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REFUGEE-STATUS PROCEDURES AND THE BOAT PEOPLE

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Six hundred and fifty-two boat people, 316 of whom were Cambodians and 269 Chinese, arrived unannounced and unauthorised in Australia between November 1989 and October 1991. Eventually, almost all applied for refugee status. One hundred and forty have been granted asylum and more than 200 have returned home.[1] It is the story of the remaining 300 which has dominated the recent news about immigration.

After exhaustive investigations these 300 have been found not to be refugees. But some have spent over three years in detention waiting for the authorities to reach this conclusion. Many critics have been disturbed by the practice of keeping them in detention. Given the experience of other western countries where asylum-seekers vanish without trace into the community (see the article by Vernon Briggs in this issue), this policy is defensible. But it does make the questions raised by the delay more urgent. Why has it taken so long? Is the delay the result of bureaucratic ineptitude? Or was it caused by manipulative lawyers conniving with the applicants to draw out the process and buy more time? (In this way they could say that their clients must be allowed to stay because the heartless bureaucrats have made them wait so long.) Whose fault is it?

The procedures for assessing on-shore applications for refugee status have evolved rapidly between 1989 and 1993 in the face of a sharp increase in numbers. (Few of these growing numbers were boat people. Most, though not all, were Chinese nationals who had come in legally on student visas.) In essence, the procedures applied to the boat people were as follows. They were first given 'compliance interviews' by officers of the Immigration Department to determine their nationality, port of departure and so forth. Then, after they had lodged applications for refugee status they were re-interviewed, again by officers of the department. These officers, on

the basis of the interviews and any other evidence that the applicants were able to present, made a judgment on whether the applicants were refugees within the meaning of the 1951 Geneva Convention.

The applicant (and the United Nations High Commissioner for Refugees [UNHCR]), was given the opportunity to comment on any negative assessment by the case officer and if comments were received there was a possibility of further investigations. The process could lead to extensive consultations between the applicant and the case officer as applicants provided more and more details at each consultation. (Just as some advocates claimed that delays in the process meant that the boat people were accumulating a moral claim to clemency so others have suggested that the openness of this process also strengthened the applicant's claims on Australia because it encouraged false hopes.)[2] When this primary decision-making process was completed the case officer made a recommendation to the Minister that the application be either accepted or rejected. (In the past, acceptance had meant that the applicant was eligible to apply for permanent residence but, in June 1990, this changed and people were given four year temporary visas.) If the case officer recommended rejection, a 'statement of reasons' was given to the applicant.[3]

These procedures were in accord with the principles of natural justice as applied to administrative law in Australia. But in practice these principles could lead to considerable delays. On receipt of the 'reasons', rejected applicants could claim that the decision was based on a misunderstanding of their case. They would now tell the 'real' story (perhaps because they were too nervous to do so the first time). This process was often repeated many times as story number two was modified to become story number three, in what could be described as 'unending loops' of natural justice.

Once this first phase was complete the rejected applicants had the opportunity to appeal to the Refugee Status Review Committee. The Committee was made up of a senior officer from each of the following: the Department of Immigration, Local Government and Ethnic Affairs (DILGEA) (Chair); the Department of the Attorney General; the Department of Foreign Affairs and Trade; and a nominee of the Refugee Council of Australia. A representative of the UNHCR also attended in an advisory capacity. Again, there was provision for applicants to comment on negative assessments. After a decision had been reached the Committee then advised the Minister on whether the applicant should be accepted or rejected and, though the Minister was not obliged to act on this advice, he almost always did so. However this additional level of decision-making also became subject to appeals on natural justice grounds, thus on occasion further delaying decisions. If an applicant's claim was rejected by this Committee it was then open to him or her to appeal to the Federal Court under the Administrative Decisions (Judicial Review) Act.

This system of primary decision-making within the department, with the option of appeal to the Refugee Status Review Committee, replaced a previous model, the former Inter-departmental Committee for the Determination of Refugee Status (the DORS committee), in December 1990. And it too was changed in 1993 as some of the provisions of the 1992 migration reform Act began to take effect. The

Refugee Review Tribunal, an independent, statutory body with determinative rather than advisory power, replaced the Refugee Status review Committee in July. But, though some modifications were introduced in February 1992, the system described above is the one that has been in effect for the evaluation of the boat people's applications. (The February 1992 modifications imposed binding time limits on submitting applications and stipulated that all details relevant to a claim be submitted at the time of applications.)[4]

Australia has been unusual in allowing asylum seekers the possibility of both administrative and judicial review. This, together with the constant possibility of submitting new details during the process of inquiry, helps explain the length of time that it has taken to arrive at a final decision on the boat people's claims.

But this is not a explanation acceptable to critics. In the eyes of refugee lawyers and member of various church groups the Immigration Department did not give the boat people's cases adequate priority and was unnecessarily bureaucratic and dilatory. The department, it is alleged, compounded these faults by moving the boat people about the country, eventually to the remote location in Port Hedland. These moves not only added to the stress that the people experienced in detention but made it difficult for them to maintain contact with their lawyers. These actions, it is claimed, were arbitrary, callous and probably racist.[5]

In contrast, people defending the department, allege that the lawyers dragged the process out, failing to lodge the boat people's claims for refugee status promptly, in some cases delaying this for as long as seventeen months. Refugee lawyers also encouraged people who had been rejected in the early stages of the process to appeal, even though their cases had little merit. Why did they do this? Perhaps it was because they had a blinkered, sentimental concern for the people they had chosen to support (and were oblivious to the needs of deserving applicants with confirmed refugee status waiting in camps overseas for a chance of resettlement). Or perhaps they were simply trying to create work for themselves, work that, when it came to court appeals, was often funded through legal aid at the tax-payer's expense. A number of politicians have delivered harsh judgements. Senator Ray called immigration lawyers 'leeches and bludgers', Dr Hewson described the field of immigration as likely to develop into a lawyers' paradise and Senator Walsh said that they had 'discovered how to tap the legal aid income stream while simultaneously enhancing their "civil libertarian" credentials'. He added that the lawyers' outrage when boat people were moved to Port Hedland was due to the inferior ambience of the locale as a place to tout business.[6]

Kathryn Cronin writes of current immigration policy as the product of conflict between the judiciary and the executive.[7] We can see this conflict in 1992, in the sharp public exchange of hostilities between the Minister, Gerry Hand, and a Federal Court Judge, Marcus Einfeld, when Hand accused Einfeld of bias and Einfeld retaliated by claiming that judicial independence was under threat.[8] But it is not enough to say that the delay can be explained in terms of conflict between the executive and the judiciary. How exactly did it happen?

Just as the department was struggling to come up with fair and efficient procedures for handling

unprecedented numbers of applicants, so were some of the lawyers struggling to come to terms with a branch of the law that was complex, changing, and unfamiliar. Some of those who advised the boat people in the initial administrative stages of their applications were working as volunteers; others were funded by the Jesuit Refugee Service.[9] But many volunteers could only work on the question during the weekends. They were also anxious about making mistakes and claimed to have difficulty co-ordinating the times when they could talk to the applicants with times when competent interpreters were available. While the department claims that interpreters were readily available and were often waiting around with their services unused, the general picture might indicate some mismanagement on the department's part.

But it was not initially envisaged that asylum-seekers would need legal representation. The procedures were fair, the departmental interviewers were professionals, and there was also a system of administrative review for unsuccessful applicants. Other applicants in immigration matters are not held to need lawyers. Some might chose to employ them but, in principle, this should be as much a waste of time and money as asking a lawyer to help with an application for social welfare benefits or Austudy. The department considered that its procedures would both protect the rights of any genuine refugees who were amongst the boat arrivals and safeguard the nation's interests against accepting illegal entrants. The lawyers, who were focused on the human rights of individuals, had a different approach to the problem. All stops should be pulled out to protect the interests of individuals who were in a position that excited compassion and pity.

Lack of familiarity with immigration law and regulations, and the fact that assessment procedures had not been designed to facilitate their involvement, help explain why the boat people's lawyers did not move quickly. In the evidence they gave to the Joint Standing Committee on Migration Regulations, refugee lawyers cited further difficulties that they had experienced: the problem of working outside normal hours as volunteers (and in the case of those representing people held outside of Darwin, the necessity of driving 100 kilometres for interviews); lack of experience; difficulties in co-ordinating their visits with those of properly qualified interpreters; and the effect of their initial decision that all of the applications for the group held in Darwin should be lodged at the same time. Witnesses also spoke of problems in gaining the trust of the boat people.[10] The Darwin Citizens for Support of Cambodian Boat People said:

> ...the people themselves who are making the application may need time to work out where they are and what is happening to them and how to explain what their situation has been ... in this case generally, despite the problems of time and interpreters, the applicants themselves need half a year to get their stories out and be confident to tell their stories.[11]

Other difficulties mentioned by other groups of lawyers and advisers include: the frustration that the boat people experienced sometimes manifesting itself in behaviour which appeared to be non-compliant; faulty computer equipment at Port Hedland; and the fact that the proximity of the officers provided for lawyers at Port Hedland to those of the department's

staff made it harder for the lawyers to convince applicants that they were indeed offering independent advice.[12] The Australian Lawyers for Refugees Incorporated (ALRI) did not, however, consider that legal involvement in the primary stage of the refugee determination process prolonged the interviews. They told the Committee that ALRI lawyers only intervened if they felt an issue was not being addressed which, in their opinion, should be addressed, or if they thought that the immigration officer was unduly harassing the applicant, or that he or she was not conducting the interview in a fair manner. ALRI representatives said that their main involvement in the interview came after the initial questioning when an opportunity was given to the applicant to consult their lawyer about issues which the applicant might want to take further.[13]

When cases moved from the administrative to the judicial stage of review, applicants were eligible to apply for legal aid and many of the lawyer's complaints about inadequate facilities would no longer have been applicable.

The department did suffer from lack of resources in the face of their rapidly growing task, though these were considerably augmented during the early 1990s. But officers charged with determining refugee status also moved carefully and cautiously. They did this not because they had a callous disregard for the detainees' need for a quick decision, but for the desire both to do justice to applicants and to reach a sound decision that would be unlikely to be overturned in the courts. The two main grounds on which a decision was likely to be contested under the Administrative Decisions (Judicial Review) Act were that it breeched natural justice (because the procedures had not been fair) or that it was so unreasonable that no reasonable person could have arrived at it. A desire to ensure that procedural fairness be neither breeched nor be seen to be breeched may explain why, though they did not originally fund legal representation at the primary decision-making stage, the department did not prevent it. (In the face of the problems experienced with delayed applications, the department later began to fund lawyers to advise applicants during the administrative process. This practice appears to date from October 1991.)[14]

In early 1992 the first group of boat people had been rejected by both the primary decision-maker and the Refugee Status Review Committee. Their lawyers moved quickly to take their case to the Federal Court. Gerry Hand professed himself confident. The decision-making process was fair (indeed it was 'the Rolls Royce' of refugee processes) and he was happy for it to be scrutinised in court.[15] Soon after, there was an ignominious retreat. The department announced that a defect had been discovered in the initial decision-making process and the court ordered that a new primary decision-maker be appointed and that the whole process be started again from the beginning.

What was this defect? The department was not anxious to announce it. But the Joint Standing Committee on Migration Regulations report refers to a problem that is in all likelihood the fatal flaw. Natural justice requires that, where adverse information is known about an applicant, the applicant should be told and given opportunity to respond. The report states that:

> Referring to specific examples, DILGEA noted that some adverse

> material regarding certain boat arrivals was discovered at compliance interviews. DILGEA indicated that while that information had nothing to do with the group's claims for refugee status, it bore directly on the credibility of the group. As that information initially was not put to the persons concerned for response, there may have been a perception that there would be a bias or prejudice against individuals in the group. As a result, the primary interviews were repeated and any adverse material obtained in compliance interview was put to the relevant applicants.[16]

Sources within the department say that not only were the cases that had been before the court taken back to the beginning for complete re-assessment, so were a number of others as well.

Some of the anger that has surfaced in public over the question of the delays could lead one to conclude that finding an explanation was a matter of finding a guilty party — the unscrupulous lawyer or the callous bureaucrat. But the answer does not lie on this plane. It is to be found in the conflict between an executive oriented towards administering policy in the national interest and a judiciary focused on the needs and rights of individual applicants and ill-equipped to cope with questions of policy.[17] Both groups were operating within a set of structures ill-designed to accommodate the differences in their perspectives and to prevent conflict impeding a speedy outcome.

It would be difficult to draw up a moral balance sheet, but if this were possible, it could show two groups of individuals who, for the most part, were striving to behave well in adverse circumstances. A financial balance sheet, not just for the costs incurred in responding to the boat people's application, but for on-shore refugee applicants in general, could be almost as hard to complete. But the costs have been considerable. They include: detention for unauthorised arrivals (and of limited welfare support for others); administrative processing; the defence of legal challenges; subsidies to lawyers representing applicants at the administrative level and legal aid for cases that go to court. During 1991/92 the department paid $665,500 to the Refugee Council of Australia and ARLI to represent applicants at the administrative stages of the process but separate estimates for the amount spent on legal aid in these cases are not available. However, in 1992 Chris Conybeare, secretary of DILGEA, said that the average cost of processing one claimant in Australia was $28,000 and that this was one thousand times more expensive than processing one overseas applicant. The human cost for the boat people themselves has been much discussed in the media. But they at least chose to put themselves into an uncertain situation.

The issue of detention has muddied assessment of the asylum determination process. Some have argued that Government anxiety to deter other prospective boat people has overridden any interest in the well-being of the applicants, and that this spirit has affected the decision-making process.

But experience overseas shows that, in the absence of detention, most asylum claimants are likely to stay illegally. Detention did not stop DILGEA officers from rigorously following the routine of administrative law required for asylum cases. Indeed it was the very openness of these procedures to applicant adjustment and appeal which seems to be the prime reason for delays in the decision-making process. The appeal courts

have thoroughly interrogated DILGEA's asylum procedures. Most recently in the Lek case decided in June 1993, Justice Wilcox of the Federal Court ruled that there were no errors in law in the determinations made in the 48 asylum cases before him.

Nevertheless, the 300 boat people remain in Australia despite the rejection of their asylum claims. Their future may be determined by another appeal on natural justice grounds, recently heard by Justice Keely of the Federal Court. The appellants claimed that because former Prime Minister Hawke declared the boat people to be 'economic refugees', as well as other evidence of a tough government policy to deter future claims, departmental decision-makers would not have been able to give an unbiased judgment to their claims. Justice Keely had not delivered his judgement at the time of writing. But if it should be in favour of the applicants it could mean another loop in the natural justice cycle, requiring many cases to be heard again.

Such a decision would be of profound importance since it would imply that Government officers were incapable of independent judgement when following administrative procedures. It is doubtful whether further Federal Court appeals will be available should Justice Keely's ruling be against the plaintiffs. However a final issue remains. The agreement between the Australian and Cambodian governments concerning repatriation stipuates that those whose asylum claims are rejected should return, but that the departure should be 'voluntary'. Can deportation on the grounds of failed asylum claims be considered 'voluntary'? Legal argument over this issue may constitute the final act in the boat people saga.

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