Marooned in Port Hedland

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The case of the boat people The UN Human Rights Committee in practice

On 20 June 1993, a Communication was forwarded to the United Nations Human Rights Committee on behalf of a Cambodian national who is currently being detained by the Federal Government in the Port Hedland immigration detention centre.

The applicant arrived in Australia by boat with 25 other Cambodian nationals in November 1989. Shortly after his arrival, he made application for refugee status, pursuant to the 1951 UN Convention Relating to the Status of Refugees and the 1967 Protocol. His application was finally rejected by the Immigration Department in December 1992, and he is currently seeking review of that decision before the Federal Court of Australia.

The policy of detention

The applicant is one of what may be described as the second 'wave' of boat people who have arrived in Australia in the past two decades. The first 'wave' followed the fall of Saigon in 1975, and consisted of approximately 52 boats from Vietnam which arrived between 1975 and 1981. All arrivals during this period were granted refugee status almost automatically by the Australian Government. No further boats arrived until November 1989. However, since that date a total of 15 boats containing 707 people (mainly from Cambodia, China and Vietnam) have landed.[1]

The Federal Government's policy with regard to the unauthorised boat arrivals since 1989 has been to detain all arrivals for the entire period while their applications for refugee status are being considered. Thus, from the day of his arrival, the applicant has been held in detention in various centres around Australia, including Sydney's Villawood centre, a 'bush camp' near Darwin, and at present he is being held in the detention centre in Port Hedland, some 1500 kilometres northwest of Perth, Western Australia.

Few would argue against the principle that a state may detain unauthorised arrivals until it is satisfied that they will not attempt to abscond into the larger community, or where they may be regarded as being in some way a threat to the community (for instance, identified criminals, and so forth). However, a policy which indiscriminately detains all arrivals, for sometimes very lengthy periods, must be open to question on human rights grounds. Under the current policy, the Government has detained very young children (many who have been born in detention), families, and even a wheelchair-bound grandmother in her eighties, whose son in Melbourne made numerous unsuccessful approaches to the Department of Immigration, Local Government and Ethnic Affairs (DILGEA) requesting that she be allowed to stay with him.[2]

The reasoning behind the detention policy is simple – it is a form of deterrence, to stop an imagined 'flood' of boat people. This was made clear by the then Minister for Immigration, Mr Gerry Hand, when speaking in favour of detention legislation in May 1992:

> The Government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community.[3]

This 'floodgates' argument has deliberately been aimed at the more reactionary section of the community, and has often been expressed in a fairly crude form. For instance, the Western Australian Senator, Jim

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McKiernan, has stated that:

> If the refugee assessment procedure was changed, Australia would be inundated and 'boats filled with people, who can afford the fare and the bribes that go with it, will land on our shores by the score'. [*West Australian* 21.4.92, p.1]

It is of scant comfort that Senator McKiernan is the Chairman of the Joint Standing Committee on Migration, which is currently inquiring into Australia's policy of detention.

Exhausting local remedies

The decision to take the matter to the Human Rights Committee came only after exhaustive attempts to persuade the Government to abandon its policy of detention. Even before the establishment of the Port Hedland detention centre in October 1991, there had been considerable disquiet over the lengthy periods of detention faced by the boat people.[4] However, when Port Hedland was opened these concerns grew, mainly as a result of the isolation of detainees from their community support groups and legal advisers, the physical discomfort and heat of the desert climate in the far northwest of Western Australia, and apparent attempts by DILGEA to discourage 'outside' contact with the detainees.[5] The Department was inundated with submissions from community and legal groups who were, by now, seriously questioning the need to detain the boat people, especially in such a place as Port Hedland.[6]

The matter came to a head in April 1992, when the applicant and fellow boat members had their applications for refugee status finally rejected, after some three and a half years in detention. Proceedings were immediately commenced in the Federal Court of Australia seeking review of these decisions. Just one week later, the Minister, Mr Hand, ordered that the decisions be withdrawn, and that the 'final stages' of the decision-making process be carried out again, because of a 'defect' in the decision-making process. (The nature of this 'defect' was never disclosed by the Minister. It is clear, however, that the Minister had been given advice that the decisions were simply indefensible.)

Faced with another indeterminate period waiting for a non-defective decision, an application was listed before the Federal Court on 7 May 1992 for the release of this group from detention. However, before the court had an opportunity to hear the application, one of the more sordid episodes in Australian political history occurred. Late at night on 5 May 1992, two days before the case was listed, the Government, with bipartisan support, passed the *Migration Amendment Act* (no. 24 of 1992), which inserted a new Part 2, Division 4B, into the *Migration Act* 1958, effectively defining boat people as 'designated persons' and providing, by s.54R, that 'a court is not to order the release from custody of a designated person'. The Federal Court action, of course, had to be abandoned, and costs were awarded against the Minister.

On 22 May 1992, fresh proceedings were instituted in the High Court of Australia, seeking a declaration that the relevant provisions of the *Migration Amendment Act* were invalid. However, in an unfortunately conservative judgment handed down on 8 December 1992, the court upheld the right of the Federal Government to detail all aliens under s.51(xix) of the *Constitution*.[7]

Ultimately, the Department took until December 1992 to produce another decision, finally rejecting the applicant, who has again sought judicial review in the Federal Court. By the time that this article is published, he will have been in detention for just over four years.

The Communication to the UN Human Rights Committee

The largely unsuccessful application to the High Court has, at least, paved the way for the Communication to the UN Human Rights Committee (the HRC). The major jurisdictional restriction in taking a matter to the HRC is that the applicant must have exhausted all available domestic remedies (*Protocol*, Article 5.2). As the High Court is the ultimate appellate court in Australia, there is really no other judicial avenue for the boat people to pursue in relation to their detention.

The Communication is an entirely private initiative, submitted on behalf of the applicant not necessarily as a representative of the other boat people, but in the knowledge that any finding of the HRC will be relevant for all detainees.

The Communication claims that the 'State Party' to the International Covenant on Civil and Political Rights (ICCPR) and Optional Protocol – Australia – is in breach of Articles 9.1, 9.4, 9.5, 14.1 and 14.3. It is a hefty document, running to 80 pages, plus six appendices.

Briefly, the major allegations are as follows:

Article 9.1 - Arbitrary Detention

Article 9.1 provides that . . . 'no-one shall be subjected to arbitrary arrest or detention'. 'Arbitrariness' has been defined as being not merely against the law, but as including elements of 'inappropriateness, injustice and lack of predictability'.[8] In the United States, it has been found that arbitrary detention under international law is determined 'according to what is reasonable and fair in the circumstances, specifically by reference to purpose, length and conditions of detention' (*Fernandez-Roque v Smith* 622 F Supp 887).

Insofar as asylum seekers are concerned, the UN Convention on Refugees warns against imposing penalties on refugees merely by reason of their illegal entry or presence, and prohibits the application of unnecessary restrictions on the movement of refugees (Article 31). The UN High Commission on Refugees has also clearly said that detention should normally be avoided, should not be unduly prolonged, and should be restricted to cases where it is necessary to verify identity, determine the elements of the refugee claim, to deal with cases where the asylum seeker has intentionally misled the authorities, or to protect national security or public order.[9]

Other persuasive evidence against a blanket policy of detention can be found in the fact that Australia is virtually the only western country which imposes such a regimen – most other countries detain unauthorised arrivals for a short period to verify identity and obtain security clearance, following which they are released into the community on conditions similar to bail release.[10]

It is also worth noting that DILGEA has produced no evidence that the applicant is likely to abscond, that he is in any way a threat to national security or public order, or that he cannot be released for any other legitimate reason.

Given the above considerations, it is difficult to see how the Federal Government will attempt to defend this aspect of the Communication. Indeed, the Federal Attorney-General's

Department already appears to have accepted this inevitability. In its submission to the Joint Standing Committee on Migration – Inquiry Into Detention Practices, in August 1993, it summarised the legitimate reasons for detaining a non-citizen as being (i) to control migration flows, (ii) to facilitate expulsion of deportees who have exhausted all avenues of review, and (iii) to prevent persons from absconding (p.14). It also made the following remarks, obviously mindful of the present Communication:

> . . . where the detention is for an indeterminate or unduly prolonged period of time, the Human Rights Committee would be more likely to examine the reasons for the detention and may form the view that instances of detention are excessive and therefore unreasonable, or not reasonable in the sense of no longer having a legitimate purpose. The Department considers such detention could amount to a violation of Article 9(1) of the ICCPR. [p.9]
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> . . . detention for the objective of deterring other possible asylum seekers is inconsistent with the objects and purposes of the Refugee Convention. [p.17]

Articles 9.4, 14.1 and 14.3 – access to the courts

Article 9.4 provides that all people in detention shall be entitled to take proceedings before a court to determine the lawfulness of that detention. The Communication argues in this instance that, under Division 4B of the *Migration Act*, once a person is lawfully declared to be a designated person, then there is no alternative to detention. There is no effective way that a person can seek to have that detention reviewed by the courts, since there is no discretion for a court to order that person's release.

Article 14 sets out the minimum guarantees to be provided in full equality to people facing criminal charges, including access to legal advice and trial without undue delay. The provisions in Article 14 are similar in terms to those set out in Principle 11 of the *Body of Principles for the Detention of All Persons Under Any Form of Detention or Imprisonment*, and, as such, they would apply not only to criminal detainees but also to those in administrative detention.

The main concern in the present Communication has been, first, the lack of access by the applicant to lawyers and second, the delay in the hearing of the applicant's case. The second point is obvious – it took two and a half years for a final decision to be made on the applicant's case, and even then it was considered to be indefensible and was withdrawn by the Minister. The final decision ultimately took three years from the time of the applicant's arrival in Australia.

The lack of access to lawyers has been a major concern. This particular applicant – along with the other members of the same boat – was not offered any legal assistance on arrival in Australia in November 1989. Indeed, they all languished in detention for almost a year before the Minister, Mr Hand, acceded to requests from concerned community groups to allow lawyers to see the boat people. The first lawyer was not provided to the boat people until around September 1990, when they were being held in Villawood, Sydney. Even then, the only legal advice made available was from the grossly under-resourced NSW Legal Aid Commission. In May 1991, the applicant's group was moved without warning to Darwin, thus losing contact with their Sydney lawyers, and in October 1991, they were again moved, this time to Port Hedland. With each move, a new set of lawyers had to come to terms with their cases.[11]

Certainly, lawyers have been provided to the boat people in Port Hedland. However, this has been limited to the administrative stages of the claims. Once a claim for refugee status has been rejected by the relevant administrative body (previously the Refugee Status Review Committee; now the Refugee Review Tribunal), all funding has been withdrawn. In this way, people in detention face the probability of being denied the right - available to all others - to seek review of their adverse decision in the Federal Court of Australia.

Of course the isolated situation of Port Hedland makes the obtaining of private legal assistance prohibitively expensive, and were it not for the staggeringly generous assistance of some of the largest law firms and leading counsel in Australia, who have provided *pro bono* assistance, the applicant and others in his position would have been denied their right to seek review and deported from Australia a long time ago.

The present situation

One of the major drawbacks to the HRC is the time that it takes for a Communication to be dealt with by the Committee. The first stage – that of admissibility – may take six months or more. Once the Communication is determined to be admissible, then the State Party has six months to respond to the allegations.

Thus far, four months after the Communication has been lodged, it is still in the initial stages. However, in terms of assisting with an increased focus on the policy of detention, whether it be through the media or in academic and community circles, the Communication has already been of considerable benefit. Certainly, there is little doubt that the Federal Government is acutely aware that the Communication is on foot. The Attorney-General's Department comes close to addressing the matter directly in the conclusion to its submission to the Joint Standing Committee on Migration – Inquiry into Detention Practices, when it states that:

> . . . there may be individuals, who have been detained in migration detention centres, who could establish that the rights guaranteed to them by Australia under international law have been breached in particular circumstances. [p.20]

Whether this sort of scrutiny will be sufficient to persuade the Federal Government to abandon its policy of detention and close Port Hedland will become more clear when the Joint Standing Committee reports in December 1993. In the meantime, a number of boat people will have just 'celebrated' their fourth anniversary in confinement.[12]

References

1. Department of Immigration and Ethnic Affairs, *Submission to the Joint Standing Committee on Migration – Inquiry into Detention Practices*, August 1993, Appendix E. The figures include the most recent arrival of 53 people.
2. Mercifully, the lady's son-in-law was recently granted refugee status, and she has been released as a dependent person.
3. House of Representatives, Hansard, 5 May 1992, p. 2372.
4. For instance, the Federal Human Rights and Equal Opportunity Commissioner expressed grave doubts as to the human rights implications of the policy of detention in his *Report on Detention of Asylum Seekers*, sent to DIEA in March 1992. This followed an inspection of the detention facilities in Darwin and the newly opened facilities in Port Hedland. The Report has never been released by the Federal Government.
5. For instance, early visitors to the perimeter fence were very quickly 'shooed' away by the guards.
6. For instance, see 'Report to the Australian Council of Churches on the Present Situation of Asylum Seekers Detained at Port Hedland Reception and Processing Centre – March 1992'.

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pensation for the pain and suffering which occurred between 1974 and 1987. There would, in any case, be difficulties in proving the pain and suffering experienced during the time of repression of memory.

If we argue that the pain and suffering arises at the time of the assaults, we may limit the compensation entitlement for pain and suffering to the statutory maximum available in 1981 – $3000. If this approach is adopted, in effect, Sharon would not be compensated for the years of pain and suffering which have ensued since 1981. There is no doubt that the pain and suffering experienced on the revival of memory is different from the pain and suffering experienced while the memory of the assaults remained repressed.

The full impact of sexual assault is not acknowledged by criminal injuries compensation legislation. Compensation for pain and suffering arising from sexual assault is limited because the compensation payable is tied to the date of injury. The difficulty with compensation, where there are prescribed statutory maximums belies the longevity of the impact of childhood sexual assault.

In addition to arguments about when the pain and suffering can be said to accrue in childhood sexual assault cases, we also intend to seek compensation for each criminal act. The evidence already led before the AAT will be relied on. We may, in addition, lead further evidence of other assaults which Sharon has remembered during the course of these proceedings. It is unlikely that this matter will be listed for hearing until 1994.

For Sharon, the process of remembering the assaults, counselling and recovery continues. The impact of the legal process, particularly given the length of time this appeal process has taken, has placed an enormous strain on Sharon. This has highlighted the lack of funded counselling services, which provide long-term counselling, available to sexual assault survivors. We wish to acknowledge Sharon's courage and strength in pursuing this process.

Reference

1. AAT decision: 4 December 1991; Supreme Court of Victoria decision: 10 December 1992; High Court of Australia consent orders: 9 September 1993.
2. Lamm, Jocelyn, 'Easing Access to the Courts for Incest Victims: Towards an Equitable Application of the Delay Discovery Rule', (1991) 100 *Yale LJ* 2187 at 2194-5.

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7. *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* 1992 (110) ALR 97. It is at least noteworthy that the court found the most offensive section – 54R – to be invalid. The court also noted that up until the passage of the new legislation, most of the boat people had been held illegally. For a more detailed discussion of this decision, see Crock, M., 'Climbing Jacob's Ladder: the High Court and the Administrative Detention of Asylum Seekers in Australia', (1993) 15 *Syd LR* 338.
8. *Van Alphen v The Netherlands* (UN Human Rights Committee Communication No. 305/1988), paragraph 5.8.
9. Conclusion No. 44, 'Detention of Refugees and Asylum Seekers' 1986, Executive Committee of the UNHCR. See also letter of UNHCR (signed by Ghassan Arnaout, Director, Division of Refugee Law and Doctrine) to Philip Rudge, Secretary of the European Consultation on Refugees and Exiles (8 January 1987), reproduced in *Asylum Law and Practice in Europe and North America: A Comparative Analysis*, Coll, G. and Bhabha, J. (eds), Federal Publications Inc., Washington, 1992.
10. See Coll and Bhabha, above, particularly the chapters by Lex Takkenberg (on the European countries) and Arthur C. Helton (on Canada and the USA).
11. More serious cases of denial of legal assistance have occurred with other boats. Some of the Vietnamese from the boat 'George' asked for lawyers on their arrival and were told that their cases were 'different', and that they did not need lawyers; and in January 1992, lawyers in Darwin were specifically refused access to see some Chinese from the boat 'Isabella' (Source: author's personal conversations with boat people and lawyers). The worst example may have been the 113 Chinese from the boat 'Norwich', which landed on Christmas Island in late October 1992. These people were summarily turned around by immigration officials and sent back to China. No independent legal advice was made available to ascertain if they were seeking refugee status, and the Australian public was asked to accept the assurances of the Immigration Department that they were merely misguided people who thought they would be allowed to enter Australia to find jobs (see *Canberra Times*, 8.11.92, 'Boat People Sent Home').
12. Those readers who wish to follow up the detention issue will be assisted by a major new text which is due to be published in December: Crock, Mary (ed.), *Protection or Punishment: The Detention of Asylum-Seekers in Australia*, The Federation Press, Sydney, 1993.

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1. Sandor, Danny, 'The Thickening Blue Wedge', (1993) 18(3) *Alternative Law Journal*, pp.104-8; White, Rob, 'Police Vidiots', (1993) 18(3) *Alternative Law Journal*, pp.109-12.
2. Sandor, above, p.105.
3. Sandor, above, p.105.
4. James, S. and Polk, K., 'Policing Youth: Themes and Directions', in D. Chappell and P. Wilson (eds), *Australian Policing: Contemporary Issues*', Butterworths, Sydney, 1989, pp.41-62.
5. This point is well illustrated in Grabosky, P. and Wilson, P., *Journalism and Justice: How Crime is Reported*, Sydney, 1989, at pp.24,127,130; Sarre, R., 'Reporting Crime', (1992) 17(4) *Alternative Law Journal*, pp.183-6.
6. *Policing in Victoria: The opinions of Victorian High School students.* A study undertaken for the Committee of Inquiry into the Victoria Police Force, Research Section, Ministry of Police and Emergency Services, Government Printer, Melbourne, November 1984, sections 6.4,6.5,8.3,and 11.
7. Beyer, Lorraine, *Community Policing: Lessons from Victoria*, Australian Institute of Criminology, 1993, p.15.
8. Moore, David, 'Measuring Police Productivity' in P. Moir and H. Eijkman (eds), *Policing Australia: Old Issues, New Perspectives*, Macmillan, Melbourne, 1992, p.56. Moore calls police 'the gatekeepers of the criminal justice system'. He explains: 'The question of who would be put into the system and who kept out has since been determined largely by police discretion except where serious offences were involved'.
9. *Police Life*, July/August 1992, p.3.