that
28 you had where that intention may have gone awry, because
29 the man was out of detention but arrested because he was
30 illegally trying to work to feed his family. Now, his
31 options were either beg for food or work, and work

1 illegally, which led to his detention and prompted the
2 attempts to re-deport him. That surely must be another
3 case where the unintended result is that somebody has to
4 live off charity or beg on the streets if they're to be
5 out of mandatory detention.

6 MR MERKEL: Again, that's a good example of the situation that
7 arises when the government loses a sense of what these
8 powers are for and uses them for a purpose that they were
9 never intended to be used for. These laws, like mandatory
10 detention and like the prohibition of refugees engaging in
11 any work even if it's necessary to feed their children,
12 all of those law were for the purpose of trying to deter
13 people from coming to Australia. In other words if you
14 came you're going to be put through a pretty, hard, tough
15 life and really the convention was designed not to try and
16 deter people from seeking refuge or asylum but to try and
17 create an environment where in appropriate cases they
18 should feel free to do so. So, that even though the
19 convention is a bit ambivalent on how refugees who wish to
20 claim status but haven't had that status established, are
21 to be treated. Really the government undermined the whole
22 purpose of the convention by embarking on a series of
23 administrative and legislative measures designed to deter
24 people from ever claiming asylum and as I think I said to
25 one of the select committees when they tried to make the
26 Pacific solution a universal solution, is basically -
27 undermines the whole point of a refugee convention and
28 takes us back to what the Swiss Government were doing to
29 Jews back during the 2nd World War. Where they were
30 turning them back on the border, sending them ultimately
31 to concentration camps, which was one of the circumstances

1 that led to the creation of the refugee's convention after
2 the 2nd World War. So, we find we've come almost 360
3 degrees back to, not a Nazi type policy, but back to the
4 kind of insensitivity that led to the convention being a
5 necessity. So, we've recreated the very circumstances
6 that led to the convention and we've then denied them. If
7 every country approached the convention in this way
8 refugees would have nowhere to go.

9 MS MCLEOD: Australia doesn't approach the convention or hasn't
10 in the last few years approached the convention the same
11 way that European countries might, who have far greater
12 numbers coming to their shores. Does that reflect just a
13 personal view, does that reflect something about our
14 unwillingness to be generous to our neighbours who are
15 less well off do you think? Or something about us as a
16 society?

17 MR MERKEL: Look, why successive governments have taken this
18 mean spirited approach is a vexed issue. I think that
19 there's always been this flood gates mentality that if we
20 start allowing 100 or 200 to come it's going to be 1,000
21 then it's going be 10,000. Our migration history full of
22 that mentality which has never really been realised but
23 it's a fear government creates or government has. I don't
24 think it's justified, I think that's the reason why
25 they've created this approach. It's not just the Howard
26 Government, before that the Keating and the Hawk
27 Governments both had periods where they were fairly
28 restrictive on these laws and the Howard Government, made
29 what the Keating Government had put in place and operative
30 in '92, '94, into a fine art. Which became even more
31 highly restrictive than had previously been the case but

1 again it gave so much discretion to a Minister which is
2 really not the purpose of what these laws should be about.
3 Particularly, when they touch upon people's rights so
4 basically.

5 MS MCLEOD: A fundamental convention ground for claiming the
6 status of a refugee is the well founded fear of
7 persecution by reason of membership of a group.

8 MR MERKEL: Or race, religion, colour.

9 MS MCLEOD: Yes, there was one case where a family claimed a
10 well founded fear on the basis of their association with a
11 family member who'd been persecuted and - or not
12 persecuted for a reason by membership of one of those
13 groups, but because he owed a debt and he was killed by
14 drug lords. Is there - obviously lawyers will argue that
15 people fall within the convention grounds and lawyers will
16 argue they don't. Is there anything you want to say about
17 how we interpret those fundamental principles and how the
18 court should interpret them in light of the issues in that
19 case?

20 MR MERKEL: Look, that comes under the social group exception
21 provision of the convention and that was something that
22 was placed in the convention for good reason. Social
23 groups may not necessarily be defined by race, religion
24 and so forth but they may, as fundamentally, be
25 discriminatory or as discriminatory as many other. For
26 example, the Romanoff's in Russia or people associated
27 with the Russian royal family were all murdered for the
28 purpose of preventing any royal succession. That was a
29 family group. You find other family units in China, there
30 was great discrimination against what were regarded as the
31 bourgeoisie, family members were discriminated against

1 because they were regarded as members of the bourgeoisie.
2 So, you have many social groups, you have the problems
3 with homosexual groups, you have problems in different
4 societies that are persecuted because of their social
5 group relationship which may or may not be a family base.
6 So, the idea of the convention was to try and capture
7 discrimination against or persecution against social
8 groups, in much the same way as there was discrimination
9 against race and it was thought to embody the same evil.
10 Now, of course there are boundaries where that starts to
11 get into grey areas but in theory if innocent people, as
12 members of a family, are suffering persecution for no
13 other reason than being members of a family, then it
14 raises the social group exception and if it falls within a
15 social group that should warrant no basis for reading it
16 down. There were honour killings in Albania and we see
17 that in, certainly, Islamic society. So, should people
18 who may have to suffer an honour killing as a
19 representative of a family or whatever, or react in a
20 particular way, should they be excluded from the
21 protection of the convention. It's not readily apparent
22 that social group should be excluded but of course, the
23 government decided that it was to be a much more
24 restrictive approach and therefore they amended the
25 legislation to try and exclude family groups as a social
26 group.

27 MS MCLEOD: There have been a number of cases I'm aware of in
28 the RRT where Falan Gong had been denied, a claim for
29 refugee status on the basis that they belonged to a
30 recognised religion or organized group and some of those
31 practitioners had difficulties in the court overturning

1 those decisions because of the narrow confines of the
2 rights of appeal. Do you think that groups, the other
3 society groups, is broad enough to encompass unrecognised
4 groups like Falan Gong?

5 MR MERKEL: I would be surprised if there was a valid or
6 properly arrived at decision that said persecution in
7 China if someone is a member of the Falan Gong would fall
8 outside the convention. I think, I'm not familiar with
9 the cases but I'd be surprised if those cases turned on
10 that decision as against whether someone was not accepted
11 as having a well founded fear of persecution by reason of
12 being a member of the Falan Gong because they do, for many
13 reasons, fall comfortably within a social group or
14 religious persecution. But it may depend on the evidence
15 presented in a particular case. They certainly would be a
16 group that the convention would intend should be protected
17 as I understand it, but whether you are merely a
18 sympathiser with the group or whether you are a
19 participant in it requires all sorts of boundaries where
20 the areas start to grey a little bit.

21 MS MCLEOD: Yes. In some of the cases the factual situations
22 disclose the procedures of customs officers interviewing
23 people at airports, and that interview in one particular
24 case before you being used against the applicant and he
25 didn't have access to a transcript of the interview. As a
26 general principal, what do the rules of procedural
27 fairness otherwise known as natural justice, require, when
28 a person has a direct interest in the outcome of their
29 application?

30 MR MERKEL: I think a person should always be given an
31 opportunity to deal with the issue on which their case

1 might turn and what happened in some situations is, they
2 were given a theoretical opportunity to raise it at some
3 earlier point of time but were not given the opportunity
4 to deal with it in the very instance where it was about to
5 be used against them in a particular way and in our court
6 system generally that would not amount to a real
7 opportunity to deal with the case that's being put against
8 you at the time that case is being put. Cases of fluid
9 matters which may be critical at an earlier stage may lose
10 their significance or may be distant in a person's mind at
11 a later stage so the idea is that every decision maker, if
12 that decision maker is going to afford natural justice,
13 should be satisfied that the matter on which the case
14 might turn, is a matter that the person before them has
15 had an opportunity to address as part of that decision
16 making process.

17 MS MCLEOD: Just a couple of side questions, given your depth
18 of experience in public interest cases, you would know to
19 what extent the courts rely on the Bar taking on cases pro
20 bono and on community groups to bring these issues to the
21 fore. Is there any comment you would like to make about
22 that for the record?

23 MR MERKEL: Yes I think that public interest cases should be
24 singled out as special categories of cases where costs
25 laws should be developed to ensure that people can bring
26 public interest cases in an appropriate case without a
27 liability for cost. I think costs is a terrible burden
28 for people to have to face when bringing public interest
29 cases to the courts. There are not special rules that
30 would in effect give them access to justice. I'm not
31 saying that we should have the American system where a no

1 cost rule ensures everyone has access to justice but on
2 the other hand we've gone to the other extreme and no
3 matter how bona fide and warranted a claim might be and
4 how important it's determination might be, there's no
5 doubt that there's a real deterrent in people bringing
6 cases if their liable to cost orders if they lose. So I
7 think that's an area that is very important to be
8 addressed because it really undermines the whole principle
9 of access to justice. Particularly when as we all know
10 access to justice is expensive and even when they get pro
11 bono assistance, that just means they're not paying for
12 their part of the case but it doesn't protect them from
13 liability for costs. We had this problem recently in the
14 Vicky Roach case in the High Court, which it involved a
15 very important question of enfranchisement or
16 disenfranchisement of voters and we had a real problem
17 getting some politicians for example, to offer to be
18 plaintiffs in the High Court because of the potential
19 problem for them of a cost liability. So that that case
20 may not have ever been able to see the light of day in the
21 High Court unless someone was prepared to bravely come
22 forward and bear the risk of a cost judgement against them
23 so there's a real chilling effect.

24 MS MCLEOD: Would you like to see an expansion of the
25 Commonwealth and various state funding of public interest
26 cases where there are real issues to be tried?

27 MR MERKEL: I think there needs to be an expansion but my own
28 experience is that there are sufficient barristers and
29 solicitors who are prepared to take on any important
30 public interest case, as a pro bono case. So I think
31 while that's an important part of what the government's

1 role should be, I think the costs problem for people
2 taking on cases, that is, the liability for costs, is the
3 bigger part of the problem. That is a real deterrent.

4 MS MCLEOD: And also for the record, to what extent do the
5 courts depend on the Bar appearing for parties in those
6 important cases?

7 MR MERKEL: Totally, there's no doubt that the formulation of
8 the case, presentation of the arguments, are critical to
9 their outcomes and the courts in Australia simply don't
10 have an inquisitorial role. They're reliant on how the
11 issues are presented to them, how the cases are argued and
12 even with proactive judges, there are some who are more
13 proactive than others, they still are heavily reliant on
14 the profession for the cases to be presented so that's
15 critical to the functioning of our adversary system.

16 MS MCLEOD: Another side issue. Do you have any view about the
17 positioning or physical location of detention centres away
18 from metropolis support systems? In the outback,
19 Christmas Island, far from access to services and lawyers
20 and - - -

21 MR MERKEL: Many of the detention centres were deliberately set
22 up in remote locations as part of this punitive approach.
23 There was no reason for them to have to be in those
24 locations and the kind of locations and settings they were
25 placed within, were all part of this deterrent type of
26 approach which the government have pursued. I think that
27 was quite an unacceptable and quite an improper way of
28 dealing with it. Of course people who had done nothing
29 wrong other than to seek to avail themselves of a legal
30 right this country gives them, should not be punished for
31 doing it and absent the risk of abscondment they should be

1 placed in a community setting and even if there was a risk
2 of abscondment, that doesn't mean they're untrustworthy,
3 it just means there was a perceived risk. They should be
4 given humane environments and be able to survive in the
5 community as best they can. Not posted in isolated
6 places, I mean even our prisoners are not put in isolated
7 remote locations, so I think a lot of people have a lot to
8 answer for, for that whole regime.

9 MS MCLEOD: Do you have a view about the family separation
10 issues that were undertaken deliberately to deal with male
11 and female separation, children?

12 MR MERKEL: Yes, quite a strong view. It shows how, once you
13 derail your principle, you only aggravate the abuse of the
14 principle by the steps you take. So the derailing of the
15 principle, was everyone had to be put in detention. That
16 was never a proper principle for reasons I have already
17 explained because there was no risk of abscondment. When
18 they finally accept that not only is there a zero risk of
19 abscondment for women and children in those circumstances,
20 but it's also inhumane to keep them in detention. So what
21 they do is they allow the women and children out of
22 detention, keep the male in again, irrespective of the
23 male's risk of abscondment because the male in a family
24 setting like that has something close to a zero risk of
25 abscondment, so what they've done is, starting off with
26 one inhumane principle by making it a little less inhumane
27 in those circumstances, they have actually separated the
28 family. Which again has no rationale or no common sense
29 whatsoever about it. In fact it violates the so-called
30 principles that the government that imposed this regime
31 thought was sacrosanct. You know families are inviolable

1 yet they violate families of human beings.

2 MS MCLEOD: Now have you had an opportunity to go out to any of
3 the detention centres?

4 MR MERKEL: No.

5 MS MCLEOD: Of the stories that you've heard and the stories
6 that were before you, are there any themes that recur that
7 have caused ongoing concern about physical and mental
8 health of detainees?

9 MR MERKEL: Look, there are a number of cases that have come up
10 before the Courts where the cruelty and inhumanity of the
11 environment creates a culture, a culture of disbelief, so
12 that amongst people who are not well trained there's a
13 culture of disbelief of any the symptoms that show there
14 is a serious problem.

15 MS MCLEOD: But those who are responsible for the management
16 and - - -

17 MR MERKEL: Those who are responsible for their management,
18 regards etc, even the medical staff start with an
19 assumption that's it's a try on, it's not genuine.
20 Assumption more often than not that's quite misconceived
21 but unfair, so we had from time to time horrific cases,
22 personal cases, come before the courts of circumstances
23 where people were severely mentally disturbed and mentally
24 ill who were not being appropriately treated. But, again
25 it comes all as part of an overall system where there's no
26 accountability because the legislature tries to immunise
27 it, there's no transparency because everything occurs
28 behind closed doors. That is a certain recipe for the
29 kind of outcomes we saw and eventually, what finally blew
30 the lid was Australians were being detained or permanent
31 residents were being detained, and that led to the whole

1 thing starting to crumble and reviews take place. But
2 really they were the extremities of the system within
3 which there were far more vicious and terrible outcomes in
4 terms of human lives, which never really saw the light of
5 day in many instances because they didn't happen to be
6 Australian citizens.

7 MS MCLEOD: There has been talk about the relaxation of the
8 Pacific solution and generally a relaxation of the long
9 term detention rules, getting back on track do you think
10 in terms of the fundamental principals?

11 MR MERKEL: While the Act remains in it's present form, I don't
12 think there is any getting back on track according to
13 fundamental principals. I think what is happening is that
14 the current government doesn't have the ideological
15 underpinning against refugees that the previous Howard
16 government had. So that I think what is happening is the
17 more humane approach to individual cases and outcomes and
18 maybe an endeavour to start rethinking the principals that
19 should govern refugees. So I think that is what we are
20 seeing, that ideological absence means that we are
21 starting to see the people involved in this process more
22 as human beings and starting to maybe readjust ourselves
23 as to how they should be dealt with. But until the laws
24 change and there's a fairer system and mandatory detention
25 is removed for detention only for good reason, when we
26 have administrative review of human rights standards in
27 accordance with administrative law, not highly restrictive
28 law, then I think we will start to get to a fairer society
29 in respect of refugees.

30 MS MCLEOD: Would you be advocating not only a Bill of Rights
31 or Charter of Human Rights but one that extended to non-

1 citizens in Australia?

2 MR MERKEL: I have no doubt whatsoever, and I don't think many
3 would quarrel with it, that if you are going to have a
4 Charter of Rights that must apply to all people in your
5 country. Doesn't matter whether they are citizens,
6 permanent residents, visitors, human beings are human
7 beings so the Human Rights standards must apply to people
8 full stop. The idea that you could have discriminatory or
9 preferential rights depending on your citizenship or your
10 legal status is itself a violation of human rights. I
11 don't think that should ever even be an issue.

12 MS MCLEOD: And obviously that would be something that you
13 would be very keen to see happen at a Commonwealth level.

14 MR MERKEL: I think so. I have always been an advocate of the
15 Charter of Rights but a lot of thought needs to go into it
16 and what might be the ideal nowadays is no longer being
17 even sought. What is being sought nowadays is not like a
18 US or even a Canadian Bill of Rights but something like
19 the English charter which Victoria has taken on. But
20 again, already as these cases are starting to come before
21 the courts, a Charter of Rights is not going to be a
22 panacea for all wrongs unless you have got a system in
23 place that enables them to be effectively accessed and
24 there is a culture in place where government is trying to
25 give the effect not just to the letter of the Charter but
26 to the spirit and intention underlying it. I think we are
27 still a long way away from that.

28 MS MCLEOD: Picking up a thread that you mentioned before about
29 untrained management of detention centres, is there an
30 issue do you think of the government delegating or
31 contracting out that responsibility to third parties? As

1 they do with prisons.

2 MR MERKEL: I think the contracting out of public
3 responsibility in respect to detainees is an unacceptable
4 outcome. It is commercialising what really is lying at
5 the heart of government responsibility and you can never
6 ever, no matter how you try and do it, have commercial
7 enterprises whose motive is profit, conduct a detention in
8 a responsible and proper manner. As long as it is driven
9 by the profit motive, it must mean it has to cut costs and
10 it has to look at a cost effective way of detaining people
11 and that should not enter the government's thinking. It
12 has higher responsibilities than that to people who are
13 detained, so the idea of contracting out detention
14 facilities, I think should, and always should, remain
15 unacceptable.

16 MS MCLEOD: In all the cases you have come across and all the
17 factual situations you have heard about, is there anything
18 that stays with you as a powerful moment that you want to
19 talk about?

20 MR MERKEL: I think there was one case which came on before
21 Federal Court where a young Iranian had complained of
22 being sexually abused and had all the symptoms which any
23 reasonable informed observer would have accepted, that
24 this girl was suffering serious personality disorders and
25 problems and her plight was just totally ignored and the
26 serious sexual abuse was part and parcel of the cause of
27 her being a refugee in a family coming to Australia in an
28 Islamic society. They were a Christian family and the
29 abuser was said to be Islamic. The tribunal rejected the
30 case and the evidence that came out of the file and the
31 detention facility showed that any sensible person would

1 have said that this poor girl, who I think was only twelve
2 or thirteen at the time had severe mental illness
3 consequence of some traumatic event and that was the
4 traumatic event that brought them to Australia yet
5 everyone in the system was not prepared to give any
6 credence to it and it was a shocking case and when it came
7 on before the Court the transcript was so terrible, the
8 neglect to confront these issues throughout the system,
9 both at the decision making level and at the detention
10 level was so bad that the government was quite embarrassed
11 by it and they then eventually I think gave the family a
12 protection Visa and brought their detention to an end. I
13 think that case more than any other, exemplified how
14 inhuman and how inhumane the system had become and even
15 though the matter settled in court it still drove me to
16 actually write something about it to say in any system of
17 society but particularly our own, sometimes there comes a
18 point when enough is enough. You know a lot of people
19 should have been answerable for what happened to that poor
20 girl But no one was.

21 MS MCLEOD: I have heard it said that judicial review generally
22 is a fairly blunt instrument for achieving justice when
23 the law seems bent on injustice. Would that be the sort
24 of case that would - the case you are talking about, that
25 prompted your frustrations?

26 MR MERKEL: No, actually judicial review in that case even
27 though it may have been limited, in fact did produce a
28 just outcome in the result but that was because the
29 process had finally made transparent what never had been
30 able to be revealed and made accountable what never had
31 been able to brought to account. So I think general

1 statements like that don't really assist. Judicial review
2 just doesn't permit merits review. But it is an important
3 check on power as we started off, saying at the beginning
4 of this interview in that case, shows how that check
5 worked, even though the court's decision may have been
6 limited in many ways by judicial review, the court process
7 was able to be used to produce a just outcome. What the
8 decision would have been, but we have never got to because
9 the case was resolved.

10 MS MCLEOD: But only at the point at which the court or the
11 minister, was before the court.

12 MR MERKEL: Yes.

13 MS MCLEOD: And represented and advised no doubt, in any case.

14 MR MERKEL: But as part of the judicial review process, so in a
15 sense the case revealed maybe aspects of the best and the
16 worst of the process. I think the question of judicial
17 review is a difficult one. All I am really saying is that
18 of course it can't produce merits review because that's
19 not it's purpose but on the other hand it is a critical
20 vehicle for ensuring fair outcomes which may not always be
21 just because the law itself may not be just.

22 MS MCLEOD: And in that particular case, which obviously left
23 an impression on you, there was a good outcome if you like
24 or at least some hope for that particular applicant.
25 There must have been a number where you weren't left with
26 that sense of satisfaction.

27 MR MERKEL: No. Quite a few where I was left with a
28 discomfort, not that I knew that the outcome was
29 necessarily unjust, because usually if I thought an
30 outcome was necessarily and demonstrably unjust, I used to
31 say so. Sometimes I would have said that this particular

1 case has an outcome that maybe in accordance with law but
2 it may not necessarily be in accordance with justice. But
3 we are not well placed to identify what the outcome should
4 have been. What we are often well placed to see is to see
5 where maybe someone had less than a fair crack of the whip
6 or a fair go at what the outcome could have been.

7 MS MCLEOD: Last question. Is there anything that you want to
8 say for the record given that this tape maybe viewed by
9 those who have been in detention and those who are working
10 in the field?

11 MR MERKEL: That's a difficult question. I think that people
12 should understand that the legal processes in the courts
13 act in a way that I think underlies what is behind the
14 separation of powers in the federal constitution, which is
15 to ensure that people have a fair go at whatever their
16 legal rights are, they get a fair access as to having
17 their cases ventilated. When their cases are ventilated
18 they're done so before an independent and fair tribunal
19 and even though some judges differ in views and approach
20 to others, I think they endeavour to give the effect to
21 what really the separation of powers is all about and that
22 is that there is an independent judiciary. There is an
23 executive that is held in check by that judiciary and a
24 parliament that lays down the laws and sometimes when the
25 outcomes are not as fair as many might see them to be,
26 their criticism is one that maybe is directed at the laws
27 or how they are administered but generally speaking I
28 think the judiciary do their best to try and make sure the
29 laws operate in accordance with our legal system and are
30 not personal, and outcomes are not geared to what
31 individuals may or may not have had done to them. So in

1 other words it is probably justice according to law that
2 they get and not according to the whims of individuals and
3 I hope that is understood by most people in the system.

4 MS MCLEOD: Of course many people come from places where there
5 is no rule of law, no democratic re-elected government or
6 when they see a minister appear in court, they assume that
7 the minister is the prosecutors', the police are aligned
8 with the courts. In Australia we have a different system
9 don't we?

10 MR MERKEL: I think I can only speak for the lawyers and the
11 judges involved in the process. I think they do the best
12 they can and ensure everyone gets a fair hearing according
13 to law and usually just outcomes are not guaranteed but if
14 they're not obtained it's probably not because of the
15 judiciary, it's probably because of either executive or
16 legislative decision making.

17 MS MCLEOD: Thank you Ron Merkel.

18 MR MERKEL: You're welcome.

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