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PHILIP RUDDOCK ON AUSTRALIA'S REFUGEE CRISIS

An interview with *People and Place*

On 3rd August 2001, the Minister for Immigration and Multicultural Affairs, Mr Philip Ruddock provided the following interview with the editors of People and Place. The Tampa affair has since dramatically changed the policy context. Nevertheless the interview and accompanying tables provide a valuable setting for understanding Australian action.

People and Place: *We have only about 4000 persons per year coming to Australia illegally by boat looking for asylum but Europe has about 400,000. Why are you so tough in dealing with these people?*

The Minister: I don't think I'm tough. This is a country that is being extraordinarily generous in accommodating migrants, many of whom have skills we want and many of whom are related to Australians, but many of whom have a humanitarian need. We are a beacon setting an example to the rest of the world. All I ask is that, as part of the covenant, people will apply properly and come lawfully.

Most of Europe does not have structured immigration or refugee settlement programs and they have borders that are essentially porous. They are experiencing very much larger unlawful population movements than us. The reason we have a smaller problem, and it is a smaller problem, is because of the way we manage it.

Bear in mind we are not always dealing with asylum seekers. We are dealing with very mixed movements in which large numbers of people are in fact looking for immigration outcomes. If you don't deal with those matters with integrity more people will say, 'Well look, if that's how they intend people should be

chosen why shouldn't we try it too?'

People and Place: *So mandatory detention is a deterrent?*

The Minister: It's no different to tax evasion. If governments are seen to turn a blind eye are you surprised later when people say, 'Oh we thought that if you hadn't closed it down it must have been appropriate'. That's the issue you deal with.

Mandatory detention is non-punitive. It's not meant to punish; I can't emphasise that enough. We are not trying to deter people by locking them up. What we are trying to do is to ensure that when people arrive unlawfully we have them available for processing and, in the end, available for removal if they have no lawful entitlement to be in Australia. That's the simple issue.

If you have people available and they know they are going to be kept while processed, and if they know that if they have no proper basis to be here they are going to go home, that sends a very powerful message. That's not deterrence in the sense of saying we are locking people up to deter them. It is a system of handling unauthorised arrivals, which makes it very clear that we want people to deal with us honestly, we want them to approach our missions, to test their eligibility.

One of the most facile set of comments I have heard anywhere comes from those people who keep running this argument that there is no overseas queue for asylum or refugee places in Australia. We do not have borders with countries that are creating refugees, and people travel through many countries, they pass through many places in which they can be safe, and they are people who are free enough to travel and have the money to pay. Now I'm not saying that refugees can't be rich; they obviously can be rich, and rich people may be more likely to be targeted.

But if people have money and are free enough to travel, their situation is not the same as somebody who is unable to return home because of a situation of safety, unable to stay where they are because they might have been targeted in the place to which they have fled, people who have no means, no capacity to move and are in urgent need of resettlement.

Normally we have been able to choose those who have the greatest need. There is a queue for these places. What we are experiencing now is that places which should be going to those in greatest need are being lost, because they are being taken by those who are merely able to establish that they are one of the world's 23 and a half million people of concern to the UN.

People and Place: *A lot of people think that the fact that we have got several thousands in detention is a product of our long process of review. But in reality it seems that we are processing most applicants quite quickly. The problem that is emerging in the detention centres is actually the accumulation of people whose applications have been refused for one reason or another but yet cannot be sent back home. How serious is that*

problem becoming?

The Minister: It's quite a serious problem. I think that at the moment we have 2700 people in detention and, of those, we are dealing with more than a thousand who have exhausted all remedies. (See Table 1.) We are also seeing a greater proportion of the people who are now arriving failing to sustain asylum claims. In other words, the example of those who have come and have made claims is suggesting to others who are looking for immigration outcomes that they should come too. So what we are seeing is that an earlier situation of, say, a 25 per cent refusal rate is rising to a 35 per cent. I think it's of that sort of magnitude.

This means that for every group of additional arrivals, say 1000, I might expect to get 350 people who will join those who are being held for removal. And that reduces the amount of capacity that we have got for new arrivals.

It is also important, and I am taking the opportunity to fully brief you on these matters, that there is now clear evidence that the asylum system is being manipulated. We recently worked with Cambodian officials and detained a boatload of potential asylum-seekers in Cambodia.

The enterprise was being planned by two or three people, two of whom have been arrested in Cambodia, and who have trafficked more people to Christmas Island than any other individuals in Indonesia. They are being held in Cambodia facing smuggling charges but what was more interesting was that, of the 242 people on board claiming to be Afghani, about 25 per cent presented Pakistani passports, and more than half admitted that they were Pakistani. When the Afghanis were questioned it was

established that they had long-standing settlement rights in either Pakistan, United Emirates, or Saudi Arabia. The reason we were able to ascertain all this was that this group in fact had documents.

People and Place: *You were able to establish their identity on this occasion because normally they would have got rid of their documents?*

The Minister: Yes. Normally they would have got rid of their documents. They were detained at a Cambodian port, and the Cambodians actually interdicted them and this was the result. We are also at the point where we might shortly be moving to cancel protection visas.

People and Place: *These are visas for people who were granted protection visas but who are now believed to have put in bogus claims?*

The Minister: Yes. They may have a claim that's been accepted, but we have now obtained evidence to suggest that we were misled. We suspect that these are very significant breakthroughs and they demonstrate two things. First, nobody should suggest that all people who come to Australia by boat are refugees. There are a range of issues that you need to address in relation to identity and entitlement as well as in relation to security, character and health.

Second, Australia's treatment of unauthorised arrivals meets our international obligations. There is absolutely nothing wrong with it in terms of the refugee convention that we have signed, any other international instruments that we are a party to, or Excom [the Executive Committee of the United Nations High Commissioner for

Refugees] decisions that help to give guidance to the way in which you will detain people.

People and Place: *Can we ask you about the effects of appeals to the courts on the bottling up of people in the camps? Have you got any idea of the number of persons who have had a protection visa claim rejected but whose stay in the camps is being prolonged by appeals to the Federal or High Court?*

The Minister: That's a big problem. At any one time we have around about 1000 people who are in the courts, and that might mean larger numbers of people when you get spouses and children included, and then you have people involved in class actions. I think we have about 3000 people involved in class actions at the moment. So you would be talking of something of the order of 5000 in the courts at any one point in time.

People and Place: *How many of those would actually be in detention centres?*

The Minister: Probably, if you include the people who appeal to the Refugee Review Tribunal, and the people who appeal to the courts, and the people who are appealing to the UN, and the people who are appealing to me under section 417 of the Migration Act, the numbers would be quite significant. Something of the order of about 800. [See Table 1 for detail on the number currently in detention who have been denied Protection Visas. Table 1 includes all persons who have been denied a protection visa.].

People and Place: *You have legislation in Parliament at the moment to reduce the number of appeals that applicants can lodge. We understand it's being held up*

Table 1: Persons in Detention Centres who have received negative PV decisions (all modes of entry)*

Citizen Roll	Total	Citizen Roll	Total
Afghanistan	226	Libya	1
Albania	5	Malaysia	2
Algeria	8	Mongolia	1
Angola	1	Morocco	5
Bangladesh	13	Mozambique	1
British National Overseas	1	Nepal	3
Burma	1	Nigeria	4
Burundi	1	Pakistan	11
China (so stated)	1	Palestinian Authority	78
China Peoples Republic of	8	Philippines	2
Colombia	1	Romania	1
Congo	1	Russian Federation	1
Cote D'Ivoire	1	Rwanda	1
Egypt, Arab Republic of	5	Samoa	1
Fiji	5	Sierra Leone	1
Gaza Strip	1	Somalia	2
Ghana	1	Sri Lanka	16
Greece	2	Stateless	14
Hksar of the PRC	1	Sudan	4
India	7	Syria	18
Indonesia	6	Tanzania	1
Iran	311	Tonga	2
Iraq	82	Tunisia	5
Jordan	1	Turkey	7
Kenya	1	Uganda	1
Korea, Republic of	2	Unknown	4
Kuwait	6	Vietnam	1
Lebanon	1	Yemen	1
		Zaire	1
TOTAL			890

* includes all persons who have received negative protection visa decisions. Most would be appealing the decision. Data on the numbers appealing was unavailable.
Source: DIMA unpublished

in the Senate. Is this delay indirectly just prolonging the detention crisis?

The Minister: The legislation that I have in mind can deal with a range of problems. We want to put a time limit on the period that people have to bring their applications for appeals to the High Court. If we do this it will bring appeals to the High Court in line with those to the Federal Court. This will be an administrative matter and I think it will stop the larger portion of the High Court applications.

People and Place: *You can do that within the constitution?*

The Minister: We can do that without a constitutional problem because it deals simply with procedural issues. We can introduce a privative clause which has validity regarding the decisions of administrative tribunals. When we do this it would apply equally to the High Court as it would to the Federal Court. Some people suggest that such a clause might be unconstitutional but, if it were found to be unconstitutional, the High Court

would be overturning a long line of decisions that have related to a whole host of administrative bodies whose decisions have been made final and conclusive.

I hear from people from time to time that this is a justice issue, I hear that from

my opposition counterpart. It is not a justice issue. People do not have a greater right as such to appeals simply because they happen to be in Australia.

Consider people applying for refugee status from the United Nations in camps overseas. Do they have an international human right to an opportunity to go to a court, a federal court, a high court, or to appeal to UN committees against decisions of the United Nations High Commissioner for Refugees? If there were some international human right that every applicant had to have their day in court, as a matter of justice, then surely the international community would have imposed such a regime on its own body? Surely they would if there were such a fundamental right?

What amazes me is that people suggest when I seek to change the law that this in some way infringes the separation of powers doctrine. What has surprised me is that my opponent is able to get away with the argument that he could give directions to the courts as to how they would process matters. He says he will even ask the courts to give greater priority to the handling of refugees issues, as if they weren't already. But he would ask them to do this and that is his answer to dealing with the issue of people being held in detention for long periods of time. I can't imagine anything that would be more calculated to infringe the separation of powers doctrine than to be telling the courts how they should consider matters. What I have sought to do is to make it clear what law the courts will apply; that is the role of the legislator.

People and Place: *Are you concerned about the recent developments in the*

United States where the courts are now being challenged over the right to keep people indefinitely in detention? And is this is a serious prospect here if we don't find a way of repatriating people soon?

The Minister: I have seen the argument and I have read the decisions of the United States Supreme Court. I don't think the situation there is substantially different to the situation here. We cannot arbitrarily detain people. Arbitrary detention is something that is unacceptable. We only detain people in accordance with our law.

People and Place: *Does detaining people for one, two or three years become problematic?*

The Minister: No. If you are detaining people because they are taking a matter before the courts then the reason for their being detained is that the courts have not resolved the matter. That's the reason for the detention; it's got nothing to do with the government. In Australia our law is quite precise. It says that unless you get a visa you cannot be admitted and you will be detained. But you are free to go, you can leave at any time.

The point I would also make is that the law has been looked at and our courts have determined that, so long as there are reasonable steps being taken to remove somebody, then the detention is not arbitrary. That's our law.

The one case where people were at the point where they were starting to raise these issues was in relation to the crimi-

nal deportees from Vietnam. It was quite clear that people were gearing up to seek some judicial review but we were able to resolve the situation because, eventually, we were able to negotiate an agreement with Vietnam for the return of criminal deportees. This put our capacity to effect returns beyond doubt. Those matters are being proceeded with officials involved in discussions about appropriate documentation and so on at the moment.

People and Place: *Your government succeeded in passing 'safe third country' legislation in 1999 via amendments to the Migration Act [S91N (2-5)]. How close is the government to declaring any particular country under the legislation?*

The Minister: Before I declare a country under Section 91N — of the Migration Act it is necessary for Australia to have in place a readmission arrangement in respect of the relevant people covering the country concerned. Otherwise, the declaration is of little effect as the person cannot be removed from Australia. The countries likely to be declared are refugee destination countries with established refugee processes and procedures.

People and Place: *In regard to the obligations upon asylum seekers to retain any residency rights [under S36(3)], how many applicants by nationality were denied protection visas at the primary level on these grounds in 1999-2000 and 2000-2001? Which locations were deemed to fit the criteria in question?*

The Minister: The Australian Government has introduced legislation to ensure that all protection visa applications are decided on the basis that applicants are not owed protection obligations by Australia if they have effective protection

in other countries. Statutory bars have been imposed on protection visa applications by people with dual or multiple nationality and those who may have effective protection in third countries.

In assessing protection visa applications, decision-makers are required to consider whether the applicant has effective protection in an intermediate third country elsewhere. That is, would the applicant be likely as 'a matter of practical reality and fact', to be given effective protection by being permitted to enter and live in a third country where he/she will not be at risk of being persecuted or refouled (common law) or has the applicant taken all possible steps to avail themselves of a right to enter or reside in, temporarily or permanently any other country, including countries of which the non-citizen is a national.

Departmental computer systems do not report on refusals under S36(3) of the Migration Act. However, an example of those found to have effective protection elsewhere includes Iraqis with effective protection in Syria. It will be the circumstances of an individual that will determine whether they have effective protection elsewhere.

People and Place: *What progress has been made in negotiating agreements with relevant countries in order to remove failed asylum seekers?*

The Minister: The Government has invested a considerable amount of effort over the past 18 months in negotiating readmission arrangements with key countries, notably Iran and Pakistan, which are the main countries of first asylum for third country nationals who have arrived unlawfully in Australia. These negotiations are proving problematic with neither country showing signs of shifting its

policy position. This presently precludes readmission of third country nationals. Other Western destination countries, including Canada and the EU countries, are facing similar difficulties. We are pursuing ideas as energetically as we can in these areas.

In an effort to develop a global network of readmission arrangements to counter people smuggling and the abuse of asylum systems, the Government has also been engaged in discussions with a number of other countries, including the EU collectively and individual EU countries, Canada, South Africa and New Zealand. These discussions have been more positive with mutual recognition that the prompt return of those not entitled to protection is the most potent means of combating irregular migration and people smuggling.

In the case of one country, negotiations are at an advanced stage. There is a good prospect of a readmission arrangement being concluded shortly with that country with the possible 'declaration' of that country to follow. For confidentiality reasons, I regret that it is not possible to be more specific at this stage.

People and Place: *Which countries have agreed to take back failed asylum seekers and how many of such persons have actually returned to the countries in question?*

The Minister: Most countries accept that they have an obligation to accept back their own nationals. This is a general principle of good international citizenship. This general principle takes on more tangible form in Article 12 of the International covenant on Civil and Political Rights which, in Article 12, says: 'No one shall be arbitrarily deprived of the right to enter his own country'. There are obvi-

ously some questions of interpretation here, but it is a useful statement of principle. There are 147 Parties and 65 Signatories to this convention.

Annexe 9 to the Convention on International Civil Aviation also includes some useful provisions about the obligations of states to accept the return of their own nationals found to be inadmissible on arrival at other countries. Most countries are signatories to this convention as it governs international air travel.

It is worth noting that there are some countries that will accept third country nationals or 'stateless' people who have established long term residence.

There are, however, some countries that are reluctant to accept returnees at all; which impose conditions on such returns (for example, returns must be voluntary); or where there are significant practical impediments to return (eg: Iraq and Afghanistan — to which commercial aircraft operators cannot fly so agreement from neighbouring countries is required).

It is our experience that removals can eventually be effected in most cases, it just takes more time in some cases. We have also found that some countries which displayed reluctance to take back their own nationals in the past are now prepared to do so. Australia has adopted a policy of negotiating with such countries in a positive and cooperative manner.

Failed asylum seekers are routinely returned to a wide variety of countries and in 2000-01, 511 failed protection visa applicants were removed from Australia.

People and Place: *You've indicated that you're not thinking critically about the Convention [the 1951 Geneva Convention on Refugees and the 1967 Protocol]. But the fact that we are signatories of the Convention does act like a magnet to bring people here and hope that they will*

be able to work through the system. In the light of experience, might not the Government reconsider?

The Minister: It's not being signatories to the Convention that has this effect. It's what goes with it and the nature of benefits that are offered.

People and Place: *If the situation gets worse, could it arise that you would start to think critically about the Convention and perhaps think about contributing to reforming it or, in the final analysis, resigning from it?*

The Minister: No. Let me put the argument and the argument is very simple. There is an obscenity emerging. The UNHCR looks after the bulk of the refugees, 23.5 million people, and gets only \$800 million US a year to do this with. It's sacking staff — something like 700 to 800 people have been dismissed from its organization and they have come from places like Indonesia, parts of the Middle East, Africa. It is an organization strapped for funds. And how much does it have? Less than one billion US dollars.

Now Australia is spending about 200

million dollars on detention per year (including the legal processes associated) If you add together Sweden's expenditure on asylum seekers (about one billion Australian dollars per year), the United Kingdom's one billion pounds sterling a year, and add up all the other European countries, the sum is huge. The developed countries are spending about ten billion dollars US per year managing asylum applications and, review of decisions and in providing support while applicants are being processed. And all this is for around half a million asylum seekers of whom eventually 50,000 get refugee status.

If the UNHCR were to use a system like this to determine refugee status in the camps what would it cost them for 23 and a half million people? You'd be talking 400 billion US dollars. I mean it just doesn't add up. Now all I say is if you think that an international protection system can go on with those distortions ...

People and Place: *So you are thinking about reforming it?*

The Minister: I am saying that the international community has to look at the way

in which these issues are addressed, and the UNHCR has to take a much stronger and more pro-active role in supporting countries like Australia which try to ensure that only those people who have the most manifest claims get up. The UNHCR needs to be ensuring that people who are manipulating the system are removed; they need to be ensuring that countries that are hesitant

Table 2: Protection Visa Outcomes, unauthorised boat people by nationality, 2000-01

Nationality	Granted	Refused	Otherwise resolved	Total	Per cent granted
Afghanistan	1,599	305	4	1,908	83.8
Iran	123	406	3	533	23.1
Iraq	2,135	182	5	2,322	91.9
Kuwait	13	1	0	14	92.8
Other	27	81	5	113	23.9
Palestinian Authority	32	101	0	133	24.0
Sri Lanka	13	18	0	31	41.9
Stateless	45	14	0	59	76.3
Turkey	13	4	0	17	76.4
Total	4,001	1,112	17	5,130	78.0

Source: DIMA, unpublished

about taking back their nationals know that the international community expects that they will take them back.

In other words there is a capacity for the organization to be far more pro-active in supporting the Convention. But the other aspect of it is in relation to what I call the 'second- level Convention'. In Australia we have a jurist's model of the convention. It's been developed by the courts giving their own view as to what the nature and meaning of the Convention is in Australia. This is different from the approach the UN body itself employs in dealing with asylum claims.

For instance, we know that the great majority of Iraqis will get their applications in Australia considered positively [See Table 2 for Protection visas outcomes at the primary level in 2000-2001.] We know that when the UNHCR makes the same decision in Jordan it's between 10 and 15 per cent. Why the difference? I can tell you. The UNHCR is closer; it knows the reality. It's better able to assess whether people are telling the truth. We're further away. We have less in-country information and it's much easier to say that we will just let this one through, it doesn't matter very much. This is particularly so when the only source of information is the material

offered by the claimant. I am going to look at legislating to put beyond doubt some of the issues on which our courts have extended the refugee Convention. We will be doing that in relation to claims sur place for instance. That is what happens when somebody themselves says something when they are abroad that's designed to draw attention to themselves, something to bring them publicity in their country of origin. Our courts have expanded the Convention in this respect. We are also going to look at issues in relation to criminal offences. If people have significant criminal records we want to be able to give the courts some guidance as to what that means.

People and Place: *When will this happen?*

The Minister: Cabinet has agreed and I will make some announcements on it, probably before you publish. I suspect that you won't be breaking news, but we've got some legislation that we are in the process of drafting now to deal with these issues. I hope that the legislation will give us a Convention within Australia which will be more in tune to what we have always understood to be our obligations.