Equality Before the Law: Including for Asylum Seekers?

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All persons shall be equal before the courts and tribunals.[1]

Equality before the law is a fundamental principle both of human rights law and in the common law. In Australia, however, this principle has increasingly been challenged in relation to asylum seekers. Perhaps most starkly, asylum seekers who arrive by boat are treated differently from those who arrive by plane. Asylum seekers are also subject to distinctions that do not apply to other non-citizens. Finally, non-citizens including asylum seekers are treated differently from citizens in ways that are difficult to justify 'on objective and reasonable grounds'.[2] This article reviews the main ways in which Australian refugee law and policy challenge the principle of equality, focusing on three main aspects: access to the territory, access to the legal system (including courts and tribunals), and equality of arms.

I. ACCESS TO THE TERRITORY

The most significant challenge for asylum seekers has been their physical exclusion from Australia itself. This is not a new practice; between 2001 and 2006, the Australian Government adopted the well-known policy of 'turning boats back' to Indonesia.[3] This practice was reinstated on 18 September 2013 under Operation Sovereign Borders, a military-led joint taskforce charged with intercepting boats of irregular migrants.

Irregular migrants intercepted under Operation Sovereign Borders have been mainly transferred to detention centres in Nauru or Papua New Guinea under the 'offshore processing' policy. These centres were reopened in September and November 2012 respectively.[4] However, these gained new significance on 19 July 2013, when the Australian Government announced that asylum seekers arriving irregularly would no longer be resettled in Australia.[5]

Under arrangements with these countries, Australia funds the costs of offshore processing (including detention and resettlement), but those countries are formally responsible for administering them.[6]

Australia also conducts physical exclusion in the lesser known form of screening at airports.[7] This has been built upon more recently in 'enhanced screening', principally for Sri Lankan Tamils.[8] Both forms involve departmental officials 'screening in' people who raise protection claims, with review by a second departmental officer, and returning those 'screened out' rapidly. Both processes involve little independent scrutiny, with access to legal advice provided only upon request.[9]

This physical exclusion is complemented by strict control of legal migration routes. Under Australia's universal visa regime, visas are imposed on all non-citizens[10] and this visa regime is enforced by sanctions on airlines or other carriers that carry unauthorised passengers.[11] The Australian government has also encouraged other countries to impose their own visa

restrictions, such as influencing Indonesia to cancel visa on arrival arrangements for Iranians, in an attempt to reduce the numbers of irregular asylum seekers arriving from Indonesia.[12]

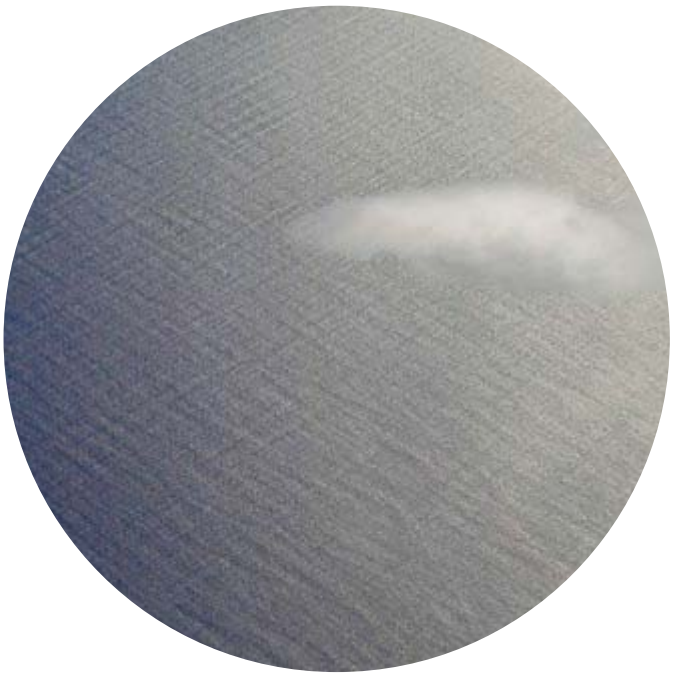
Denying access to the Australian territory does not mean Australia is absolved of all legal responsibility. International legal obligations relating to the law of the sea, for example, continue to apply to Australia's actions in turning asylum seekers back to Indonesia,[13] and Australia remains jointly and severally responsible with Papua New Guinea and Nauru for any violations of the *Refugee Convention* or human rights in relation to offshore processing.[14] Australia also retains other general legal obligations, including under tort law for breaches of the duty of care in relation to detained asylum seekers.[15]

Nevertheless, offshore activities create very real legal problems. For example, although asylum seekers are detained in PNG under arrangements with the Australian Government, the constitutional challenge to those arrangements failed in June 2014 principally because the Australian legislation spoke only of transferring asylum seekers, and did not expressly require their detention or resettlement overseas.[16] In the same case, an argument that this detention offended the principle of exclusive judicial power under the Australian Constitution also failed because the detention was authorised under PNG and not Australian law.[17]

Denying access to the territory also significantly restricts access to justice in practice. Although asylum seekers in Australia have very limited access to legal representation (as discussed below), access to legal representation and the courts in Papua New Guinea and Nauru is even more restricted.[18] There are also concerns about the strength of the rule of law in these countries. In 2014, the Chief Justice of Nauru resigned after its government deported its Chief Magistrate following an adverse ruling in relation to Australian asylum seekers.[19] The Papua New Guinean government has intervened to forestall an inquiry initiated by a local judge into the human rights of detainees on Manus Island,[20] and has also amended the right to liberty in the PNG Constitution.[21]

II. ACCESS TO THE LEGAL SYSTEM

Australian law also denies irregular asylum seekers access to the legal system — that is, to the entire system of refugee status determination set out in the *Migration Act* 1958 (Cth) ('*Migration Act*'). Again, this is not a new practice. In 2001, the legislation effecting the 'Pacific solution' introduced the concept of 'excising' the parts of Australian jurisdiction outside of the Australian



mainland.[22] Persons who arrived on 'excised' places were barred from applying for a protection visa (the visa for refugee protection) unless the Minister chose to exercise a personal, non-compellable power in the asylum seeker's favour (known as 'lifting the bar').[23]

Prior to 2011, asylum seekers in excised places were subject to a non-statutory refugee status determination process known as Refugee Status Assessment, with an appeal to an Independent Merits Reviewer. However, a High Court decision found that procedural fairness applied to these processes, and that such assessments still had to apply Australian law, including court decisions interpreting the Refugee Convention.[24] This led eventually to a government decision that from March 2012 the statutory process, including access to the Refugee Review Tribunal, would apply to both irregular and regular asylum seekers.[25]

In 2013, the logic of preventing applications for protection visas was extended to all persons arriving irregularly, including those who made it to the Australian mainland.[26] This legislation was intended to effect the recommendations of an ad hoc report by a specially commissioned Expert Panel in 2012.[27] The result is that no irregular asylum seeker has any legal avenue to claim protection in Australia, unless the Minister chooses to allow the person to do so. While, in the past, Ministers did choose to exercise this discretion, the present Minister has indicated that it will not be used until the Government succeeds in introducing temporary protection visas.[28] This is, perhaps, the clearest breach of the principle of equality before the law between irregular boat arrivals and asylum seekers who arrive by plane.

Similar clauses apply to other categories of people. For example, people granted temporary safe haven visas are also barred from applying for other kinds of visas.[29] Following the Australian Government's failed attempts to re-introduce temporary protection visas, these temporary safe haven visas, originally introduced for Kosovar and East Timorese refugees, have been granted to asylum seekers instead of permanent protection.[30] Another section prevents subsequent applications for protection visas by people who have previously been refused a protection visa or had one cancelled.[31] Under legislation currently being considered by the Australian Parliament, this bar would extend to minors or people who, by reason of mental impairment, could not understand their original application.[32]

There is also a current Bill before Parliament which proposes to automatically deny protection visas to asylum seekers in cases where a decision-maker

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is satisfied that they have provided false identity, nationality or citizenship documents.[33] This would also be a clear breach of the principle of equality before law in relation to irregular asylum seekers, as well as a direct breach of article 31 of the Refugee Convention which prohibits penalising irregular asylum seekers. For those who can be assessed under the *Migration Act*, their access to courts and tribunals is significantly limited. The Act provides for an initial decision by a Departmental official, followed by independent merits review by the Refugee Review Tribunal and judicial review by the courts.[34] However, if a person has not applied within the statutory time limit of 28 days,[35] the Tribunal cannot extend this time, even if the person's lawyer has been negligent.[36] This deprives the asylum seeker of a merits review, with their only remedy the more limited (and more expensive) judicial review in the courts. A similar non-extendable time limit applies to non-citizens applying for review to the Migration Review Tribunal.[37] In contrast, time limits to the Administrative Appeals Tribunal are extendable,[38] raising the question of whether this distinction can be objectively and reasonably justified.

There have also been attempts, some more successful than others, to limit the ability of courts to review decisions. In 2001, for example, a privative clause was inserted into the *Migration Act* which provided that most migration decisions were not reviewable by the courts,[39] except for the High Court's constitutional power of judicial review. However, the High Court interpreted this clause in a way that greatly limited the application of the section.[40] In another High Court case, a clause inserting non-extendable time limits on the federal courts was held to be constitutionally invalid in relation to the High Court,[41] after which the time limits for federal courts were also made extendable.[42]

Perhaps the starkest challenge to the principle of equality, however, is the fact that non-citizens are unable to substantively challenge their detention under the *Migration Act*,[43] which is also a clear breach of Article 9(4) of the International Covenant on Civil and Political Rights ('ICCPR).[44] In the famous case of *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, where Australia's first mandatory detention regime was challenged, the High Court expressly acknowledged that administrative detention would not be constitutional in relation to citizens, but was in relation to non-citizens.[45]

III. EQUALITY OF ARMS

The principle of equality of arms 'means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.'[46] There are two main challenges to this principle: legal advice and representation, and the provision of information.

Asylum seekers in Australia have very limited access to legal advice and representation. The principal form of government funded legal assistance has been through the Immigration Advice and Application Assistance Scheme (IAAAS). However, from 31 March 2014, the Scheme no longer provides funding for merits review or for irregular migrants (whether arriving by air or by boat).[47] This has threatened the sustainability of specialist legal services.[48]

Even before these cuts, asylum seekers who were represented were not always accompanied to the interview with the Departmental official – which forms the basis of the critical initial decision – or to the Refugee Review Tribunal. Few asylum seekers are represented at the court level.[49] Further discouraging litigation, those who fail at the Refugee Review Tribunal are required to pay a 'fee' of $1,540[50] while, in court, costs are awarded against those who fail.

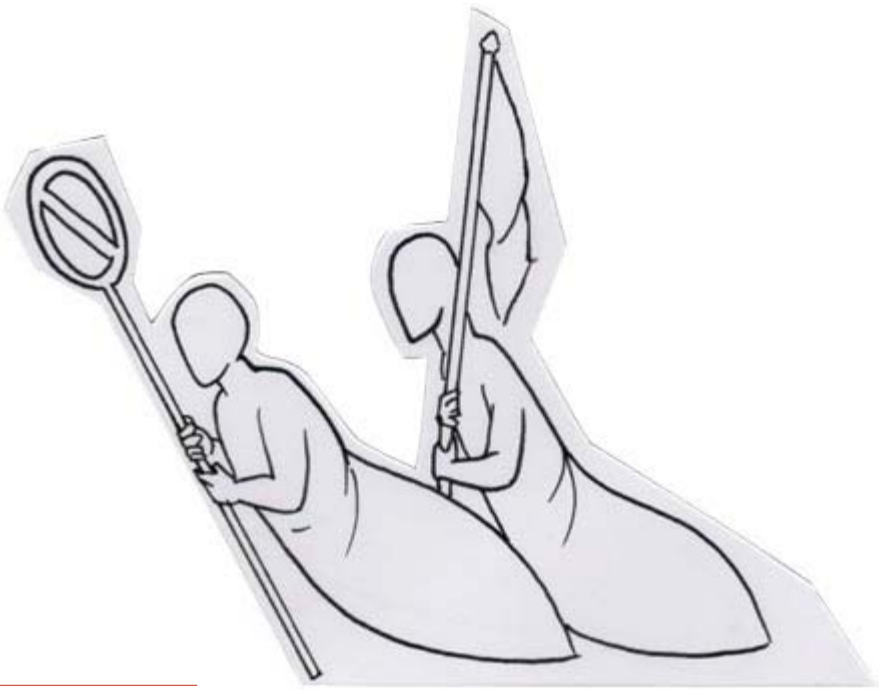
Another challenge is that asylum seekers are not automatically given access to relevant information held by the Department. Instead, they must file freedom of information requests to access their own information. Nor does an asylum seeker have equal access to the objective information about the country of origin relied upon by the Department of Immigration. Since 1 July 2013, this has been compiled by the Department of Immigration itself rather than the independent Refugee Review Tribunal.[51] Further, under a ministerial direction country assessments prepared by the Department of Foreign Affairs and Trade (DFAT) must be taken into account.[52] Both the Department and Tribunal have regularly made specific requests to DFAT in relation to refugee applications. The Refugee Review Tribunal is not required to put country information adverse to a person's claim to that person for a response,[53] although this would be required by the common law as a matter of procedural fairness.[54]

The looming challenge is that of a current proposal to 'fast track' asylum seekers, based on a flawed UK model.[55] While the details of this proposal have not yet been made clear, this compression of time clearly has implications for both access to the courts and tribunals, and the principle of equality of arms.

Equality before the law: but not for asylum seekers?

The guarantee of equality before the law in Article 14(1) of the ICCPR applies to asylum seekers and refugees.[56] It includes within it the concepts of access to the courts, equality of arms, and non-discriminatory treatment of parties.[57] Article 31 of the Refugee Convention also prohibits contracting States from imposing penalties on account of the illegal entry or presence of refugees, provided they present themselves without delay and show good cause for their illegal entry or presence. There are real questions about whether the distinctions in Australian refugee law between regular and irregular asylum are compatible with these obligations. Finally, Article 16 of the Refugee Convention guarantees refugees 'free access to the courts of law'. It is true, however, that international law has generally countenanced a lesser standard of procedural protection for asylum seekers. Article 13 of the ICCPR provides that in expulsion decisions, aliens lawfully in the territory have the right to submit reasons and have the case reviewed by, and be represented for the purpose before, competent authorities, except where compelling reasons of national security are otherwise required. This is mirrored in article 32(2) of the Refugee Convention, which also provides some other limitations on the power to expel. The Council of Europe procedural guarantees – afforded by the equivalent article 6 of the European Convention on Human Rights – have not been extended to immigration proceedings.[58]

The common law has provided more fertile ground; in 1985 the High Court reversed its earlier decision that procedural fairness did not apply to asylum seekers,[59] and more recently these common law principles were applied to a 'non-statutory' assessment process.[60] However, the common law remains susceptible to frequent legislative amendment in this contested policy area. Perhaps the attitude to equality before law for asylum seekers (and other non-citizens) is most clearly shown in the fifteen provisions of the Migration Act codifying or excluding natural justice.[61]



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