

The Flooding Tide of Illegal Migration to Australia

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IS THE CURRENT LAW AND GOVERNMENT POLICY EFFECTIVE IN CONTROLLING OR DISCOURAGING THE FLOODING TIDE OF ILLEGAL MIGRATION TO AUSTRALIA? DARWIN BARRISTER AND LEGAL OFFICER IN THE ARMY RESERVE, SIMON LEE, DISCUSSES.

The law that is applied to a person who “organises or facilitates the bringing or coming to Australia” of a group of at least five persons who are “non-citizens” who “had, or have, no lawful right to come to Australia” is the *Migration Act 1958*.¹ Current federal government policy is to detect, seek and detain non-citizens or potential illegal immigrants at various detention centres pending the process of their applications for refugee status. Temporary Protection Visas and Temporary Humanitarian Visas have been abolished and are now replaced with a permanent visa or, as the Department of Immigration and Citizenship has named them, the Resolution of Status (RoS) visa, Class CD, subclass851.

This article will focus on arrivals of non-citizens by sea and does not address unauthorised air arrivals or overstaying of visas.

Discussion of immigration issues, particularly illegal immigration, strikes a raw nerve in Australian society. There is no simple solution to the illegal migration. Desperate people will always flee persecution and ill treatment.

The person who bears the brunt of section 233C of the *Migration Act 1958* is often an impoverished

Indonesian fisherman lured by the prospect of a more lucrative haul than fish. There are other less frequent occasions where the master and crew of the vessel illegally entering Australian waters are fellow members of the future applicants for refugee status.

The *Commonwealth Criminal Code Act 1995* also includes a variety of offences under the umbrella of people smuggling.²

People smuggling is perhaps a misnomer as arrivals in Australia are, by no stretch of the imagination,

covert or hidden from government agencies responsible for border protection. People smuggling is distinct from people trafficking. The international community, through the United Nations (UN), has arrived at a definition of people smuggling. Australia ratified the UN Convention against Transnational Organized Crime, its Protocol against the Smuggling of Migrants by Land, Sea, and Air (the Smuggling Protocol) on 27 May 2004, and its Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially Women and Children



Author Simon Lee at sea.



SIEV 68 boarded by ATTACK ONE onboard HMAS ALBANY.

(the Trafficking Protocol) on 14 September 2005.

Article 3(a) of the Smuggling Protocol defines the 'smuggling of migrants' as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident."

Article 3(a) of the Trafficking Protocol defines the 'trafficking in persons' as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs." People trafficking is another complex area, detailed discussion of which is beyond the scope of this article.

During the peak of unauthorised arrivals between 1999 and 2002, the *Migration Act 1958* underwent some considerable changes to the criminal sanctions available to prosecutors. The *Border Protection (Validation and Enforcement Powers) Act 2001* introduced into the *Migration Act 1958* a mandatory penalty of five years (with a three-year non-parole period) for first offenders.³ The provisions of section 236B do not apply to a person who can prove on the balance of probabilities that they are under 18 years of age.

Suspected Irregular Entry Vessels (SIEVs) that carry non-citizens into the Australian federal jurisdiction show no sign of abating. According to the then Department of Immigration and Multicultural and Indigenous Affairs, in 1998-1999, 42 vessels carrying 926 people arrived. In 1999-00, 75 boats arrived, bringing 4,175 people. In the 2002-03 and 2004-05 periods there were no unauthorised boat arrivals. The absence of arrivals in the latter two periods may be accounted for by the offshore processing centres which were operating in Nauru and Manus Province, Papua and New Guinea. The facility on Christmas Island (CI) was then a "temporary" facility. The CI detention facility is now a very

permanent feature of that island's landscape.

Arrival locations of SIEVs have been many and varied, including Flying Fish Cove of Christmas Island (sometime after circumnavigating the island and heading for the lights at night), Scott, Ashmore and Hibernia Reefs, offshore oil and gas installations, oil and gas tender vessels, Melville and Bathurst Islands and the Coburg Peninsula to name but a few.

Australia is a signatory to the *1951 Convention Relating to the status of Refugees*.⁴ (Refugee Convention). The Refugee Convention was initially limited to protecting European refugees after World War II however the scope of the Refugee Convention has been expanded by the 1967 Protocol. Article 1 of the Refugee Convention, as amended by the 1967 Protocol, defines a refugee as

"A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such

fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

Broadly speaking, the Refugee Convention sets out the rights of individuals who are granted asylum and the responsibilities of nations that grant that asylum. Some applicants are denied the protections under the Refugee Convention by the operation of Article 1F. Persons excluded under the Article 1F exclusion clauses include those who have committed a political crime against the peace, a war crime or a crime against humanity, a serious non-political crime outside the country of refuge and/or acts contrary to the purposes and principles of the United Nations.⁵ Exclusion under Article 1F deals with a particularly difficult and complex area of domestic and international refugee law that also incorporates international humanitarian law and international criminal law, including the relevant international instruments⁶ that deal with these types of international crimes.

The standard for establishing whether a person is excluded from refugee status is considerably lower than the civil standard of proof ('on the balance of probabilities') and the criminal standard ('beyond a reasonable doubt.'). It is sufficient to establish that there are "serious reasons for considering" that one of the acts outlined in Article F has been committed.

The question which arises is whether a conviction for a people smuggling offence equates to a "serious non-political crime". In *Ovcharuk v MIMA*⁷ the Full Federal Court held that the question of whether there are serious reasons for considering that a person "has committed a serious non-political crime outside the country of refuge" may be answered by reference to notions of

serious criminality accepted within the receiving state.⁸ What then becomes of crime committed "inside" the country of refuge? There is no "bright line" differentiating political and non-political crimes.⁹

Geoff Gilbert, who was commissioned by the United Nations High Commissioner for Refugees (UNHCR) to prepare a background paper on refugee protection, noted that the exclusion clauses in Article 1F of the Refugee Convention were intended to fulfil two aims:

"refugee status has to be protected from abuse by not granting it to undeserving applicants, who committed serious transgressions prior to seeking refugee status, and secondly, to ensure that those who have committed grave crimes or other serious non-political crimes, or who were guilty of acts contrary to the purposes and principles of the United Nations, do not escape prosecution."¹⁰

When the person being prosecuted is not a person seeking asylum and is merely in the illegal enterprise for either "financial or other material benefit" then the exclusions under Article 1F are unlikely to arise. It is when the person being prosecuted for a people smuggling offence is a member of the group of potential illegal immigrants seeking refugee status that a problem arises between the enforcement of the domestic Australian law and the obligations under the Refugee Convention.

It appears the prosecution of the (non asylum seeking) master and or crew of a SIEV bearing potential illegal immigrants is having little of the desired deterrent effect so sought after by our political leaders. Where a member of the non-citizens (one who is ultimately to seek refugee status after apprehension) either navigates, takes the helm, bails out water from the vessel or assists with engine repairs, that person likely to fall foul of the "facilitating" element of a people smuggling

offence. The real ring leaders of "facilitating" or "organising" the movement of people displaced from their countries of origin are not those being apprehended. As those people who organise or facilitate people smuggling offences become more aware of the processes, techniques, tactics and reactions of Australian government agencies tasked with the protection of Australia's maritime borders, the nature of people smuggling will evolve in a more sophisticated form. It is not beyond the realms of the imagination that Indonesian fishermen will argue that they have towed people they have found in distress at sea on vessels which have apparently already sunk or that vessels are directed to "head south and keep the setting sun on your starboard beam" with no-one other than asylum seekers onboard the vessel.

Leaving aside the difficulties of complying with our international obligations under the Refugee Convention, it is difficult to imagine how my original question can be answered in the affirmative. Illegal migration is, by no means, an ebbing tide. ●

Footnotes

1. section 233C aggravated offence of people smuggling (at least 5 people)
2. Division 73 – People smuggling and related offences
3. section 236B mandatory minimum penalties for certain offences
4. Opened for signature 28 July 1951 (entered into force 22 April 1954)
5. Articles 1F (a), (b) and (c)
6. Geneva Conventions of 1949 and the Additional Protocols of 1977, the 1948 Genocide Convention, the Statute of the International Criminal Court, the Statutes of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, to name but a few.
7. (1998) 88 FCR 173
8. *Ibid*, per Branson J at 185, Sackville J agreeing.
9. *Singh v MIMA* (2002) 209 CLR 533 per Gleeson CJ at [21] and Kirby J at [141]
10. Geoff Gilbert, 'Current issues in the application of the exclusion clauses', in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 428.