ANU COLLEGE OF ARTS & SOCIAL SCIENCES

THE AUSTRALIAN NATIONAL UNIVERSITY

Professor Penelope Mathew
Freilich Foundation Chair
Research School of Humanities and the Arts
Building no 120

Canberra ACT 0200 Australia
T:
F:
E:
http://freilich.anu.edu.au

28 June 2011

Committee Secretary
Joint Standing Committee on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

I welcome the opportunity to make a submission on the *Migration Amendment (Detention Reform and Procedural Fairness) Bill* 2010. I support the aims of the Bill which are to diminish the resort to immigration detention in the case of persons seeking asylum and to repeal the provisions in the *Migration Act* which permit asylum seekers to be sent offshore, along with the provisions that seek to deny asylum seekers avenues for judicial review. I would like to express my gratitude to Senator Hanson-Young for introducing the Bill.

I have three points to make. First, I support the provisions amending the operation of immigration detention. I think these amendments may need tightening, however. Second, I fully support the repeal of the provisions that permit offshore processing or 'protection'. My submission addresses the problems with offshore options for unauthorized maritime arrivals in Australia, including some of the problems with the current proposal relating to Malaysia. I suggest that some interception provisions introduced in 2001 should also be repealed. Third, I fully support the repeal of the privative clause. My submission briefly outlines the reasons for restoring access to judicial review.

1. Amendments concerning detention

The Bill seeks to amend the *Migration Act* so that it no longer requires the mandatory detention of asylum seekers. It does so primarily by amending the requirement that unlawful non citizens in or seeking to enter the Migration zone *must* be detained, and providing instead for a discretion to detain as well as requiring in proposed section 4AAA that decision-makers must have regard to the asylum seeker principles set out in that section. These principles include the principle that detention in immigration detention facilities must only be used as a last resort and for the shortest practicable time. In other words, the asylum seeker principles aim to introduce a presumption against detention into the *Migration Act*. It also appears that these principles may be more effective to secure their aim than the current s4AA which simply says that a minor shall only be detained as a last resort but contains no link to the substantive provisions concerning detention (in particular, s 189 and s 196 of the *Migration Act*). The Bill seeks to bring Australia into line with its international obligations as well as best practice overseas.[1]

Although I admire the simplicity of the drafting, I am concerned, as are other submitters (for example the Law Council of Australia and PIAC) that insufficient guidance is given to decision-makers as to what constitutes

[1] See for example, International Detention Coalition, *There are Alternatives: a Handbook for Preventing Unnecessary Immigration Detention* (2011); Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UNHCR, PPLA/2011/01.Rev.1, April 2011.

arbitrary detention and what is a last resort. Perhaps the Bill could give examples as to when detention may be permissible (for initial identity checks, for example) and when it is not (for prolonged periods based simply on unresolved identity or security checks, for example) in notes to the asylum seeker principles, while making clear that decisions to detain must be taken on an individual, case by case basis consistently with international law. I make this suggestion cognizant that there are drafting conventions followed by parliamentary counsel and they would be able to advise as to whether acting on my suggestion is possible. I also think it would be desirable for s189, and proposed s195B and s195C to make an explicit cross reference back to the asylum seeker principles, and that s4AAA ,s189, s195B and s195C should state that decision makers *must apply* the asylum seeker principles.

In order to ensure that decision makers can properly act on the change to a presumption against detention, it would also be necessary to ensure that there are adequate alternatives to detention. In particular, as pointed out by other submitters, the criteria for bridging visas would have to be widened. For example, it would be possible to widen the criteria for Bridging Visa E so that it is available to any unauthorized arrival who, consistently with the asylum seeker principles, is not to be detained. As other submitters have stressed, it is also necessary to ensure adequate social support for all asylum seekers released on bridging visas.

2. Amendments repealing the excision

The 2001 amendments to the *Migration Act* which excised certain territories from Australia's Migration Zone have created unfairness and uncertainty in the operation of Australia's refugee protection system. This is evident in three distinct phases of Australian refugee policy following the 2001 amendments.

Phase One: the Pacific Solution and offshore processing

Under the 'Pacific Solution', 'boat people' were taken to Nauru or Papua New Guinea where they were held in detention.[2] They remained in detention even after recognition as refugees because Australia initially refused to resettle them, in the hope that other countries would come forward to resettle these refugees. At the end of the day, most persons recognized as refugees under the Pacific Solution arrangements were resettled in Australia. This was a very costly exercise that inflicted great damage on vulnerable asylum seekers and refugees. The quality of refugee status determination and access to judicial review were also compromised, meaning that Australia ran the risk of returning refugees contrary to Article 33 of the 1951 Convention relating to the Status of Refugees ('Refugee Convention'). The Edmund Rice Centre has documented cases of return to danger.[3] In 2006, an attempt to effectively extend the operation of the 2001 amendments, was rejected by the Senate Legal and Constitutional Committee.[4]

Phase Two: Onshore processing under the dual system

Upon closure of the centres in Nauru and Papua New Guinea in 2007, the 2001 amendments were not repealed. This has meant that Australia has operated a dual system of refugee status determination – one for offshore entry persons and one for other asylum seekers. It has also meant that release of many unauthorized arrivals from immigration detention has been doubly difficult, because a decision to release an offshore entry person on a bridging visa requires the Minister to exercise his discretion.

Despite the High Court's ruling in the *M61* case[5] the government has maintained the dual system. This makes no sense, it is bureaucratically cumbersome, and it risks violation of the obligation not to return a refugee under Article 33 of the Refugee Convention. The question at issue in refugee status determination is always whether a person is a refugee according to the international definition of a refugee. The mode of arrival is not

[2] I acknowledge that the regime was relaxed in Nauru from 2005. However, even the relaxed regime raises questions as to whether asylum seekers' liberty was still unduly restricted.
[3] Edmund Rice Centre, Deported to Danger II (2006).
[4] See the report on the Migration Amendment (Designated Unauthorized Arrivals) Bill 2006.
[5] *Plaintiff M61/2010E v Commonwealth of Australia and Ors, Plaintiff M69 of 2010 v Commonwealth of Australia and Ors* [2010] HCA 41.

a relevant factor. The quality of refugee status determination must always be fair, and it should be the same for all applicants.

Phase Three: A return to offshore processing and 'protection'?

Following an increase in unauthorized maritime arrivals from around two thousand to around five or six thousand during the course of 2009 – 2010, a figure that is tiny when the global context is considered and is well within Australia's capacity, offshore options have again been explored. As in 2001, there has been an unsightly scramble for partners, with the government first looking to Timor Leste, then to Papua New Guinea and finally to Malaysia, while the Opposition has suggested that Nauru would be appropriate. Nauru has reportedly lodged its instruments of ratification with respect to the Refugee Convention and the 1967 Protocol relating to the Status of Refugees. It may fairly be doubted whether its implementation of the Convention and Protocol will lead to adequate protection as it appears that the decision to ratify is solely a result of the possibility that Australia may again turn to Nauru to 'accommodate' asylum seekers, rather than on the basis of a need and desire to protect refugees.

Many asylum seekers remain in limbo while the government is in negotiations with Malaysia. As a matter of international law, their current detention is arbitrary. As the European Court of Human Rights held in *Amuur's* case, to detain people subject to the 'vagaries of international relations' is unacceptable.[6]

The extent to which refugees and asylum seekers will actually be protected under arrangements reached with Malaysia or Papua New Guinea or Nauru remains unclear. It seems unlikely that either Nauru or Papua New Guinea would agree to do more than act as an accommodation/detention site for asylum seekers, meaning that Australia would have to resettle recognized refugees at the end of the day. In other words, it is possible that asylum seekers will again be subjected to the risks of inferior refugee status determination, hampered by inadequate access to lawyers and judicial review, and prolonged, indeterminate and arbitrary detention.

In the case of Malaysia, the available evidence is that refugees and asylum seekers are not protected.[7] In the face of this evidence, Australia is attempting to leverage refugee protection through governmental assurances that will presumably be implemented through a Memorandum of Understanding between Australia and Malaysia, and accompanied by a declaration of Malaysia as a safe third country under s 198A of the *Migration Act*.

Given the experiences with the Pacific Solution, it would appear that neither an MOU nor s198A offer sufficient protection to refugees and asylum seekers. Australia's practice is that an MOU is *not* a binding instrument. Australia uses MOUs when it wishes to *avoid* legal obligations. Moreover, the MOU between Malaysia and Papua New Guinea may not be made available to the Australian public, at least through formal channels such as the treaty data base maintained by the Department of Foreign Affairs and Trade. There is a complete lack of transparency.

There will be no oversight by an international judiciary, either. The situation is completely unlike the situation in Europe where the Dublin II Regulation[8] permits the return of unauthorized arrivals in one EU country to the first EU country that they entered. In the European context, all countries concerned are party to the Refugee Convention as well as the European Convention on Human Rights, meaning that there are (at least in theory) existing frameworks for refugee protection. There are also two supra-national judicial organs that may scrutinize whether asylum seekers are protected – the Court of Justice of the European Union, and the European Court of Human Rights. Recently, in a landmark decision, *M.S.S. v. Belgium and Greece*, [9] the

[6] *Amuur v France*, 22 European Court of Human Rights at 533, [48] (1996).

[7] See for example, Amnesty International, 'Situation dire for Refugees in Malaysia', 4 September 2009, http://www.amnesty.org.au/refugees/comments/21648/

[8] See Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national, OJ L 50, 25/2/03, p. 1 – 10.

[9] *M.S.S. v Belgium and Greece* (Appl. No 30696/09) ECtHR, 21 January 2011. This case had been eagerly awaited given the referral of two cases concerning the Dublin arrangements, to the Court of Justice of the European Union. Meanwhile,

European Court of Human Rights held that Belgium's return, under the Dublin II regulation, of an asylum seeker to Greece, with its inadequate refugee status determination and risk of *refoulement*, as well as detention and degrading living conditions for asylum seekers, entailed the violation, by Belgium, as well as Greece, of Article 3 of the European Convention on Human Rights. This effectively stopped all transfers to Greece.

In the case of Malaysia, which has not acceded to the Refugee Convention and Protocol and which apparently will continue to treat the other 90,000 asylum seekers in Malaysia in exactly the same manner as is presently the case, the only monitoring available will be from two international organizations. The first would be the UNHCR, which I do not think is sufficiently well-resourced for the task and is in any event operating only with the acquiescence of Malaysia. The second would be the International Organization for Migration, which is not a protection agency.

In addition, the government seriously appears to be contemplating the separation of families as highlighted by the recent initiation of a High Court challenge, in spite of the principle of family unity for refugees and obligations concerning family life in the International Covenant on Civil and Political Rights (articles 17 and 23) and the Convention on the Rights of the Child (Article 3 concerning best interests, and Articles 9, 10, 16, 20 and 22). Decisions separating families in this way are *not permitted* under the Dublin II regulation, a fact which confirms that the animating force behind the Malaysia plan is not refugee protection.

Fundamentally, the Malaysia plan is not about protection, but deterrence. It aims to use 800 people, arbitrarily selected, in an experiment to see whether boat arrivals to Australia will slow down or stop. This is not consistent with the ethos of human rights which is that human beings are an end in themselves, not a means to an end. If the experiment is successful in its aim of deterring boat arrivals in Australia, one of two things may occur. Either asylum seekers will stay in precarious situations in countries of first asylum that are not party to the Refugee Convention, have no domestic legal framework for refugee protection, and do not respect refugees' rights, including the cardinal norm of *non-refoulement*; or the people smugglers will temporarily change their itineraries and any disasters (lorries full of suffocated asylum seekers, for example) will occur elsewhere. It is questionable whether the 'swap' element of the Malaysia plan will save lives or secure refugee protection. The element involving more resettlement, will certainly do so, however, and I commend the government for this aspect of the negotiations with Malaysia.

I therefore fully support the amendments proposed by the current Bill which seek to repeal the provisions that excise certain Australian territories from the Migration zone and all the provisions that attend the excision. The provisions relating to the excision have resulted in the diminution of protection for refugees and asylum seekers. They have resulted in refugees being left in limbo, in an effort to prevent people from seeking our protection. This is not what the Refugee Convention is about. The Refugee Convention is concerned with giving refugees *status* and *extending* the scope of protection for refugees.

In order to ensure that asylum seekers are not summarily removed from Australia, however, I think that the Bill should seek to repeal s7A of the *Migration Act* which refers to an executive power to eject persons from Australia, and s245F(8) also needs to be amended so as to specify that any ship which is detained must be brought to a place within Australia, not another country. I am concerned that these two provisions were either introduced or take the form they now have as a result of the 2001 amendments underpinning the Pacific Solution and if they are not repealed, interdiction of ships may occur, thus circumventing repeal of the provisions relating to excision.[10]

3. Amendments restoring fair process and procedural fairness

As I understand the introduction of the various provisions reducing access to judicial review, the rationale is that people desperate to stay in Australia will use any means, including all avenues of appeal. However,

---

the interdiction and transfer of asylum seekers to states that are not party to the European Convention on Human Rights has been challenged in the case of *Hirsi and Others v Italy* (Appl. No 27765/09) ECtHR.

[10] For a full analysis of the legislative amendments underpinning the Pacific Solution, please see Penelope Mathew, 'Australian Refugee Protection in the Wake of the Tampa' 96 *American Journal of International Law* 661 (2002).

judicial review is a vital check on bad decision-making as well as an incentive for good decision-making. It helps to ensure that people are not desperate to appeal because they have a well-founded fear of persecution that has not been recognized by decision-makers at the lower levels. I therefore strongly support Part 4 of the Bill.

Yours sincerely,

Penelope Mathew
Freilich Foundation professor
The Australian National University