

## **Tampering with Asylum**

**National Press Club**

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In 2001, I was directing the Jesuit Refugee Service in East Timor which was assisting with the return of tens of thousands of East Timorese from the squalid camps on the Indonesian side of the border.

On Monday morning 27 August 2001, I awoke in Dili to the sound of the BBC World Service News. A Norwegian, Captain Arne Rinnan was telling the unlikely tale that Australian authorities had asked him to pick up a boatload of persons in distress on the high seas and that the Australian authorities were now denying him permission to land his human cargo in Australia. They were even denying him permission to enter Australian territorial waters. At my regular round of meetings in Dili that day, United Nations workers from every country on earth were asking me what my country was up to. Australia had such a fine reputation for its humanitarian intervention in East Timor, driving the pace for UN peacekeeping and making up the shortfall in the interim with the leadership of INTERFET. Here now was the same government, the same nation refusing humanitarian aid to a boatload of asylum seekers.

Then came word around the streets of Dili that Australia was sounding out the interim administration of East Timor about taking the Tampa refugees for

detention and processing in East Timor. I could not believe that my own government which well knew the devastation and lack of infrastructure in East Timor just one year after the conflagration would seek such a return favour from its newest most mendicant neighbouring nation state. The UN was still in control and the late Sergio de Mello had the courage and integrity to tell Australia where to get off. How could we so jeopardise our international humanitarian reputation by exploiting the vulnerability and indebtedness of the recently liberated East Timorese? At the time, I thought - and I still think - that there are some problems that a country like Australia should solve at home inside its own borders. We should be neighbourly and we should carry our weight.

Soon after my return to Australia in January 2002, I made my first visit to the Woomera Immigration Reception and Processing Centre, six hours drive from Adelaide, on the outskirts of the small town owned and run by the Defence Department. Afghan asylum seekers had sewn their lips in protest at the government's decision to suspend the processing of their asylum claims, despite their ongoing detention in the middle of the desert, in light of the changing political situation in Afghanistan.

From there I came here to Canberra. In my wanderings around the corridors of Parliament House, I met with Mr Bill Heffernan, a member of the Howard government, who explained the government strategy starkly and simply. Having been a local councillor and being a lifetime farmer, he described to me the moral dilemma that confronts you during a major bushfire. You have to build a firebreak. You have to choose someone's property as the firebreak. Destroying their property, you will save the neighbourhood. Bill said, "It's not pretty. These are hard moral decisions. But you have to do it." The government's boast two years later is that the firebreak has worked, at least for

the moment. The boats have stopped coming. The borders are secure and Australia can choose those refugees to whom it wishes to offer places under its generous offshore refugee selection program.

For these last two years I have I visited centres such as Woomera, Port Hedland and Baxter every month. Every two months I have come to Parliament House Canberra and met with the political architects of this policy, thinking there must be a better way than rhetorical stand-offs in the media. The politicians remain as convinced of their decency in implementing the policy as I am in decrying it. Now I have published a book entitled *Tampering with Asylum*.

My concern about the detention of boat people was heightened when I was conducting a worship service in the Woomera detention centre on Good Friday in 2002. At the end of the service, a riot broke out and demonstrators together with detainees managed to breach the security fence. I was allowed back into the centre on the Tuesday after Easter. There I met for the first time Nasrin Hosseini who is in the audience here today. Nasrin arrived in Australia with her six year old son in April 2001. They spent more than three years in detention before being released on their temporary protection visa last month. Spare a thought for another woman with two children who won her case in the Full Federal Court with Nasrin on 13 June 2003. Having already been in detention for 3.5 years, they may have to wait in detention and in suspense for another year while the government seeks to appeal their 3-nil win to the High Court.

On Easter Tuesday last year, Nasrin described to me the assault on her son by an ACM guard which had taken place on Good Friday night. Her son had been struck by a baton as well as being hit with tear gas. I observed bruises on her

boy's left knee and right ankle. The ACM Centre Manager told me that it was unfortunate that children had been hit by tear gas "because the wind happened to be blowing the wrong way". I immediately wrote to Minister Ruddock explaining all that I had seen and heard.

After a two week silence from government, I then spoke publicly about this assault. On the very day that the newspapers carried my remarks, DIMIA was able at 2.41pm to place on its website a denial of any injury to children stating "If Father Brennan has information or evidence of mistreatment of detainees he should report it to the appropriate authorities for investigation." As far as I knew, Minister Ruddock was the appropriate authority. I realised that enthusiastic idealism of some public servants in handling the troublesome public was getting a little beyond the pale. The Children Overboard mindset had taken root in the Public Affairs section of DIMIA. This is very unfortunate, especially given the dedication of many of the DIMIA officers in the detention centres - those who actually meet the traumatised, incarcerated asylum seekers face to face.

Even if the detention of children is a vote winner and even if it is effective in deterring unauthorised arrivals (which I do not concede and which government does not claim), every political party and every citizen has an interest in ensuring that the human rights of these children are not further undermined by actions of the state or of its private contractors. Now that only two boats have made it close to Australia in the last 18 months, it is time to review the firebreak and to assess the permanent measures that are now in place.

The firebreak has consisted of five key elements:

- Payments to Indonesian authorities to engage in upstream disruption activities that would never be reported to the parliament of either country
- Instructions to our navy to engage in brinkmanship on the high seas requiring non-intervention until persons including children have ended up in the sea abandoning unseaworthy vessels
- Long term detention of asylum seekers in remote desert locations
- Detention and processing of asylum seekers in Pacific locations out of the reach of Australian courts, lawyers and those of us now affectionately known as the do gooder cappuccino set
- Three year temporary protection visas denying the right to travel and return to Australia (in breach of the Convention on Refugees), denying the right of family reunion and denying access to permanent protection and residence if the person transited a country such as Malaysia for seven days where they could be **deemed** to have had the opportunity to seek protection. This deeming exercise is very artificial when you consider that Malaysian minister Dr Rais Yatim explained last week why Malaysia would not sign the Refugee Convention: "We have had a series of understandings with (other countries), that once their people come here and claim asylum, we automatically tell them to return. Our policy is very simple, those who have no valid documents will not be allowed to stay in our country."

We Australians have always enjoyed the benefits and suffered from the disadvantage of acute geographic isolation. Since World War II we have been a strong net migration country. Though generous to refugees, we have always demanded the right to determine who comes to Australia. That clarion call was not invented by Pauline Hanson. Nor was John Howard the first Prime Minister to repeat it.

The wave of nine thousand boat people principally from Afghanistan and Iraq, lasting from 1999 until the interception of the Tampa, was the fourth wave of boat people arriving on our shores since the end of the Vietnam War. The second wave including boat arrivals from Cambodia came during the prime ministership of Bob Hawke. In June 1990, Hawke told Jana Wendt:<sup>1</sup>

*We have an orderly migration program. We're not going to allow people just to jump that queue by saying we'll jump into a boat, here we are, bugger the people who've been around the world.*

Who will ever forget his declaration:<sup>2</sup>

*Do not let any group of people in the world think that because Australia has that proud record, that all they've got to do is to break the rules, jump the queue, lob here and Bob's your uncle. Bob is not your uncle on this issue, other than in accordance with the appropriate rules. We will continue to be one of the most humanitarian countries in the world. But it is not an open door policy.*

It was a Labor government that first instituted a policy of universal mandatory detention for unauthorised arrivals. What was the rationale for this policy? At first, government had two reasons. First, detention was considered a deterrent to future unauthorised arrivals. Government had to formally abandon that rationale once the High Court said that detention without judicial order would be unconstitutional if it was designed to be punitive or a deterrent. That is why Mr Ruddock took to explaining, "Detention is not arbitrary. It is humane

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<sup>1</sup> A current Affair 6 June 1990

<sup>2</sup> *Weekend Australian*, 21-2 July 1990

and is not designed to be punitive."<sup>3</sup> Executive government spared parliamentary, judicial and media scrutiny can make words mean what they like.

Government's second rationale back in 1990 had nothing to do with our immigration policy. Gareth Evans was justly proud of his peace plan for Cambodia. A central plank of the plan was the return of 300,000 Khmer from the Thai border. They were no longer classed as refugees. Their return was deemed to be safe thought the civil war smouldered until 1998. The peace plan could have come unstuck if Australia had made a prompt determination that the Cambodians arriving on our shores were refugees. These boat people had to be kept away from the lawyers. So the first immigration reception and processing centre was set up at Port Hedland.

By 1994, there was bipartisan support in our Parliament for universal mandatory detention. Our politicians admitted that there was some inconvenience and cost in putting people at remote Port Hedland but thought there were benefits in "placing detainees in a centre which is in reasonable proximity to where most of the boat arrivals first land, and where the remoteness of the location provides a disincentive to abscond from the centre."<sup>4</sup> We had completely lost track of this rationale by the time a boatload of Vietnamese turned up at Port Hedland in July this year. They were transported to Christmas Island for processing even though there were plenty of spaces and trained personnel at Port Hedland. Now the talk is of sending signals, though without mentioning the constitutionally embargoed word "deterrent".

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<sup>3</sup> P. Ruddock, Letter to the Editor, *Medical Journal of Australia*, Vol. 176, No 2, p. 85, 21 January 2002

<sup>4</sup> Joint Standing Committee on Migration, *Asylum, Border Control and Detention*, AGPS, Canberra, February 1994, p. 192

Especially since September 11, no one quibbles with the entitlement of government to detain unauthorised arrivals who come without documents while their identity, health and security status are established. Equally, there can be no problem with the detention of persons justifiably awaiting removal from Australia, especially if they be a flight risk. However there is a problem with detaining people to coerce them into "voluntary return" when it is not safe for them to return.

What is the rationale for keeping people, including children, in protracted detention during the processing of their claims? Let's remember that 90% of those in the fourth wave of boat people and held in detention were proved to be refugees. Many of those refugees have stories like the young Hazara, Sha Hussain Hassani who is here with us today. Sha had been on the run in the mountains for months when his father came one night with food and a message. He was to leave with smugglers that very night. His father had sold enough goods to employ a smuggler so that Sha, the eldest son, might leave immediately, he being the one most at risk. Sha's father hoped to be able to afford to have all his family leave Afghanistan eventually. "There was no place to go and no one to trust any more. It was too dangerous to wait. I had to go immediately."<sup>5</sup> Sha has heard nothing from his family since that night. He does not know whether they are still in Afghanistan. He does not even know if they are still alive.

Government has suggested only two other rationales for detaining people like Sha when they arrive here: ease and efficiency of processing, and ensuring that people are available for removal once they are rejected as refugees. These rationales are also flawed. With the fourth wave of boat people, it has now been shown that those in detention were six times more likely to succeed in their

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<sup>5</sup> Sha Hussain **Hassani's** interview with Camilla Cowley, 23 January 2003

appeals to the Refugee Review Tribunal than those asylum seekers living lawfully in the community. So much for ease of processing. Most migration agents, lawyers, public servants and tribunal members could do their work better if they were able to meet asylum seekers face to face in their offices.

If government's chief concern was an increase in the number of unlawful overstayers in the community, the savings from holding unlawful arrivals in protracted detention during the processing stage could be devoted to increased surveillance of all overstayers in the community. This would facilitate their orderly departure from Australia regardless of their racial, national or religious identity. We have 60,000 overstayers a year. On average there have been 222 boat people a year removed from Australia over the last three years. Each year there are 10 - 14,000 other removals. The others are persons permitted to live in the community, including failed asylum seekers who came having made incomplete disclosures in their applications for business, student or tourist visas. Would it really have mattered if those extra 222 boat people each year had been in the community rather than in detention at taxpayer expense?

There is no coherent rationale for keeping all unauthorised asylum seekers in detention during the second stage of their processing. Despite ten years of such detention, there is no proof that it operates as a deterrent. No Australian deterrent will ever match the horror of Saddam Hussein or the Taliban who caused these people to flee in the first place. It is not good enough for us Australians to say they can flee anywhere but here. If we insist on securing our borders and making them impregnable, why shouldn't other countries be allowed to do the same?

We Australians have allowed ourselves to be easily spooked. Having just returned from the United Kingdom and the United States, I know that even the most rampant Republicans and Conservatives would find it laughable that the nation work itself into a lather over a boatload of 56 Vietnamese off Port Hedland or 14 Turks off Melville island.

The boats have stopped coming, in large measure because the Indonesians have come to the table with the Bali conference on people smuggling and they are no longer under threat that we will embarrass their generals with calls for war crimes arising from their activities in East Timor. Also the sinking of SIEV X with large scale loss of life sent a clear signal. So is there any justification for resurrecting Operation Relex with the requirement that Australian navy personnel await direction from Canberra while boat people, including children, are forced to jump into the sea? Why can't Australia support Norway's proposal to the International Maritime Organisation "ensuring ship masters that they will be permitted and able to deliver persons rescued to a place of safety in some suitable State in all cases and circumstances"?<sup>6</sup>

We have now started excising Aboriginal communities from our migration zone. If only our indigenous communities had been able to avail themselves of such legal artifices two centuries ago. Most of us could be deemed never to have arrived. We Australians enjoy many advantages including our geographic isolation. We are an island nation continent. We have set up a virtual offshore border with our computerised visa system. Just last month, I was present at a US Congressional Committee hearing where our electronic travel authority was being espoused to the US legislators. We live in a neighbourhood which rarely produces refugees. And we do not have a

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<sup>6</sup> IMO, Maritime Safety Committee, MSC 77/10/2 (25 March 2003)

constitutional bill of rights. So our governments are much more free to interfere with the human rights of asylum seekers in the name of national interest and security, immune from judicial supervision.

Instead of going it alone, we Australians should put the firebreak behind us and co-operate with other countries seeking international solutions to these problems. It is shameful that we have exploited the desperation of Nauru, paying them to set up isolated detention facilities such that ordinary visitors from Australia have to be excluded. In August this year, I was to visit Nauru as a guest of the local Catholic Church. My visa was duly issued. The day before travel, the Government of Nauru cancelled the visa with this advice: "Noting that Fr Brennan's request to enter Nauru is not for the purpose of conducting parish or pastoral work with the Catholic mission, I wish to inform you that his application is denied at this stage." Nauru is more closed to Australians such as myself than was East Timor a year after the Dili massacre in 1991.

For the moment, the boats have stopped coming. Make no mistake. At some time in the future, there will be a fifth wave of boat people regardless of our laws and policies. When a country like Iraq or Afghanistan implodes in future, people will justifiably flee to the four corners of the globe seeking security and protection for themselves and their families. Some people will even turn up in Australia. The effect is the same as throwing a stone into a pond. Water and ripples emanate even to the remotest corners of the pond.

A simple thought experiment highlights the immorality and inequity in world burden sharing resulting from our firebreak. Imagine that every country signed the Refugee Convention and then adopted the Australian policy. No refugee would be able to flee from their country of persecution without first joining the mythical queue to apply for a protection visa. If anyone dared to flee

persecution, they would immediately be held in detention awaiting a determination of their claim. All refugees in the world would be condemned to remain subject to persecution or to proceed straight to open-ended, judicially unreviewable detention. The purpose of the Refugee Convention would be completely thwarted.

After the 2002 Christmas fires in the gulag of Australian detention centres, one detainee who offered to assist police with their inquiries was given a guarantee by senior immigration officials in Canberra. He would not have to return to a detention centre. He was moved to a motel for nine days and provided information to the police. The guarantee from Canberra was then withdrawn. He had no legal remedy and no political leverage. I thought the treatment he received was unAustralian. But on reflection, I concluded in the wake of Tampa that the treatment was very Australian. Asylum seekers who have arrived in Australia without visas have been used by government as a means to an end. Their detention has been used to transmit a double signal warning other asylum seekers to take a detour to any other country but ours and luring those voters who appreciate a government prepared to take a tough stand against the one who is "other". It is time for the nation once again to respect the dignity and basic rights of those who come to our shores seeking asylum. We should abandon our funding of unaccountable upstream disruption. We should spare our navy life-threatening actions in peace time. We should detain persons, including children, without court orders, only if there is a coherent rationale for such detention. We should abolish the Pacific solution and look after our own asylum seekers on shore. We should permit proven refugees to remain in Australia if they are still proved to be refugees after an initial period of up to three years temporary protection. We should not force people home to places like Afghanistan and Iraq unless satisfied that the cause of persecution has been

removed and "that security and access to justice in areas of return is of an acceptable level"<sup>7</sup>. We should stop tampering with asylum.

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<sup>7</sup> Letter of Michel Gabaudan, UNHCR Regional Representative, The Australian, 31 October 2003