Children in Immigration Detention: The Policy, The Practice, The Prognosis

By Barbara Rogalla

On Friday, 2nd April 2004, the Castan Centre for Human Rights Law at Monash University in Melbourne hosted the workshop "Children in Immigration Detention: The Policy, The Practice, The Prognosis".

This workshop focused on how Australian refugee law has curtailed the human rights of children. Papers presented by the speakers will soon be available at the Castan website, http://www.law.monash.edu.au/castancentre/.

Here is a summary of the presentations.

Mary Crock spoke of her ongoing research "Seeking asylum alone". She wants to account for every one of the 290 unaccompanied children who asked Australia for refugee protection. If you know of such children, please contact Mary on maryc@law.usyd.edu.au . She would like to hear from you.

Sev Ozdowski, Human Rights Commissioner, said that his report on Children in Detention has been submitted to the Minister for Immigration, and is awaiting tabling in Parliament. For legal reasons, he is unable to comment on his findings, until the Minster formally releases the report. Some people were concerned that the impact of the report would be lessened if the release of the HREOC report coincides with the release of the budget.

Tania Penovic from Castan gave an overview on the legal development of legislation that keeps children in immigration detention, by exploring the significance of the "Lim", "El Masri", and the "B and B" cases. From Lim to Al Masri, it took eleven years to identify children as bearers of rights in refugee issues.

Lim confirmed the powers of parliament to mandatorily detain people for immigration reasons. Al Masri tested the powers of Lim. Mr Al Masri faced potential lifelong detention. He did not pass the Australian refugee test, but he was also unable to obtain a visa to go elsewhere[1]. The court found that indefinite detention exceeded what can be reasonably expected from detention by Parliament under the Alien Power, and ordered his release. The government responded by amending section 196 of the Migration Act. In future, the courts are unable to order the release under similar circumstances. There is no upper limit to the length of detention.

Neither Lim nor Al Masri were children. But the Al Masri judgement was applied in the "B and B case". The court ordered the release of the two children from immigration detention, pending the final outcome of the case. Then Immigration Minister Philip Ruddock argued that the children were not involuntarily detained, because they could go home with their parents at any time. He accused the judges of "judicial activism" and of interfering with the right of parliament to pass legislation.

After the court ordered the release of the B and B children, migration legislation was amended so that judges are no longer able to order the interlocutory release of children. But in February 2004, the constitutionality of the indefinite detention of children was questioned, because detention impacts most adversely on their developmental needs. The question remains whether detention violates the Separation of Powers doctrine. At any rate, mandatory detention of children violates the Children's and Young Persons Act, which stipulates that a child must be brought before a judge within twenty-four hours of being detained.

The notion of "voluntary detention" needs to be tested in court. This may not be impossible, given that the current definition ignores the realities of refugee flight, and how such flight impinges on the ability of asylum seekers to make voluntary decisions. During questioning time, Dr Ozdowski added that many people might be unable to make rational decisions as the result of the damage they have suffered. Again, this proposition has not yet been argued in court.

Adiva Sifris from Castan put a different perspective on B and B. In June 2002, the Family Court challenged the detention of children under the Welfare Powers legislation. The court ordered the release of the children, but the Minister appealed to the High Court. **Trial Judge Strickland found that although the children were detained unlawfully, it was not in their interests to be released.** His decision was later overturned by the full court. But Chisholm J of the Family Court found that the privative clause[2] applied, and could therefore not be appealed.

Significant is the clash of welfare and migration laws. Section 189 and 196 of the Migration Act stipulate the mandatory and indefinite detention, and this cannot be challenged. Family law argues from the less well defined concept of interests of the child. The question is whether the jurisdiction of the Welfare Power of the Family Court applies to children in detention. If so, it must be shown that children suffer from harm, as the result of the actions of their parents, and that their parents are unable to protect them.

Another way to argue for the release of children is to apply to the External Affairs Power, so that the Convention on the Rights of the Child may apply. But for this to happen, the High Court needs to allow the implementation of international law as a line of argument.

Julian Burnside, National Treasure and QC, said that children's laws are developed from the customs of how a society treats its children. The assumption is that children are vulnerable, and therefore need special protection because they are less likely to defend themselves than adults. Under the constitutional validity conferred by the High Court, immigration laws actually harm children. He cited three instances where children were harmed, and said that the government must accept direct responsibility for this.

> *Example 1.* Shayan Badraie was detained at Villawood in Sydney. A television documentary showed how the six-year old had become almost catatonic as the result of being unable to eat and drink. He was admitted to hospital seven times. As he recovered with treatment, he returned to detention, despite pleas from medical experts that he should be released immediately.
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> *Example 2.* An eleven-year old girl was detained at Woomera. After one year of detention, she lost all interest in life. Her only wish was to return to Iran and to be buried next to her grandmother. Eventually she was moved to the Maribyrnong detention centre in Melbourne. Despite advice from health professionals that she should receive specialist treatment immediately, this did not happen. After three months, the girl sought her death by drinking shampoo and by hanging herself. Fortunately she survived and was subsequently admitted to hospital.
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> *Example.* Detention guards at Baxter ordered a detained man to strip in front of his seven-year-old daughter. He refused. The guards overpowered him in front of his daughter and placed him in solitary confinement for ten weeks. The daughter was allowed to visit him each day for ½ hour. One day, the visits stopped. The Baxter manager told the man that his daughter could not visit, because she went on a shopping trip to nearby Port Augusta. In reality, the daughter was returned to Iran on the previous evening. The Australian government said it acted on a court order from Iran, but refused to produce the document. The man's own case was still awaiting a decision by the High Court.

All three cases show gross child abuse at the hand of our government. The children are treated as if they were not human beings, and the government gets away with it, because the public do not care.

Susan Kneebone focused on breaches of CROC and of the Refugee Convention. Historic events show that when the court findings rule in favour of children's refugee rights, the government changes the law to undermine the possibility of similar findings in future. Whilst the Refugee Convention is incorporated into Australian Law through the "Protection Obligation" in section 36.2 of the Migration Act, it is unclear whether the non-refoulement obligation is reflected. Non-refoulement is the central aim of the Refugee Convention. It means that a person must not be sent back to a country where they may suffer death or torture.

Al Masri incorporated principles of the International Covenant on Civil and Political Rights. Case "M38", by contrast, is the "antidote to Al Masri". In M38, the court found that removal from Australia is not restricted by the possibility of refoulement, because refugee determination is an administrative matter, not a matter for the courts. The M38 judgement contained no reference to the ICCPR, but relied on the constitutional right of states to remove aliens.

Paris Aristotle from Survivors for Trauma and Torture, said that refugee policy developed in a hostile political environment, influenced by electoral advantage. Government statements to the media and in the Hansard identify such policy primarily as a deterrent. He sees Australia's response to refugee adults and children primarily as a moral dilemma, because laws follow from the moral base in society. Public opinion has shifted and current Immigration Minister Amanda Vanstone is more flexible in her approach than her predecessor was. Paris argued that the pendulum might swing back toward anti refugee sentiment if more boats arrived, because Australia has not addressed the underlying fundamental moral questions that were raised when the Tampa was denied entry into Australia.

Footnotes

1 Eventually, Mr Al Masri returned to the Gaza strip. But this option had already been explored and discounted at the time of the court case.

2 The privative clause is a provision under administrative law. It was applied to migration law during the post-Tampa legislative changes, in order to further restrict judiciary review of refugee matters.