IS THERE AN ALTERNATIVE TO MANDATORY DETENTION ?

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Opponents of the mandatory detention of asylum seekers may not be making enough allowance for the strong and widespread desire to emigrate from the poorer countries. Applicants should be detained if there is a significant chance of their absconding before their cases are finalised, but the proportion held at present is unnecessarily high.

In January 1973, the Whitlam Government finally ended the White Australia policy. In December of the same year it acceded to the 1967 UN Protocol relating to the Status of Refugees, which went beyond the 1951 UN Convention so as to cover persons who had been made refugees by events later than 1 January 1951. The effect of the Convention and Protocol was to make asylum a privilege that a person who had entered a country with or without authorisation could then claim as a right.

Nothing in the 1967 Protocol limits the power of States Parties to detain asylum seekers until their claims to refugee status have been decided one way or the other, nor would Australia have acceded to it if this power had been endangered. An extensive ability to detain is needed by all countries accepting the Protocol and especially by rich countries, given the enormous numbers elsewhere who can gain by migrating to them and the growing number, even in poor countries, who can afford a smuggler's charges. (For that matter, there may be many who, even if they cannot afford these charges, can profitably be lent them and later forced to repay the loan out of what they will earn in a rich country, legally or illegally, provided of course they escape detection after arriving there.) It seems highly likely that some of these entrants will not genuinely fear persecution, that they will nonetheless claim refugee status, and that unless detained they will abscond before the status to be accorded to them has been finally determined.

The Office of the United Nations High Commissioner for Refugees (UNHCR) has been curiously unrealistic about the resultant problem. Its 'Revised Guidelines on the Detention of Asylum-Seekers', released on 10 February 1999, state that 'as a general principle asylum-seekers should not be detained'. 'Exceptional grounds for detention' are, however, listed:

(i) to verify identity,

(ii) to determine the elements on which the claim for refugee status or asylum is based,

(iii) in cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum, and

(iv) to protect national security and public order.

Only a very few persons who have entered without permission could properly be held on any of these four grounds except briefly, yet the possibility of their absconding after identification and before their claims are considered has been wholly disregarded.

That the UNHCR ignores this possibility suggests that it has not known of, or has disregarded, a constructive proposal put forward in 1994 by nineteen

highly respected non-government organisations in Australia,[1] which was that continued detention could be justified 'where there is a demonstrable likelihood that the person will abscond'. This language is known to have been derived from the NSW Bail Act which says that in almost all decisions as to whether to grant bail:

> it is sufficient if the officer or court is satisfied on the balance of probabilities.

But where the same Act lists matters affecting 'the probability of whether or not the person will appear in court', the first to be mentioned is:

> the person's background and community ties, as indicated by the history and details of the person's residence, employment and family situations and the person's prior criminal record (if known).[2]

Because of this requirement very few asylum seekers would be released on probation if all provisions of the Bail Act were complied with. A 'demonstrable likelihood' of absconding would seem to mean a statistical probability, in which case the authorities would be obliged to release any detainee unless they could prove that the chance of him or her not turning up to a tribunal hearing was higher than 50 per cent. That is something that should not be alleged about any asylum seeker in the absence of supporting evidence. But neither should a government, because of this lack of evidence, be obliged to release almost every asylum seeker whom it now detains.

A more appropriate form of words has been used by the recently appointed president of the Human Rights and Equal Opportunity Commission, Professor Alice Tay. She interprets the alternative to mandatory detention which her Commission had proposed in 1998 as meaning that 'individual assessments would be made on the risk of absconding'.[3]

The only policy that seems to stand a chance of supplanting mandatory detention is one that will allow an asylum seeker to be held when there seems to be 'a significant chance' of him or her absconding before an application is finally resolved. What some well informed advocates for those now detained may be overlooking is that such a significant chance will appear to exist whenever someone about whom little is known enters Australia without authority from a low income country. However, the fact of an entrant coming from such a country should never cause us to infer that he or she has not fled because of a genuine fear of persecution. There are innumerable instances of refugees desperately in need of protection who, as it happens, have greatly raised their incomes as well as saving their own and their families' lives by fleeing in time to a prosperous country. That they had ample non-economic grounds for fleeing does not preclude the possibility, that other persons, not in danger, may arrive in the same country and make similar claims. If after arrival and identification they are released under a bailing arrangement, then knowing that their claims may not be seen to be strong, they may go bush rather than wait for their probable or even possible deportation.

Huge numbers of persons want to migrate to Australia; this fact necessarily dominates immigration policy, even on matters where it might not seem to be relevant. It still has unfortunate implications even today when at long last we have ceased to discriminate against would-be immigrants because of their race or nationality. All migrants have, and of course should have, the right to be accompanied or joined by their spouses. But because they do, it seems unlikely that the brothers and sisters of Australian

residents will ever again be able to immigrate without possessing some additional qualification besides blood relationship. That is because, when residents have siblings in low income countries, a lot of the siblings will want to migrate too. These siblings will bring their spouses, some of whose siblings will also want to come and bring their spouses…until the inflow becomes so large as to crowd out other applicants, including persons who might otherwise enter under Australia's humanitarian programme. In the days when almost all our people were of British, Irish or Aboriginal origin, all brothers and sisters of residents could be allowed to migrate here. Not so today. Nor can we offer non-residents the right not to be detained because there is not a demonstrable likelihood of their absconding before their claims to stay have been assessed. That is sad, because some have had no chance of having their claims assessed anywhere unless they could first enter a country without permission to do so.

None of this negates the fact that many asylum seekers now detained and suffering gravely from their situation could be released at once without any serious risk that they would abscond rather than wait to appear before a tribunal. At present the Minister for Immigration and Multicultural Affairs has a non-compellable discretion to release unauthorised arrivals on Temporary Protection Visas. He can issue these if they are minors, or over 75, or torture and trauma survivors, or require medical treatment of a kind that they cannot receive where they are detained; there are also a few other exceptions. These provisions could be exercised more generously and also widened to include, for example, persons whose physical disabilities make it unlikely that they would try to conceal themselves, or families all members of whom would find concealment almost impossible should they try to vanish before the principal applicant has had his case determined. Australia could follow the lead of Sweden where, following riot, hunger strikes and suicide attempts, changes have included the use of group homes to accommodate the wives and children of detainees.[4]

Mandatory detention has been defended as a deterrent to persons who otherwise might 'try their luck' by coming secretly to Australia.[5] This is a weak argument applied to refugees who contemplate attempting to escape from a country where they are persecuted, or where they enjoy a temporary and precarious right of first asylum. The risks of being drowned or captured and the financial cost make the stakes either way too huge for a decision to be swayed by the likelihood of being held for a time in an Australian centre. Although detention here is always potentially damaging and at present quite needlessly harsh,[6] it is certainly less so than in a country where the refugee has suffered persecution. The only entrants who can be deterred are those who are not refugees.[7]

It is a mistake, however, to question the good faith of politicians and administrators who act on the basis that temporary entry may lead, potentially and unless regulated, to a large scale, illicit influx. Asylum seekers who have entered legally are seldom detained until their claims are heard, but in August 2000 the *Sydney Morning Herald* reported the Government's reluctance to issue temporary entry permits to Pakistanis, Lebanese over 20, Russian women over 20 or Greek women aged 20 to 39.4.[8] This would be partly due to a fear that some of the entrants would 'disappear' as well as to the possibility of women entrants con-

tracting marriages that were bogus. The following month it was also reported that visitor and working holiday visas had hit an all time high, presumably because of the Olympics, with even the figure for Lebanon up by 32 per cent,[9] for example. Thus a number of applicants from a suspect country had been shut out but not all of them. This suggests the kind of willingness to act on relevant evidence that ought to govern Australian policy on the holding of asylum seekers. It would be consistent with visas for temporary visits from Britain and the United States having long been relatively easy to obtain, not necessarily for sinister racist reasons but because large numbers of Britons and Americans are not queueing up to settle here. This is also a reason why so many visitors from these countries who have not observed the terms on which they were admitted are still left at large.

In the increasingly fierce debate on detention policy, mention is sometimes made of an experiment conducted by the U.S. Immigration and Naturalization Service and described by lawyer and activist Arthur Helton.[10] In 1992 the Service interviewed over 2000 asylum applicants who were being detained and arranged for 32 per cent to be released on parole. About 95 per cent of these applicants appeared later in the immigration court and had their claims considered. If Australia paroled some of its detainees, the escape of so small a proportion, most of whom would probably be recaptured later, could be brazened out fairly easily by a clear-sighted Minister. He could, for instance, remind taxpayers of the financial cost which detention imposes, along with its psychological costs. A similar kind of courage is shown whenever a Minister for Justice defends low security prisons from which a few inmates who have never been guilty of violent offences occasionally break free.

At the moment all of the main political parties support the policy of mandatory detention. There are some legitimate concerns behind this attitude, but none justifies the detention of so high a proportion of women, children and other asylum seekers as are being held at present. One senses also a reluctance to accept that the twenty-first century will offer widening opportunities for international movement, both legal and illegal. These opportunities will be such that no country, not even Australia, should expect to avoid acting at times as a country of first asylum. True, it will be less convenient for us if a higher proportion of our humanitarian programme comes to be filled by unauthorised entrants. But this is simply one more reason to facilitate the 'off shore' component of the humanitarian programme by opening more, and more accessible, immigration posts and by providing them with more staff where necessary. Flight and unauthorised entry will still sometimes remain the only course open to persons who, after intolerable treatment because of their political or religious views, choose rather to endure the physical danger and somehow to find the finance that may enable them to arrive in Australia by illicit means.

References

1 These include the Australian (now National) Council of Churches and the Australian Council of Social Service. The full list can be found in *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals*, Sydney, Human Rights and Equal Opportunity Commission, May 1998, no. 247

2 The relevant parts of the Bail Act are Section 32 (1) (a) (I) and Section 59.

3 'Treatment of refugees should come from the heart', *Sydney Morning Herald*, 19 December 2000

[4] G. Mitchell, Project Coordinator, Asylum Seeker Project, *The Swedish Model of Detention*, Melbourne, Uniting Church in Australia, Hotham Parish Mission, 28 November 2000. Mr Mitchell worked at Sweden's largest detention centre from January 1999 to January 2000.

[5] Attempts to deter by detention and the withholding of social security benefits are not confined to Australia. See *Detention of Asylum-Seekers in Europe*, European Series, vol. 1, no. 4, Geneva, UNHCR Regional Bureau for Europe, October 1995.

[6] D. Silove, Z. Steel and C. Watters, 'Policies of deterrence and the mental health of asylum seekers', *Journal of the American Medical Association*, vol. 284, no. 5, 2 August 2000

[7] The depth of feeling behind the present disagreements concerning detention is shown by the language of Professor Amin Saikal:

> The need to exclude the very few who may not be refugees should not be used as grounds for meting out collective punishment to the vast majority who are found to be genuine refugees.

'Halting illegal immigrants begins with the source', *Sydney Morning Herald*, 3 January 2001. Almost all detainees whose cases have been heard have had their genuineness accepted, but no one can guarantee this as regards 'the vast majority' of future unauthorised entrants.

[8] *Sydney Morning Herald*, 9 August 2000

[9] *Australian*, 25 September 2000

[10] A. C. Helton, 'Reforming Alien Detention Policy in the United States', in M. Crock (Ed.) *Protection or Punishment: the Detention of Asylum Seekers in Australia*, Sydney, Federation Press, 1993, pp. 103-115

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