From dehumanisation to demonisation

THE MV TAMPA AND THE DENIAL OF HUMANITY

Philip Lynch and Paula O'Brien

An analysis of legal and political responses to the MV Tampa asylum seekers and the public interest in humanising the oppressed.

On 26 August 2001, a Norwegian container ship, *MV Tampa,* acting on the request of Australian authorities, rescued 433 people from a sinking wooden fishing boat in the Indian Ocean. The people rescued were principally from the Afghani religious and ethnic minority group Hazara Shi'ite. According to the United Nations High Commissioner for Refugees, this is one of the most persecuted minority groups in the world'.[1]

After boarding *MV Tampa*, the asylum seekers communicated to the Captain of the vessel, Arne Rinnan, that they feared persecution in their countries of origin and sought asylum in Australia. The Captain assessed that they were 'desperate people from desperate backgrounds'.[2] He initially steered *MV Tampa* towards the Indonesian port of Merak but subsequently changed course after some of the asylum seekers threatened to commit suicide unless he sailed to Australia.

As *MV Tampa* approached Australia on 27 August 2001, Captain Rinnan was instructed by Australian authorities to remain outside territorial waters. These instructions came from the Department of Prime Minister and Cabinet, which also directed the Administrator of Christmas Island to ensure that no boat from Christmas Island approach *MV Tampa*.[3] The Captain abided by these instructions but requested that the asylum seekers receive urgent medical and humanitarian assistance. He assessed that the medical condition of some of the asylum seekers was critical and that, if it was not addressed immediately, 'people would die'.[4] No medical or humanitarian assistance was forthcoming. As William Farmer, the Secretary and Chief Executive Officer of the Department of Immigration and Multicultural Affairs, would later depose, the government's focus at the time was on ensuring that none of the fundamental rights accorded to non-citizens under the *Migration Act 1958* (Cth) accrue to the asylum seekers.[5]

On 29 August 2001, as the condition of some of the asylum seekers deteriorated and Captain Rinnan became increasingly concerned with their welfare and that of his crew, he sailed *MV Tampa* towards Christmas Island and into Australian territorial waters. Within two hours, 45 armed troops from the Special Air Services (SAS) boarded *MV Tampa*. They secured the vessel and controlled the movements of the asylum seekers.[6] They began to monitor all communications to and from *MV Tampa* and shadowed Captain Rinnan around the vessel. He felt scared, threatened and controlled.[7] Two SAS medical personnel began to render medical and humanitarian assistance to the 433 asylum seekers.

The following day, the Public Interest Law Clearing House (Vic) Inc (PILCH) was contacted by a Melbourne barrister, John Manetta, about rendering legal assistance to the asylum seekers. PILCH is a non-profit legal referral organisation which coordinates the provision of pro bono legal services in public interest matters. For the next 48 hours, PILCH attempted to communicate with the asylum seekers in order to obtain instructions to bring an application in the Federal Court for the grant of a

Philip Lynch is a solicitor with the Public Interest Law Clearing House (Vic) Inc and Allens Arthur Robinson in Melbourne.
email: philip.lynch@aar.com.au
The views expressed here are those of the author and do not represent the views of Allens Arthur Robinson.
Paula O'Brien is a solicitor with Minter Ellison in Melbourne.
email: paula.obrien@minterellison.com
The views expressed here are those of the author and do not represent the views of Minter Ellison.

writ of habeas corpus. The writ of habeas corpus is a common law remedy which orders the release of a person who is detained without lawful authority.

All attempts by PILCH to communicate with the asylum seekers through *MV Tampa's* Norwegian owners, Australian agents and Captain Rinnan were unsuccessful. Accordingly, on 31 August 2001, PILCH began to explore the possibility of an application being commenced on behalf of the asylum seekers by an organisation concerned with the rights and freedoms of refugees. It is axiomatic to the notion of habeas corpus that an order for release may be sought by a 'stranger' on a detainee's behalf.[8] Later that day, following discussions with PILCH, the Victorian Council for Civil Liberties (VCCL) filed an application in the Federal Court seeking the grant of a writ of habeas corpus and an order of mandamus compelling the government to fulfil its obligations to the asylum seekers under the *Migration Act*. As an ancillary to this application, VCCL also sought an urgent interim injunction preventing the removal of *MV Tampa* from Australian territorial waters. The purpose of this injunction was to preserve the territorial jurisdiction of the Court.

A similar application was commenced on the same day by a Melbourne solicitor, Eric Vadarlis. The applications were heard together in the Federal Court at first instance by North J, before whom the applicants were successful in obtaining an order that the asylum seekers be released from detention and delivered to mainland Australia.[9] The decision of North J was overturned on appeal by Beaumont and French JJ, with Black CJ dissenting.[10] At both instances, the applicants failed to establish standing to seek orders in the nature of mandamus in respect of the application and operation of the *Migration Act*.[11]

Habeas corpus and freedom from deprivation of liberty

For a writ of habeas corpus to lie, the applicant must first demonstrate that the person, on whose behalf the writ is sought, is in fact being detained. If detention is established, the onus then shifts to the respondent who must demonstrate that the detention is lawful. In the absence of lawful authority, the detainee must be released.[12]

The writ of habeas corpus is founded on the notion entrenched in international law, common law and common sense that all people have the right to be free from unlawful deprivation of liberty. Traditionally, the remedy was used to 'reach behind prison walls and iron bars'.[13] But in the United States of America, and now in Australia, there are attempts to make it do more:

> It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.[14]

In this case, the respondents asserted that the asylum seekers were not being detained. The government maintained that they were free to go anywhere in the world — except Australia. It pointed to three forms of egress from *MV Tampa* for the asylum seekers: departure on any vessel willing to take them from Australian territorial waters; departure from territorial waters on *MV Tampa* itself; or departure pursuant to arrangements between the Australian and Nauruan governments which provided for the transfer of the asylum seekers to Nauru for 'processing'.[15]

At first instance, North J rejected these arguments. His Honour found that:

> They [the government] were committed to retaining control of the fate of the rescuees in all respects. The respondents directed where the *MV Tampa* was allowed to go and not to go. They procured the closing of the harbour so that the rescuees would be isolated. They did not allow communication with the rescuees. They did not consult with them about the arrangements being made for their physical relocation or future plans … The respondents took to themselves the complete control over the bodies and destinies of the rescuees … Where complete control over people and their destiny is exercised by others it cannot be said that the opportunity offered by those others is a reasonable escape from the custody in which they were held. The custody simply continues in the form chosen by those detaining the people restrained.[16]

On appeal, French J, with whom Beaumont J concurred, held that the constellation of factors considered by North J did not constitute sufficient restraint on the liberty of the asylum seekers to support the grant of a writ of habeas corpus. His Honour considered that the actions of the Commonwealth were:

> properly incidental to preventing the rescuees from landing in Australian territory where they had no right to go. Their inability to go elsewhere derived from circumstances which did not come from any action on the part of the Commonwealth.[17]

This may be contrasted with the position adopted by Townley J in *Burton v Davies and General Accident Fire and Life Assurance Corporation Ltd*:

> If I lock a person in a room with a window from which he may jump to the ground at the risk of life or limb, I cannot be heard to say that he was not imprisoned because he was free to leap from the window.[18]

Justice French's finding that the asylum seekers were not detained could be said to result from his approach of abstracting each individual act of the Commonwealth from its context and consequences. His Honour found each act of the Commonwealth to be legitimate and lawful. Specifically, French J commented that the closure of the Christmas Island port was carried out under statutory authority.[19] His Honour determined that 'the presence of SAS troops on board the *MV Tampa* did not itself or in combination with other factors constitute a detention'[20] and that 'the Nauru/NZ arrangements of themselves provided the only practical exit from the situation'.[21] His Honour also found that while the Commonwealth did not facilitate communications nor permit third parties to approach the vessel, 'attempts to communicate with the rescuees through the vessel's owners were unsuccessful because of the attitude of the vessel's owners'.[22] On this point, French J appears not to have considered correspondence between the shipping company and the Department of Immigration and Multicultural Affairs which reveals that the shipping company was threatened by the Australian government with 'massive fines'.[23]

In our view, the approach of North J in considering the totality of the asylum seekers' circumstances and the Commonwealth's acts is to be preferred. It is flawed to abstract actions from their surrounding circumstances. Actions, which would ordinarily constitute no restraint or partial restraint, may, in combination, amount to detention. Following the reasoning of the Full Court of the Federal Court, if a person obtains a planning permit to construct four walls and then constructs those walls around a sleeping person, the resulting detention is arguably lawful.

The executive power to expel aliens

Before North J and on appeal to the Full Court of the Federal Court, the Commonwealth submitted that its treatment and actions in respect of the asylum seekers were a valid exercise of prerogative power. That is, even if the asylum seekers were detained, they were lawfully detained. The prerogative power relied on was said to arise as a necessary incident of territorial sovereignty and the power of the executive under s.61 of the Constitution. Section 61 vests in the executive the power to execute and maintain the Constitution and the laws of the Commonwealth. In the Commonwealth's submission, its prerogative includes the power to detain and expel aliens.[24]

The executive prerogative may be abrogated, modified or regulated by laws of the Commonwealth.[25] In accordance with this principle, North J found that the *Migration Act*[26] was 'intended to regulate the whole area of removal of aliens' and it therefore left 'no room for the exercise of any prerogative power on the subject'.[27] The applicants were therefore entitled to a remedy requiring the release from unlawful detention of the asylum seekers. In a practical sense, the remedy fashioned required that the asylum seekers be brought to mainland Australia.[28]

A corollary of North J's conclusion is that unlawful non-citizens in Australian territory *must* be dealt with and accorded rights under the *Migration Act*. In our view, this approach is consistent both with Australia's obligations under the Convention Relating to the Status of Refugees[29] and the International Covenant on Civil and Political Rights.[30] It also accords with the view expressed by Lord Scarman in *R v Home Secretary; Ex parte Khawaja* that:

> He [sic] who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed 'the black' in Sommersett's case.[31]

Contrary to North J's conclusion regarding executive power in this matter, the Full Court of the Federal Court found that the steps taken by the government to prevent the asylum seekers from entering the Australian migration zone and to expel them from Australian territorial waters were within the scope of prerogative power.[32] In French and Beaumont JJ's view, the *Migration Act* does not contain express words nor evince the necessary clear and unambiguous intention to deprive the executive of this power.[33]

This view is problematic. French and Beaumont JJ referred to the facultative nature of the *Migration Act* and concluded that the Act does not operate in a manner that is inconsistent with the continued existence of the executive power claimed by the Commonwealth.[34] The substantive effect of their Honours' judgment is to vest in the government a broad discretion to choose when, and for whom, to invoke the operation of the Act. There appears to be no impediment to the government making a policy decision to grant rights under the *Migration Act* to people of one race while detaining and expelling, under the imprimatur of its parallel common law prerogative, those of another. As Eric Vadarlis stated following the Commonwealth's successful appeal to the Full Court, 'if they come near our shores, the government is allowed to push them out, tow them out, drag them out. I can't believe this is happening in this country.'[35]

Dissenting from the decision of French and Beaumont JJ, Black CJ concluded that it is, at best, doubtful that there exists a common law prerogative to detain and expel aliens. The proposition that such a prerogative power exists is, in His Honour's words, 'not good law in Australia'.[36] Chief Justice Black's conclusion is consistent with modern constitutional jurisprudence, international human rights law and the recognition as long ago as 1890 that:

> Whether they be innocent immigrants or sojourners or fugitive criminals of the deepest dye, their right to land or remain upon British soil depends not upon the will of the Crown but upon the voice of the Legislature.[37]

The government's denial of our common humanity

From the outset, the government determined that the asylum seekers would not be permitted to enter Australia and their situation would be handled so that the *Migration Act* would not apply to them.[38] Clearly, the government also determined that the Australian people would not be permitted to connect with the asylum seekers or empathise with their plight.

On 30 August 2001, the Norwegian Ambassador boarded *MV Tampa* and was handed a letter addressed to the Australian people, their government and human rights organisations. The letter was signed 'Afghan Refugees now off the coast of Christmas Island' and expressed that the asylum seekers were fleeing persecution and sought refugee status in Australia. It read, in part:

> You know well about the long time war and its tragic human consequences and you know about the genocide and massacres going on in our country and thousands of us men, women and children were put in public graveyards, and we hope you understand that keeping view of above mentioned reasons we have no way but to run out of our dear homeland and seek a peaceful asylum.

This powerful but pained letter remained the only communication that the Australian public was permitted with the asylum seekers from the time *MV Tampa* was occupied by the SAS on 29 August 2001 until the asylum seekers disembarked from HMAS Manoora some three weeks later in Nauru. Initially suppressed, the letter was conveyed from *MV Tampa* by the Norwegian Ambassador under diplomatic privilege and subsequently produced to the Federal Court by order of North J on 1 September 2001. All other attempts to communicate with the asylum seekers through the SAS and the Department of Immigration and Multicultural Affairs were stymied.

The denial of communication evinced a high level governmental policy to disengage and disconnect the Australian people from the asylum seekers. Underlying this policy was an acute awareness that our sense of the value of others is contingent, in part, on our understanding of how those others love and are loved. It is this sense of others than can affect us and it is this sense of others that the government sought to deny in the case of the *MV Tampa* asylum seekers. As Raimond Gaita elucidates in *A Common Humanity*:

> One of the quickest ways to make prisoners morally invisible to their guards is to deny them visits from their loved ones, thereby ensuring that the guards never see them through the eyes of those who love them.[39]

That is why our largest immigration detention centres are situated in Port Hedland, Woomera and Curtin. That is why, to date, we do not know the names of any of the *MV Tampa* asylum seekers. Until they arrived in Nauru, safely out of the reach of a potentially empathetic public, we did not see their faces. We did not hear their voices. We still do not know who they love, what they fear, how they dream, or for what they

hope and aspire. But we cannot doubt that they love and fear and dream and hope and aspire *just as deeply as we do*. The loss of homeland afflicts them just as deeply as it would us. They grieve for their loved families and friends just as sorely and surely as we grieve for those who have been lost to us.

Governmental attempts to stifle empathy for the asylum seekers continued in the courtroom. Throughout the proceedings the government sought, in a calculated way, to deny the humanity of the asylum seekers. In submissions before the Full Court of the Federal Court, disconnection turned to demonisation as the government attempted to conflate the asylum seekers with the New York hijackers.[40] At first instance, the government submitted that, even if the asylum seekers were found to have been unlawfully detained, the Court should exercise its discretion not to grant the relief claimed by the applicants.[41] According to the government, the asylum seekers would be 'happy' with the arrangements made for them in Nauru. This view was not shared by asylum seekers aboard *MV Tampa*, one of whom later remarked: 'After a few days they [the SAS] said we must go to Nauru and we got angry. We had never heard of Nauru before.'[42]

Unsurprisingly, the asylum seekers were not consulted regarding the Nauru arrangements which will so materially impact upon their freedom and right to self-determination.[43] They were not accorded the prima facie 'right to their liberty and to their own choice as to their future course of action.'[44] Implicit in all this is the invidious notion that, to the asylum seekers, a meaningful say in how and where they live is less important than such a say would be to people in the broader Australian community. Implicit in all this is the very real sense that, in the government's view, the asylum seekers are somehow *less than fully human.*[45]

Practising in the public interest: the rule of law and the role of lawyers

Both the lawyers and applicants involved in the Federal Court proceedings were criticised by the government and certain members of the public for interfering with government policy and the will of the Australian people. 'How much money do you make out of defending these worthless scum?' Counsel was asked.[46] To answer with the words of French J:

> The counsel and solicitors acting in the interests of the rescuees in this case have evidently done so pro bono. They have acted according to the highest ideals of the law. They have sought to give voices to those who are perforce voiceless and, on their behalf, to hold the Executive accountable for the lawfulness of its actions. In doing so, even if ultimately unsuccessful in the litigation they have served the rule of law and so the whole community.[47]

A belief that 'the law is not merely a bludgeon for beating people; it is a two-edged sword ... written in universal language … that can be used by the weak against the powerful'[48] motivated and sustained the applicants, their Counsel and their many supporters throughout the proceedings in the Federal Court.

It is indispensable in civil society that we have agitators. Especially is this the case when the government seeks to act with impunity against the marginalised, the disadvantaged, the voiceless and the vulnerable. As Oscar Wilde aptly averred in *The Soul of Man Under Socialism*:

> Agitators are a set of interfering, meddling people, who come down to some perfectly contented class of the community and sow the seeds of discontent amongst them. That is the reason why agitators are so absolutely necessary. Without them, in our incomplete state, there would be no advance towards civilisation.[49]

The measure of any civilisation must be the way in which it treats its most powerless and vulnerable members. This is because, in our own vocation to become more fully human, we must ensure conditions that enable others to do the same. To accept injustice and the distortion of the humanity of others is to fail to observe our own humanity.[50] As Tom Joad opines in *The Grapes of Wrath*, 'I been thinking … maybe a fella ain't got a soul of his own, but on'y a piece of a big one'.[51]

Many of the *MV Tampa* asylum seekers fled from repressive and destructive regimes. They fled in hope of a better future. Held incommunicado for over three weeks, they became some of society's least wanted and most oppressed. They represented a challenge to the Australian polity. They made an appearance in our national consciousness and caused us to ask: How do we want to live? How do we want others to live? What futures do we imagine for others and, by extension, ourselves?

Other challenges will present themselves to us in the future. In such circumstances, we must ensure that, as in the case of the *MV Tampa* asylum seekers, the rights and interests of the oppressed are articulated and not subverted. For, we all have just 'a little piece of a great big soul' and that little piece 'ain't no good … less [it's] with the rest, and whole'.[52]

References

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2. Letter from James Neill (Aus Ship P & I) to Neville Nixon (Department of Immigration and Multicultural Affairs), 27 August 2001, p.1.
3. Mike Mrdak, First Assistant Secretary, Territories and Regional Support, 'File Note: Handling of Possible Arrival of MV Tampa at Christmas Island', 27 August 2001.
4. Letter from James Neill (Aus Ship P & I) to Philippa Godwin (Department of Immigration and Multicultural Affairs), 27 August 2001.
5. *Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs* [2001] FCA 1297 (North J, 11 September 2001), *(VCCL v Minister for Immigration)* Transcript of Hearing, 2 September 2001, pp.170-1.
6. *VCCL v Minister for Immigration,* above, ref 5, para 35.
7. Conversation between Captain Rinnan and Niels Thomessen, 1 September 2001.
8. *VCCL v Minister for Immigration,* above, ref 5, para 56; *Ruddock v Vadarlis* [2001] FCA 1329 (Black CJ, Beaumont and French JJ, 18 September 2001) para 66 (Black CJ). See also *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591, 600 (Gleeson CJ and McHugh J), 627 (Gummow J) and 652-3 (Kirby J); *Waters v Commonwealth* (1951) 82 CLR 188, 190.
9. See generally *VCCL v Minister for Immigration*, above, ref 5.
10. See generally *Ruddock v Vadarlis,* above, ref 8. Mr Vadarlis had, at the time of writing, lodged an application for special leave to appeal to the High Court from the decision of the Full Court of the Federal Court. The VCCL opted not to join as a party to this application in light of the *Border Protection (Validation and Enforcement Powers) Act 2001*. This Act seeks to retrospectively legalise the government's actions in relation to *MV Tampa* and to preclude the initiation or continuation of any legal proceedings in the matter.
11. *VCCL v Minister for Immigration* above, ref 5, paras 123-137, 149, 161; *Ruddock v Vadarlis* above, ref 5, paras 160-1.
12. *VCCL v Minister for Immigration,* above, ref 5, para 54. See especially *Liversidge v Anderson* [1942] AC 206, 245; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 528 (Deane J), 521-2 (Brennan J); *Chu Kheung Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1, 63 (McHugh J).
13. *Jones v Cunningham* 371 US 236 (1963), 243.
14. *Jones v Cunningham,* above, ref 13.

15. *VCCL v Minister for Immigration*, above, ref 5, paras 69-73.
16. *VCCL v Minister for Immigration*, above, ref 5, para 81.
17. *Ruddock v Vadarlis*, above, ref 8, para 213.
18. [1953] StRQd 26, 30.
19. *Ruddock v Vadarlis,* above, ref 8, para 212.
20. *Ruddock v Vadarlis,* above, ref 8, para 213.
21. *Ruddock v Vadarlis,* above, ref 8, para 213.
22. *Ruddock v Vadarlis,* above, ref 8, para 213.
23. Letter from James Neill, above, ref 2, p.2.
24. *VCCL v Minister for Immigration,* above, ref 5, paras 110-111; 'Appellants' Outline of Argument' in *Ruddock v Vadarlis,* above ref 8, pp.2-5 (copy on file with authors).
25. *Ruddock v Vadarlis*, above, ref 8, para 181 (French J).
26. See especially ss.4, 189, 198-9, 200-6.
27. *VCCL v Minister for Immigration,* above, ref 5, para 121.
28. *VCCL v Minister for Immigration,* above, ref 5, paras 107-109.
29. Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 1954 ATS 5 (entered into force for Australia and generally 22 April 1954). See especially Article 16 (refugees shall be accorded free access to the courts), Article 26 (refugees shall be accorded freedom of movement within Australian territory), Article 31 (no penalty shall be imposed on a refugee on account of their illegal entry), Article 32 (refugees shall not be expelled save for national security or public order) and Article 33 (principle of non-refoulement — that is, refugees shall not be returned to a state in which they fear persecution).
30. International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force generally 23 March 1976, entered into force for Australia 13 November 1980). See especially Article 9 (right to liberty and freedom from arbitrary arrest and detention), Article 13 (freedom from expulsion other than in accordance with law and right of access to a competent authority to submit reasons against expulsion) and Article 26 (equality before the law and right without any discrimination to its protection).
31. [1984] AC 74, 111.
32. *Ruddock v Vadarlis,* above, ref 8, para 204.
33. *Ruddock v Vadarlis,* above, ref 8, para 201.
34. *Ruddock v Vadarlis,* above, ref 8, para 202. Cf para 61 (Black CJ).
35. Interview with Eric Vadarlis, Melbourne, 17 September 2001.
36. *Ruddock v Vadarlis* , above, ref 8, para 28.
37. Craies, W. F., 'The Right of Aliens to Enter British Territory', (1890) 6 *Law Quarterly Review* 27, 27-9 as quoted at *Ruddock v Vadarlis*, above, ref 8, para 26 (Black CJ).
38. *VCCL v Minister for Immigration*, above, ref 5, paras 74-75; *Ruddock v Vadarlis*, above, ref 8, para 60 (Black CJ).
39. Gaita, Raimond, *A Common Humanity: Thinking About Love, Truth and Justice,* Text Publishing, 1999, p.26.
40. Gregory, Peter, 'Canberra Push for Right to Expel', *Age,* 14 September 2001, p.12.
41. *VCCL v Minister for Immigration,* above, ref 5, paras 98-106.
42. Skehan, Craig, 'Life Inside Camp Nauru', *Age,* 14 September 2001, p.B2.
43. *VCCL v Minister for Immigration,* above, ref 5, para 81.
44. *VCCL v Minister for Immigration,* above, ref 5, para 103.
45. See generally Freire, Paulo, *Pedagogy of the Oppressed,* first published 1970, current edition Penguin 1996, pp.39-40.
46. Yallop, Richard, 'Barrister Target of Public Hate Campaign', *Australian,* 4 September 2001, p.6.
47. *Ruddock v Vadarlis* above, ref 8, para 216. Before North J, although successful, the applicants declined to seek costs orders against the government. This may be contrasted with the approach of the government following their successful appeal to the Full Court of the Federal Court. On 2 October 2001, the government made submissions seeking to recover from the VCCL and Mr Vadarlis the full costs of both hearings. At the time of writing, the decision on costs had been reserved.
48. Kercher, Bruce, *An Unruly Child: A History of Law in Australia,* Allen & Unwin, 1995, p.xx.
49. Wilde, Oscar, *The Soul of Man Under Socialism,* quoted in *Neal v The Queen* (1982) 149 CLR 305, 310 (Murphy J).
50. Freire, above, ref 45, pp.25-6.
51. Steinbeck, John, *The Grapes of Wrath,* first published 1939, current edition Penguin, 2000, p.439.
52. Steinbeck, above, ref 50, p.437.