Afghan and Sri Lankan Asylum Seekers in Limbo

Setting a poor regional example

By Bassina Farbenblum

On April 6, 2010, 65% of voters believed the government was "too soft" on asylum-seekers, according to polling data by Essential Report. The same data suggested that 34% considered Liberal party leader Tony Abbott most trustworthy to handle the issue, compared to 23% favouring Labor. Then-Prime Minister Rudd's approval ratings were sliding across the board. Against this backdrop, Australians awoke on 9 April to the surprise announcement that the government was stopping the processing of asylum applications from all Afghan and Sri Lankan nationals. The refusal to process claims would last for at least 3 months for Sri Lankans and at least 6 months for Afghans, after which time the policy would be reviewed. All Afghan and Sri Lankan asylum seekers arriving by boat would be subjected to mandatory detention for as long as the policy was in place – a time period that the government would not define. A week later the government announced that because Christmas Island was reaching capacity, up to 300 asylum seekers would be mandatorily detained at an immigration detention centre to be re-opened at the Curtin Air Base, a remote desert facility in the far north of Western Australia.

The Ministers for Immigration, Foreign Affairs and Home Affairs released a joint statement explaining that the "suspension" policy had been introduced because of "evolving circumstances" in Sri Lanka and Afghanistan, and "hopes for further improvement and stabilisation in conditions". According to the Ministers, the effect of these "evolving circumstances" and the new policy will be that future "asylum claims from Sri Lanka and Afghanistan will be refused". In other words, the policy sought to avoid the processing of asylum claims in the hopes that by the time claims were processed conditions might have improved to such an extent that some asylum seekers might no longer be able to engage Australia's protection obligations under the Refugees Convention.

The Ministers claimed that these policy changes "reinforce the Government's strong approach to border security and ensure that its humane approach to asylum seekers delivers for those genuinely in need of Australia's protection, consistent with the Refugees Convention". Closer examination however reveals that no part of this apparent justification is borne out by the policy.

The Policy Would Not Strengthen Border Security

The policy has had no perceptible impact on "border security", assuming that term is code for the number of asylum seekers arriving by boat. This is unsurprising, given that the reason that Afghan and Sri Lankan asylum seekers embark on the perilous boat journey to Australia is that they are fleeing something that they fear more than death at sea, with the only alternative being to languish with their children in inhumane Indonesian detention facilities for years on end with uncertain prospects of resettlement. In the lead up to a general election, the conflation of Afghan and Sri Lankan asylum seekers with criminal smuggling activities and weakened border protection has served to further undermine any possibility of informed, rational public debate on asylum issues. There has never been any indication that asylum seekers arriving by boat pose any threat to Australia's national security. Indeed, ASIO recently reported to the Senate that it had not made a single negative security assessment of an onshore boat arrival during the past 3 years.

The Policy Is Not Humane

The policy requires mandatory detention of all Afghan and Sri Lankan nationals arriving by boat, for its indefinite duration – including those who will be found to be refugees once they are able to have their applications processed. Many asylum seekers arrive in Australia in an extremely vulnerable state, having recent experiences of physical and emotional trauma. The permanent physical and mental damage caused by long-term detention of these asylum seekers, and the debilitating effects of indefinite detention in particular, has now been well-documented. Indeed, it was in recognition of this harm that the Labor government abolished Howard-era mandatory detention policies.

The Policy is Inconsistent with Australia's Human Rights Treaty Obligations

The policy undermines Australia's compliance with a number of its international human rights treaty obligations. First, in singling out Afghan and Sri Lankan nationals for indefinite detention and exclusion from access to asylum determination procedures, the policy is inconsistent with the principle of non-discrimination. A cornerstone of human rights law, the principle appears in several core human rights treaties to which Australia is a party, including the *International Covenant on Civil and Political Rights* (ICCPR; articles 2 and 26), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR; article 2) and the *International Convention on All Forms of Racial Discrimination* (CERD). Article 3 of the Refugee Convention also requires states to apply the Convention without discrimination on the basis of a refugee's country of origin. The UN Human Rights Committee has limited the definition of discrimination to exclude differentiation between groups that is based on reasonable and objective grounds and that serves a legitimate human rights purpose. Neither is the case here: the characterisation of the situation in Afghanistan and Sri Lanka as "evolving" is anything but objective, and hard to differentiate from the "evolving" situation in any conflict-ridden country from which refugees flee. The policy may also violate section 9 of the *Racial Discrimination Act*, which incorporates Australia's non-discrimination obligations under CERD into Australian domestic law.

Second, the mandatory detention of all Afghan and Sri Lankan asylum seekers who arrive by boat, for the indefinite duration of the policy, amounts to arbitrary detention. Australia is no stranger to criticism from UN human rights treaty bodies for engaging in arbitrary immigration detention practices. Article 9 of the ICCPR defines detention as arbitrary when it is not a necessary and proportionate means of achieving a legitimate end. The policy's blanket application to all Sri Lankan and Afghan asylum seekers prohibits any individualised assessment of the necessity of detention in a particular case. The indefinite duration of the policy, in order to wait-and-see how circumstances evolve, further undermines the legitimacy of detention. And the lack of access to any legal avenues to challenge an individual's detention constitutes an additional breach of article 9.

In addition to contravening Australia's international obligations, the policy's detention implications stand in disappointing contrast to the "detention values" that the government adopted in July 2008 (in what now seems a political lifetime ago). These values included the recognition that "[d]etention that is indefinite or otherwise arbitrary is not acceptable".[1]

Third, Australia has an obligation under the Refugees Convention to assess claims for refugee status on an individualised basis, based on each individual's personal circumstances. There are good reasons for this requirement. Whether it is safe for an individual to return to a country will depend on myriad factors that go beyond national political landscape. These include the individual's race, ethnicity, religion, region of the country, clan affiliations, political opinions or group memberships, sexuality, or prior activities. Even if country conditions in Sri Lanka or Afghanistan "evolved" to the point

1 The government may also lack power to detain asylum seekers under the *Migration Act* 1958, for reasons beyond the scope of the current essay.

that the "hopes" for stabilisation were realised, there would undoubtedly still be individuals for whom return would not be safe, based on their individual circumstances. The denial of an individualised assessment is also incompatible with the fundamental right to due process.

Finally, the government stated repeatedly with a degree of pride that the policy was intended to serve as a deterrent against other Afghan and Sri Lankan asylum seekers coming to Australia to invoke Australia's protection obligations under the Refugees Convention. Leaving aside the dubious idea that one should build yet more barriers to achieving security for the world's most vulnerable people, using the policy to circumvent the Refugees Convention in this way undermines Australia's basic obligation to implement *in good faith* the human rights treaties to which we are a party, including the Refugees Convention.

The Policy Was Based on a Profound Misreading of the Situation in Sri Lanka and Afghanistan

Predictably, three months after the policy was announced, leading international human rights organisations confirmed that Sri Lanka remains extremely dangerous for particular groups and individuals, including journalists, members of trade unions, human rights defenders, activist lawyers, and young Tamil men from northern or eastern Sri Lanka. Days before the policy's "review" date of 8 July, Prime Minister Gillard ended the application of the policy to Sri Lankans, enabling the processing of their asylum applications to commence.

However, at the time of writing, the Prime Minister left the policy in place for Afghan asylum seekers despite the lack of any indication that the hope for stability in that country will be realised in the next three months. Many have wondered what alternate sources of information the government might be relying upon in its assessment of the rapid stabilisation of Afghanistan, given that it cannot be any of the news reports available to the public. When asked this question on the SBS *Insight* program in June this year, the Minister for Immigration pointed to reports from the U.S. State Department. Given that the U.S. has not suspended processing of asylum applications from Afghan nationals (and is far from a disinterested observer of the stability of Afghanistan), the "hope" on which the ongoing policy is based strains credulity.

Buried in another overnight surprise asylum policy announcement - this time, an attempt to burden Timor-Leste with Australia's refugee obligations - the decision to continue the denial of processing of Afghan asylum applications went virtually unnoticed. Except, of course, to those Afghans enduring another pointless, debilitating day of indefinite detention -- detention which now not only violates international law, but also contravenes the government's own policy that status determinations should be made within 90 days of lodging an application (and sooner for unaccompanied minors, torture/trauma cases, and other claimants with special needs).

Prime Minister Gillard has stated that any solution to the asylum seeker issue must be a regional solution. This is right and sensible. But a regional solution does not mean exporting implementation of our obligations to our poorer neighbours. It means encouraging other countries in the region to ratify the Refugees Convention, to abide by human rights commitments and accept international human rights treaty obligations, and to share responsibility for the *protection* of refugees. Achieving this formidable but important goal is made all the more improbable when Australia demonstrates to its neighbours a profound disregard for its own international human rights obligations, and for the situation of the world's most vulnerable people. It not only sends the wrong message to other governments in the region, but also erodes the excellent work being done by human rights and refugee advocates in Indonesia, Malaysia and elsewhere, who work relentlessly to convince their own governments that refugees' and asylum seekers' human rights matter. Australia's best and only chance at a regional solution starts by setting an example at home. ■

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