Asylum Seekers; a Disgraceful Episode in Australian History

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As a young person I had never thought, as I do now, that I would be ashamed to be an Australian. One of the main reasons for that shame, but not the only ones, are our policies to asylum seekers and Aboriginal people. Both issues directly affected me in my former role as Chief Justice of the Family Court, but today I will discuss asylum seekers.

It will be recalled that it was the Labor Government in 1992 that first acted to provide for mandatory detention of asylum seekers and set up a detention facility at Port Hedland where we began the appalling process of detaining asylum seekers and their children.

At the time that it first introduced the policy of holding asylum seekers in detention and doing so in remote areas like Port Hedland I accepted an invitation to speak to a seminar at the MCG on the rights of children. I took the opportunity to criticise the Government for setting up what I described as a virtual concentration camp in a remote area and in particular, for wrongly detaining children contrary to the UN Convention on the Rights of the Child.

That set up a media hue and cry with my remarks appearing on the front page of the Australian newspaper, which surprisingly enough, agreed with me. Then Immigration Minister Senator Bolkus was depicted in a cartoon dressed in Nazi uniform outside of a concentration camp and even Greg Sheridan expressed support for my remarks. How times have changed.

The Government response was of course predictable and I was criticised for speaking publicly as a judge on a political issue. I took the view then and now that human rights issues transcend mere political issues and that they give rise to a duty to espouse them.

Subsequently in 2001 a case came before the Family Court involving asylum seeker children where it was argued that the Court in its welfare jurisdiction should order their release from detention in light of evidence as to their extreme psychological deterioration. The trial judge dismissed the application on the basis that the court lacked jurisdiction, but on appeal the Full Court over which I presided, held that the Court did have jurisdiction to make such an order and adjourned the further hearing to enable the presentation of further evidence.
Subsequently another Full Court directed the Minister to release the children. The Minister did so but appealed our decision to the High Court which unanimously held that we lacked jurisdiction to make the order.¹

Normally one might feel chastened by a unanimous defeat in the High Court but I think that I can say that I have never been as proud of any decision that I have made as a judge as I am of that one. I still think that it was morally and legally correct, even though the High Court thought otherwise. I think that the earlier Mason High Court might have taken a different view as it was far more liberal minded than its successor. The particular constitution of appellate courts can have a significant effect on the outcomes of cases that they hear.

A practical result of our decision was that the children were not returned to detention and revulsion against the practice of detaining children gained force to the point where for a time, both major parties adopted the policy, but not the practice, of refraining from doing so.

This has now changed markedly however to the point that only this week the media reported the Gestapo like tactics of the Department of Immigration in removing mothers and children sent to Australia for medical treatment in the early hours of the morning to Christmas Island. Others are being sent to Nauru in similar circumstances and I understand that work is in progress to house families on Manus as well.

Speaking of such tactics the Abbott Government has adopted another practice of totalitarian regimes of shrouding its activities in secrecy and applying a false patina of military necessity. What they are doing is now hidden from the public and the media. Goebbels, Stalin and similar types would be proud.

This indefensible policy continues, fuelled by what I believe to be the immoral attitude of both major parties. The Howard Government’s policy of turning around the boats and reintroducing temporary protection visas was a combination of refined cruelty and criminal disregard for human life, despite the crocodile tears shed in Parliament by its proponents then and now. The revival of the so-called Nauru and PNG solution that both parties continue to support was a pathetic return to morally bereft policies of the past.

Let us not forget that it was under the Gillard and Rudd governments that this revival took place but it has been enthusiastically supported and worsened by

¹ (B and B v Minister of Immigration etc (2003) 30 Fam LR 676).
the Abbott Government and its indescribable Minister for Immigration, Scott Morrison. His hypocrisy was demonstrated once again when interviewed on PM this morning when he said that the only Iraqi refugees who would be returned were those who wished to do so. He failed to mention that the whole policy of his Government is to treat them so abominably that they will have no choice but to do so.

Let us also not forget that the Nauru episode from its beginning involved wholesale human rights abuse by the Australian and Nauruan Governments and to cover this up the latter, on 26 August 2003 banned lawyers, human rights activists, health care professionals and independent observers leading Amnesty International to issue a global alert about the deteriorating human rights situation on Nauru. The Nauru Government had previously refused visa to Australian media to visit the country.²

Since then the situation has become even worse with the complete breakdown of the rule of law in Nauru, tacitly encouraged by the Australian Government. The resident Magistrate was sacked and deported and the Chief Justice refused a visa to enter the country. The pathetic response of the Australian Government was to the effect that Nauru is a sovereign state and it is inappropriate for it to intervene. I say pathetic because we are talking about a country with a population of about 10000 people that is wholly supported and funded by Australia. It is a true client state. Contrast this with the Australian attitude to similar breakdowns in the Solomons and Fiji.

Similarly in PNG an asylum seeker was murdered and others seriously injured in front of hundreds of witnesses and no-one has been prosecuted. The Australian Government is reported to have financially supported the government of PNG in opposing litigation brought against it in the courts. Not only is the Government pathetic, but so is the Opposition, which only yesterday cravenly refused to alter is policies in relation to Nauru and Manus.

As for temporary protection visas, these are also morally repugnant and designed to act as a deterrent by separating families. Those promoting them should pay regard to the possibility that boats such as the SIEV X were so full of women and children because that was the only chance of them joining their

² Wendy Bacon; Our Nauru Amnesia, New Matilda 24 July 2012 accessed 7 August 2012
http://newmatilda.com/2012/07/24/our-nauru-amnesia
husbands in Australia. In my view the use of these visas is an evil policy that has no possible redeeming feature.

It seems that what both parties really want is to appeal to xenophobic views rejecting the arrival of these people in Australia when the solution of receiving them in a humane fashion and processing their applications quickly and efficiently, where necessary after their arrival in Australia is so obvious. The calumnies heaped on the Greens in relation to their immigration policy are pure exercises in hypocrisy because they are the only party with a decent and humane policy towards refugees.

I believe that we must continue to oppose the Government and Opposition policies which, taken together or separately, are the real reason that people find it necessary to expose themselves to the horrible risks associated with travelling by boat to Australia.

It is also time that we put the 'problem' in proportion. As The Age columnist Tim Soutphommasane noted in a 2011 St James Ethics Centre paper, Australia received 15,226 boat arrivals, compared with Greece’s 56,180, Italy’s 91,821 and Spain’s 74,317. These are European countries in dire economic circumstances in sharp contrast to ours. It was reported in the media yesterday that Germany had agreed to take 40,000 refugees from Syria.

It is more than time that we got rid of such pejorative and inappropriate terms such as 'queue jumping' and 'border protection' and brought some humanity to bear on this issue. These are human beings, many of them families with children who are affected so let us stop talking nonsense about 'stopping the boats', and 'processing' people and get on with helping them.

How did we get ourselves into this state? Australia is rapidly becoming an international pariah, riding roughshod over solemn treaty obligations into which it has entered like the International Covenant on Civil and Political Rights, the UN Refugee Convention and the UN Convention on the Rights of the Child.

It may surprise you to know that successive Governments have been able to get away with this by never importing these Conventions into domestic law. Thus we show an international face as a good international citizen while ignoring these conventions and the rights conferred by them at home and on the high seas.
This is the height of hypocrisy, which in the past has been justified by saying that as a democracy applying the rule of law, Australia would never act contrary to international law in this way. For obvious reasons this can no longer be said with a straight face.

Another reason for this situation is that unlike most major democracies in the world, Australia has never enacted a Bill of Rights. The conservatives have always opposed it because it acts as a brake on the power of Governments to act as they please. Labor has a policy of introducing such a constitutional guarantee but has shown a distinct lack of enthusiasm for doing anything about it.

In its absence we are all extremely vulnerable to the abuse of power by our Governments which have and are engaging in such abuse but directing it to a small and unpopular minority of non-citizens that they are able to demonise. Let there be no mistake however that legally, there is little to stop our Government treating us in this way as well. The current behaviour by successive Governments to asylum seekers should be a salutary lesson of the dangers lying in the path of us all.

What then must we do? I think that we must work together to show Governments that this situation will not continue to be tolerated. In our small way at Children’s Rights International we are doing just this, as we all are by being here today. I believe that there is a slow beginning of a groundswell in the community of distaste for these policies and with the leadership of people like Malcolm Fraser the wheel will turn, but not before much human misery will be suffered by some of the most vulnerable people of all. Perhaps the move against these policies by a minority of the Labor caucus in the Federal Parliament is a harbinger of change.

We must bring it home that the people that we are mistreating in this way are people just like us with the same hopes and aspirations. We must stand up to the Abbots, Morrisons and sadly, the Shortens of this world.

I conclude with a quote from the Australian playwright Andrew Bovell

“A man burnt himself to death in our country. Not in Vietnam. Not in Tibet. Not in the Middle East during the Arab Spring. But in Australia. Now. And the Australian government has refused entry to his parents to attend the funeral because of a lack of paper work.

This is where we are. This is our country. Now.
Meanwhile, in 2013, the same year Leo arrived in Darwin our government gave Sri Lanka two patrol boats so that their military could stop people fleeing the country. This is referred to as stopping the problem at its source. And recently the Sri Lankan government thanked Australia for re-fusing to co-sponsor a UN bill to establish a war crimes investigation into human rights abuses toward the end of the civil war.

And in one the most punitive measures in the budget the government removed the core funding from the Refugee Council of Australia. The Council is an advocate for the rights of refugees and a leading critic of Refugee policy in this country. It was a sum of $140,000. Let’s measure this against the $245 million to put Chaplains in secular schools. And let’s also measure it against the 12 billion spend on 58 military aircraft and a further 12 billion on their maintenance.

In the scheme of the budget the sum that they have taken away from the Refugee Council is nothing. This is about punishment. This is about silencing an effective critic of government policy.”