REFUGEE PROCESSING FREEZE
Unlawful and practically unsound

A great deal of commentary has followed the government's decision, made in early April of this year, to suspend the processing of new refugee applications from Sri Lanka and Afghanistan. The policy has been condemned on legal, practical and political grounds. A number of Australia's leading international refugee scholars including Michelle Foster,[1] Jane McAdam, together with Kerry Murphy[2] and Savitri Taylor[3] have convincingly demonstrated that the policy violates Australia's obligations under international law, particularly the principle of non-discrimination. NGOs around the world have objected to the policy on similar grounds.

The non-discrimination argument is a powerful one. It is grounded in particular in Article 3 of the Refugee Convention which requires that the convention be applied without discrimination as to race, religion or country of origin, and Article 26 of the International Covenant on Civil and Political Rights ('ICCPR') which prohibits discrimination on 'any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Article 26 of the ICCPR does not, however, establish an unconditional guarantee of equality. There may be situations where it is necessary and appropriate for a State to differentiate between different groups of citizens (or, potentially, non-citizens). If a State is able to show that the differential treatment is based on 'reasonable and objective' criteria, or has been instituted to serve a legitimate aim, then the treatment may not be considered to be discriminatory, and Article 26 will not be triggered.

Is there a reasonable and objective basis, or a legitimate aim, for the differential treatment of Afghan and Sri Lankan refugee applicants? The clear answer is no.

The Rudd government has repeatedly reverted to the set of justifications accompanying the announcement of the shift in policy on 9 April. Those justifications focus in particular on allegedly 'evolving' circumstances in Afghanistan and Sri Lanka. Changing circumstances, together with the suspension of claim processing, are considered to 'mean that it is likely that, in the future, more asylum claims from Sri Lanka and Afghanistan will be refused'. Rather than having any reasonable or objective bases, this proposed rationale for the policy is notoriously circular. Its implementation also comes at a high financial and human cost.

First, the assertion that conditions in Afghanistan and Sri Lanka are 'evolving' lacks a clear evidential basis. While the United Nations High Commissioner for Refugees ('UNHCR') is indeed constantly reviewing conditions, it has not concluded that the types of activities amounting to persecution in either country have ceased, or that either country is safe for return. Most sources of country of origin information recommended by UNHCR indicate that there is ongoing conflict and instability, as well as a range of human rights concerns, in both countries.

Further, ongoing conflict is not the sole basis for asylum claims from either country. Even if hostilities were to cease, there would be no presumption that the claims of all asylum seekers from that country or region would fail. More pointedly, such a presumption cannot justify the refusal, temporary or otherwise, to assess those claims.

Delaying the assessment of claims in anticipation of an uncertain evolution of conditions in the applicant's country amounts to acting (or rather instigating a policy of inaction) on the basis of incomplete evidence. Interestingly, as Jane McAdam has noted, the government's push to defer processing implies that on the basis of currently available evidence, claimants from Sri Lanka and Afghanistan would be considered refugees. If the existing evidence regarding current circumstances in the two countries indicated that the applicants could be returned, the government would presumably process the Afghan and Sri Lankan claims immediately. By asserting that asylum claims from Sri Lanka and Afghanistan are likely to be refused in the future, it implies that, at present, such claims should succeed as well-founded.

Second, to the extent that the policy is intended to act as a deterrent, it manifestly misunderstands the dominant influences that drive an individual to risk their life traversing the ocean by boat in an attempt to reach Australia's shores. It is unnecessary to revisit the pull-versus-push factor debate here; it suffices to say that a delay in processing and the imposition of arbitrary detention only adds to the great hardship already suffered by an individual fleeing from persecution at the hands of their government, and is an unlikely deterrent. Reports of a reduction in boat arrivals based on a comparison of the number of arrivals in the 18 days after the announcement of the policy with the same period prior to announcement, are based on far too small a time frame to reveal anything meaningful about the success or otherwise of its deterrent aims — a fact Home Affairs Minister Brendan O'Connor has readily admitted.[4]

REFERENCES

1. Michelle Foster, 'Refugee Obligations Violated', *The Age* (Melbourne), 13 April 2010.

2. Jane McAdam and Kerry Murphy, 'Refugee Processing Freeze Breaches International Law', *The Australian* (Sydney), 14 April 2010.

3. Savitri Taylor, 'The asylum freeze and international law', *Inside Story* (Melbourne), 14 April 2010.

4. Phillip Coorey, 'Fewer boats since border freeze but the jury's still out', *Sydney Morning Herald* (Sydney), 27 April 2010.

5. Department of Immigration and Citizenship, Managing Australia's Borders: Background to Immigration Detention, <immi.gov.au/managing-australias-borders/detention/about/background.htm> at 4 May 2010.

Third, both the financial and human cost of detention is well-documented. The cost of keeping each individual asylum seeker in detention on Christmas Island has been estimated at $1830 per day. Delaying the processing of claims will extend the length of time spent in detention, with a cumulative effect on the overall number of detainees. The government's response is to add to costs and to recant on previous commitments to roll back immigration detention. Chris Evans has announced the reopening, at 'considerable' as yet unspecified expense, of Curtin detention centre in the remote north of Western Australia. Before being decommissioned in 2002, the centre was renowned for its poor conditions and correspondingly high levels of self-harm. It has long been recognised that detention, particularly in isolated locations, may have severe effects on health and psycho-social wellbeing, particularly where the individuals concerned have already experienced significant trauma. The Australian health system will ultimately bear the financial cost of the impact of prolonged detention upon the physical and mental wellbeing of refugee applicants.

The government distinguishes immigration detention from imprisonment for punitive purposes on the grounds that it is 'an administrative function whereby people who do not have a valid visa are detained while their claims to stay are considered or their removal is facilitated'.[5] Setting aside the somewhat specious reasoning on which this distinction depends, the processing freeze undercuts the very reasons the government gives for the necessity of detention. The Sri Lankan and Afghan detainees' claims to stay are not being considered and their removal is not being facilitated. Thus, their 'administrative' detention cannot be justified on those grounds. Their detention is arbitrary. Arbitrary detention contravenes Articles 9 and 11 of the ICCPR, along with Article 37 of the Convention on the Rights of the Child.

The government has provided no evidence that the current processing freeze has a reasonable or objective basis, or serves any legitimate aim. Even worse, the Rudd government's policy has fuelled the negative discourse that already infuses public debate concerning the arrival of refugees in Australia. In this discourse, the claims of asylum seekers are taken to be suspect, and the protection of refugees in accordance with our international protection obligations is viewed as a burden detracting from, or conflicting with, the rights and interests of the Australian community. Rather than attempting to rebuke this discourse, and to engage positively with the debate, the government has chosen to accept a series of unfounded presuppositions and to use them opportunistically. The government is not merely reflecting and responding to the views of the electorate. It actively encourages an extremely damaging public misperception of 'boat people' as 'illegal immigrants' and 'queue jumpers'. Political leaders have a duty to educate and lead by example, ensuring that policy options align with our core national values. Unscrupulously abandoning this duty in the formulation of refugee policy, where fundamental human rights are at stake, is both irresponsible and unacceptable.

The Opposition has challenged the government as 'soft' on border security. The government could have taken this as an opportunity to shift the narrative and to educate through leadership; an opportunity to acknowledge that, in view of global conflict and the persistence of human rights abuses, Australia will always have refugees arriving on its shores but that, compared to the rest of the developed and developing world, these numbers are negligible; an opportunity to portray refugees as the ultimate survivors, in need of protection and deserving of our compassion. Instead, the government perseveres with a policy underpinned by the very rhetoric that it not only sought to distance itself from, but directly challenged, going into the 2007 national election.

The Labor government came into power on the basis of a policy framework designed to bring Australia further into line with its international commitments under the Refugee Convention and a number of human rights instruments. Yet its early efforts have been increasingly tarnished by the cynical exploitation for political purposes of some of the most vulnerable people to reach, against all odds, Australian shores.

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