Detention Of Asylum Seekers — A Questionable Policy
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Introduction

Asylum seekers are not criminals, nor are they charged with criminal offences. Despite this, the Australian government continues to detain all asylum seekers who arrive in Australia without proper documentation. A punishment usually reserved for the worst criminal offenders in our community is applied to people whose only crime is fleeing oppressive regimes or economic hardship. The Australian government argues that the policy of detention is necessary to control our national borders and to act as a deterrent to future undocumented arrivals. Critics of the policy point to the effects of long periods of detention on already traumatised people and the substantial economic costs involved. This paper addresses the arguments for and against detention of asylum seekers and concludes with recommendations as to how the policy may be made more humane without compromising Australia's interests.

Detention In Australia's Refugee System

Australia's obligation to assist refugees arises under international law, namely the 1951 United Nations Convention Relating to The Status of Refugees ("the Convention") and the 1967 Protocol ("the Protocol") to which Australia is a signatory. The Convention and Protocol define "refugee" and the right to seek protection from persecution. The domestic legislative basis of the program is s.22A of the Migration Act 1989 which provides that the Minister may (as opposed to must) determine whether a person is a refugee. This determination is a prerequisite for a number of different visas and entry permits. Australia also has a large humanitarian program to provide for those who do not satisfy the definition of a refugee, but still require protection.

There are two classes of refugee and humanitarian applicants: those granted refugee or humanitarian status and are accepted for resettlement in Australia whilst still
overseas (the offshore refugee and humanitarian program), and those granted refugee or humanitarian status after their arrival in Australia (the onshore refugee and humanitarian system).

There are two categories of on-shore refugee applicants — those who arrive in Australia with a valid visa and entry permit and those who arrive here illegally. Undocumented boat arrivals form the major part of the latter sub-group. In June 1992 there were 21,653 on-shore refugee applications awaiting determination. Only 478 of those applicants were detained (Joint Standing Committee on Migration Regulations 1992). Almost all of those detained were undocumented boat arrivals.

Most of the undocumented boat arrivals in Australia are from countries such as Cambodia, Peoples Republic of China and Vietnam. They arrive in the waters or coastline of northern Australia after long journeys through the seas of south east Asia. Under present laws they are deemed "designated persons" and detained in immigration detention centres such as the Port Hedland Reception and Processing Centre. They are usually given assistance to apply for refugee status but are not allowed to apply for release. Many have been detained for years.

**Conditions Of Detention**

Conditions in immigration detention centres differ little from prisons. In March 1992 the Australian Council of Churches published a report on the Port Hedland Centre. The report included the following concerns:

- there was no psychiatrist at the centre;
- although the centre was called a Reception and Processing Centre, community or support groups have no access; it is virtually a closed detention centre;
- the gates are padlocked and the centre is surrounded by barbed wire;
- the Australian Protective Service Staff are dressed in brown/khaki and blue uniforms;
- a lack of interpreters on the site;
- lack of professional torture and trauma counsellors; and

Similar problems arise in all the detention centres located throughout Australia, many of which are wings of high security prisons. For example, the immigration detention centre in Brisbane is a wing of the Wacol Remand and Reception Centre. The detention of refugees in such conditions, and indeed at all, places great demands on people who "by definition ... are people already under mental stress and may already have been ill treated in their country of origin" (Irving 1988).

**The Power To Detain**

The power to detain asylum seekers and others who enter or remain in Australia without permission is contained in various provisions of the Act, as follows:
(a) "prohibited entrants" — s.88 of the Act enables an authorised officer to keep in custody any person who is on board a vessel when that vessel arrives in Australian waters, being a stowaway or any other person whom the officer believes would become an illegal entrant if the person were to enter Australia. The prohibited entrant may be detained until the vessel departs, or until the person is granted an entry permit, or such earlier time as the officer directs.

(b) "undocumented airport arrivals" — s.89 of the Act enables an officer to keep in custody a person who is on board an aircraft in the same circumstances as those delineated in s.88 above. The person may be detained at the airport or another place until the person is removed from Australia or is granted an entry permit,

(c) "unprocessed persons" — s.54B to s.54H of the Act refers to people who have travelled to Australia in a boat or have disembarked at an airport. When an officer supposes that the person would upon entry to Australia become an illegal entrant and that it is not possible to decide whether to grant the person an entry permit, the person becomes an "unprocessed person" and may be taken to a "processing area". The unprocessed person may be kept in a processing area until granted an entry permit or becoming a "prohibited person". A prohibited person is one who has requested to leave Australia, or has been refused or has not applied for an entry permit. A prohibited person must be removed from Australia as soon as practicable.

(d) "designated persons" — s.54J to s.54U refers to people who arrive in Australian territorial waters after 19 November 1989 and before 1 November 1993 without visas, who are in Australia, and who have not presented a visa or entry permit. Such persons are referred to as "designated persons". They must be kept in custody and may only be released for the purposes of being removed from Australia or when granted an entry permit. They may only be removed upon request, if they do not apply for an entry permit or if refused an entry permit. The designated person class appears to include boat arrivals who have not entered Australia as well as boat arrivals who have entered undetected. "Designated persons" are prohibited from applying for release from custody.

(e) "illegal entrants" — s.92 of the Act enables an officer to detain in custody an illegal entrant. The illegal entrant must be brought before a prescribed authority [magistrate] within 48 hours. The prescribed authority may order the release or authorise a person to be detained for no more than 7 days. The Minister or Secretary [in practice, a compliance officer] may order the release of a person in custody at any time.

(f) "deportees" — s.93 of the Act enables an officer to detain any person against whom a deportation order has been issued. Although a prescribed authority may not order the release of a deportee, the Minister or Secretary has a discretion to order a deportee's release.

The Practice Of Detention

As a consequence of the above array of provisions, it is often difficult to know what section a person is detained under. In practice however DIEA distinguishes between
undocumented arrivals on the one hand and those who entered Australia with proper documentation but later became illegal on the other.

A person who becomes illegal after entering Australia legally may be arrested and detained. After arrest they are provided with the opportunity to apply to remain in Australia, including applying for refugee status. If they so apply, they are usually released upon reporting conditions until the application has been determined. If they do not apply they are usually released upon the provision of a surety of release, which is forfeited if they abscond before departure. The more likely a person is to abscond, the higher the surety of release. They must also purchase a one-way ticket to another country and report to DIEA as required. Even deportees (apart from criminal deportees) are usually released, subject to the above conditions.

The situation is very different for those who arrive without documentation and later apply to remain in Australia. Undocumented boat arrivals are usually detained under the "designated persons" provisions. Arrivals on aeroplanes are detained as "unprocessed persons".

Although only "designated persons" must be detained, in practice all undocumented arrivals are detained until they are granted an entry permit or deported. For example, two asylum seekers travelled from Papua New Guinea to the Australian border in 1992. By the time they were discovered, they had physically entered Australia. Instead of being declared designated or unprocessed persons, they were declared illegal entrants and deportation orders were issued against them. They were detained in the Brisbane Remand and Reception Centre until February of 1993 when they were deported. Their application for release was refused on the ground that the circumstances of entry and subsequent application to enter Australia indicated a strong desire to remain here and, therefore, they could not be trusted to honour conditions of release.

The distinction between undocumented arrivals and those who become illegal after entry has resulted in the absurd situation where refugee applicants "are categorised according to how they entered (or did not "enter") the country. This statutory categorisation determines ... whether the applicant will be detained ... It is inequitable and arguably disadvantages those potentially most in need of protection (ie those not able to use regular modes of travel)." (Refugee Council of Australia 1992)

Further, as noted by Arthur C. Helton of the Lawyers Committee for Human Rights (with respect to the United States system):

There is no rational justification for subjecting undocumented excludable aliens to a rule of detention while all other aliens, documented or not, can be considered for release on an individualised basis ... Excludable aliens cannot rationally be viewed as more likely to abscond than other aliens... (Helton 1986).

International Law And The Detention Of Refugees

The policy of detention of asylum seekers as it currently operates in Australia contravenes international human rights law with respect to the detention of asylum seekers. Article 31 of the Convention provides:
1. The Contracting States shall not impose penalties, on account of their illegal entry and presence, on refugees who, coming directly from a territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country”.

The United Nations High Commissioner for Refugees (1986) (UNHCR) has issued a resolution with respect to the matter. In Excom Conclusion No. 44 the UNHCR Executive Committee advised that it:

(a) Noted with deep concern that large numbers of refugees and asylum seekers in different areas of the world are currently the subject of detention ... by reason of their illegal entry or presence in search of asylum...
(b) Expressed the opinion that in view of the hardship which it involves, detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents...; or to protect national security and public order...
(c) Recommended that detention measures taken in respect of refugees and asylum seekers should be subject to judicial review.

The detention of refugees in Australia goes far beyond that which is necessary to protect national security, verify identity, or determine the elements upon which the claim to refugee status is based. The detention is long term and despite efforts by the government to speed the determination process, there has been little reduction in the long periods asylum seekers must wait for their applications to be determined. Further, the authorities make no attempt to screen criminal aliens or other security risks from the remainder of the arrivals. The policy of detention is universal — factors such as the person’s health, age, bona fides, and previous experience of trauma or persecution are not considered.

The mere fact of arrival without documentation is sufficient alone to require detention. In 1992 a compliance officer in Brisbane expressed relief when a Polish woman who was in the very late stages of her pregnancy was safely airlifted to Port Hedland Detention Centre after a long and stressful flight. The regulations did not allow her to be admitted to the nearest hospital or allow her to recuperate after the birth, nor did the officer appear to contemplate such a possibility. The universal detention of undocumented arrivals in these conditions clearly breaches the above human rights provisions.

**Detention and National Security**
The Australian government has an obligation to protect Australia's borders from invasion and a right to control entry by non-citizens. At the same time it has an obligation to ensure that the right to seek asylum is protected. Both interests can be protected without the need for universal detention of asylum seekers.

In 1990 the United States Immigration and Naturalisation Service (INS) authorised the commencement of a Pilot Parole Project to operate for a period of 18 months. The aim of the project was to determine the consequences of releasing undocumented asylum seekers into the community instead of holding them in detention centres. An INS review of the project undertaken in February 1991 found: "inter alia, that those cases released with the assistance of community groups in New York achieved high rates on reporting compliance and immigration court appearances". (Helton 1991)

The project was so successful that on 20 April 1992 the INS decided to re-implement it and expand it to all INS detention facilities. The Immigration Naturalisation Service (1992) reported that: "By adopting the Parole Project, the Service will be able to detain those persons most likely to abscond or pose a threat to public safety".

The project relies on interviews conducted by trained officers to ascertain the person's bona fides and ensure they are not criminally dangerous or likely to abscond. An applicant for release must meet the following criteria:

1. The person's true identity has been determined with a reasonable degree of certainty.
2. The allegations in the person's asylum application ... or in the case of a person who has requested asylum upon arrival at a port of entry, the statements made by the person on support of his or her request for asylum ... appear to be credible and to provide substantial support for the application or request.
3. The person does not appear to fall within any of the following categories:
   (a) Any person who ... participated in the persecution of any person...
   (b) Any person who has been convicted of an aggravated felony...
   (c) Any person who may be regarded as a danger to the security of the United States.
4. The person has legal representation ... and/or a place to live and employment or other means of support.
5. The person agrees to the following:
   (a) to contact the appropriate local INS office each month...
   (b) to appear at all hearings ... and/or all interviews with the Service; and
   (c) to appear for deportation, if the person is ultimately ordered excluded, and
   (d) to report for detention if the person fails to comply with the above requirements, or if the alien is convicted of any felony or three misdemeanours (Immigration and Naturalisation Service 1992).

If the asylum seekers meet the above criteria, they may be released. There is no reason why a similar release program could not work in Australia. The program protects the Australian community by screening out undesirable elements. At the same time it
ensures that genuine asylum seekers will not be penalised by long-term detention simply due to the circumstances of their arrival, thus protecting the right to seek refuge from persecution
The Economic Costs Of Detention

The cost of a release program would be significantly less than the cost of detaining all undocumented arrivals.

Most of the costs associated with operating a release program already exist in operating detention centres — the costs of staff, food and accommodation for detainees, interpreters and legal assistance. Indeed, many of these costs would be reduced. The major difference between the two approaches is the capital costs associated with detention centres. Also, isolated detention centres such as Port Hedland incur costs in transporting DILGEA staff, lawyers and interpreters to the centre.

In 1992 DILGEA was questioned as to the costs of maintaining immigration detention centres by the Senate Estimates Committee. (These costs were reported in the Parliamentary Debates, Hansard Senate Estimates Committee, 2 April 1992). The questioning revealed that the total cost of the custody and care of the 294 detainees in the Port Hedland Detention Centre for the period 1991 to 1992 was $7.922 million — or $27,184 per person. DILGEA was unable to provide a breakdown at the time of where the money was spent, although around $1.3 million dollars appeared to be capital costs. The government also announced on the 18 August 1992 that an additional $1.578 million had been provided for security related improvements and additional guarding for the centre. With respect to the other centres such as the Villawood Detention Centre in Sydney, Mr Sullivan of DILGEA stated that the average cost of detention was about $200 per day — equal to $73,000 per person per year! DILGEA was unable to provide a figure for the total cost of running these centres however.

A release program would avoid the costs of unnecessary detention set out above. The savings would be significant and could be directed to employing additional DILGEA staff to speed up the processing of the backlog of refugee applications.

Detention As A Deterrent

When the Minister for Immigration, Local Government and Ethnic Affairs introduced the "designated persons provisions" to the House of Representatives, he justified the detention of asylum seekers on the following grounds:

I believe it is crucial that all persons who come to Australia without prior authorisation not be released into the community. Their release would undermine the Government's strategy for determining their refugee status or entry claims. Indeed, I believe it is vital to Australia that this be prevented as far as possible. The Government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in that country and expecting to be allowed into the community.

(see Footnote 1)

The issue of whether detention deters future asylum seekers has not been explored or researched in any form. Neither has the government produced material to justify its belief that detention deters future asylum seekers from travelling to Australia.


Personal experience of refugee applicant clients however suggests that the prospect of detention would not have prevented them from travelling here. A client recently had to be advised that if he applied for refugee status he faced the prospect of long-term detention. He stated that he was prepared to remain in custody for so long as it took to obtain refugee status, provided he did not have to return to his country of origin. In any case, the fact that most of the "boat people" who travel to Australia from southeast Asia and southern China are prepared to endure long and dangerous trips through the open seas in small fishing boats with no guarantee that they will even land in Australia suggests that the prospect of detention will not deter them from leaving their country of origin.

Thus the argument that detention acts as a deterrent to future arrivals has little basis in the Australian context. It should not be forgotten either that protection for refugees is a basic human right. Policies designed to avoid the consequences of a genuine commitment to that right should not be tolerated.

Conclusion and Recommendations

The Refugee Council of Australia (1992) published a series of recommendations concerning the detention of asylum seekers in Australia. Basically they recommend as follows:

- the government’s practice of detaining asylum seekers should be abolished;
- detention should only be used under special defined circumstances such as to establish the identity of the claimant or if the claimant is found by a magistrate to be a risk to the community;
- minors should not be detained under any circumstances;
- there should be regular judicial review of a decision to detain an asylum seeker;
- conditions of detention should meet certain standards; and
- no detainees should be held in penal institutions.

The recommendations, if adopted, would create a more humane and cost effective approach to dealing with undocumented boat arrivals than the current practice of universal detention. They would also allow the government to control entry into Australia without penalising genuine asylum seekers for exercising their basic right to seek protection from persecution.

References


The United High Commissioner for Refugees 1986, 37th Session of the Executive Committee.