REFUGEES: THE TAMPA CASE

By Julian Burnside

All great truths begin as blasphemies.
George Bernard Shaw

Abstract

The Australian government recently decided to adopt a tougher stance in relation to refugees who arrive here informally. In adopting that stance, the government has exposed Australia to international censure. It has put us in breach of our obligations under international conventions, and it has betrayed a deeply unattractive element in the Australian character. It did this for electoral advantage, at a time when Australia receives a minimal number of refugees, and treats appallingly those who arrive here.

The government's handling of the Tampa "crisis" was a triumph of electoral cynicism over humanitarian need. It exposed the difficulty Australians have in acknowledging the conflict of need and advantage. The refugee problem involves a choice between minor self-sacrifice and major betrayal of humanitarian standards.

The Problem

There are, broadly speaking, two sorts of people who have come to Australia seeking to live here. First, there are those who choose to move here for reasons of personal or domestic convenience, or for economic advancement. And there are those who leave their country of origin because to stay there would involve the risk of persecution, torture or death on account of their political views, religious beliefs, ethnic origins, or the various other less common reasons which provoke dominant groups to seek the destruction of minorities.

Australia, like most countries, regulates the entry of the first group. There are sound social, economic and demographic reasons why this sort of voluntary migration should be regulated.

We also, unlike many other countries, regulate the arrival of the second group. The arrival of the second group involves the same social, economic and demographic considerations as the first group. But their claim to asylum introduces an additional dimension to the problem.

The UNHCR estimates that there are 22 million refugees in the world at present. Of that number, about 8 million are displaced but remain within their country of origin. Of the balance, most are in camps established near land borders with their country of origin. The number of refugees and asylum seekers who cross the seas

to other countries is small: a little over 1 million per year. Of that number, a tiny percentage make their way to Australia.

Looking at the picture globally, the majority of refugees are to be found in Asia, Africa and Europe: together, those continents house 20 million of the world's refugees . North America houses 1 million. Australia and New Zealand together hold 76,000.

About 90% of people from Afghanistan who seek asylum in Australia are found to have genuine claims for asylum.

Given Australia's physical size and relative wealth, the arrival here of a few thousand people per year desperately fleeing persecution, seems a minor issue - a charitable gesture as obvious and painless as dropping a dollar in a charity collection tin.

We have reduced our rate of refugee intake from 25,000 per year to around 10,000 per year in a period when the number of refugees and displaced people in the world has grown substantially and our population has increased by almost 3 million.

The crucial, if obvious, point about asylum seekers is that those who are genuine - between 40% and 90% of them depending on country of origin - have a special claim on our hospitality because of the consequences to them if they do not leave their home country.

The Response

The Migration Act makes provision for asylum seekers. If a person without a visa is in Australian territorial waters and seeking to land, migration officers must take them into "immigration detention", and bring them into the "migration zone". Broadly speaking, the migration zone is any place on shore, or adjacent to a port. (Since the Tampa "crisis" parts of Australia have been excised from the migration zone, notably Christmas Island and Ashmore Reef).

A person in these circumstances has a limited time in which to apply for a protection visa. If they are refused a protection visa, or if they do not apply for one, or if they ask to leave Australia, then they are removed from the country.

In practice, these people are held in custody for years as their claims to asylum are checked and assessed. Because they are kept out of public view, and because they do not vote, they are invisible to most Australians and irrelevant to most politicians.

It is a curious thing then that the Prime Minister decided to single out one group of these people and make an example of them.

The arrival of the Tampa

On 26 August 2001, a leaky boat carrying about 450 asylum seekers, mostly from Afghanistan, began to sink. It was found by the MV Tampa. The Captain, Arne Rinnan, fulfilled his duty as a mariner and picked them up. He planned to take them back to Indonesia where they had embarked on their ill-fated voyage of despair. They protested. A small group of them threatened suicide if they were not taken to Christmas Island. The Captain saw that many of the asylum seekers were sick, and considered it too risky to return to Indonesia. The Tampa was 246 miles from the nearest Indonesian port; it was 75 miles from Christmas Island. It headed for Christmas Island. Captain Rinnan radioed for medical help, but none was given. He entered Australian territorial waters. Four miles off Christmas Island he was ordered to stop.

The Cabinet it seems had decided to prevent the asylum seekers reaching Australian soil. This odd decision has never been explained, except with the rhetoric of "sending a clear message to people smugglers and queue jumpers that Australia is not a soft touch".

Plainly, the Government understood that (with an election due shortly) a show of toughness against helpless refugees would be electorally popular amongst the large number of Australians who had responded positively to aspects of Pauline Hanson's unattractive platform.

Howard had previously shown his skill in assessing and harnessing ugly populism. In 1997 he had used polls to assess community attitudes to the Maritime Union of Australia, and had set about demonising the Union ahead of the mass sacking by Patrick Stevedores.

One of the things which caused Howard and Reith to lose support during the waterfront dispute was the powerful imagery of attack dogs and security forces in balaclavas which hit the newspapers and the television screens on the 8th April, 1998.

Howard was determined that, this time, the public would not get images of the people whose misery he would exploit for cheap electoral advantage. He ordered that the port of Christmas Island be closed, to ensure that no boats could approach the Tampa. The SAS took control of the ship. The Captain was allowed only minimal contact with the outside world. The press were not allowed anywhere near the ship. Despite repeated requests from lawyers and others, no Australian

was allowed to speak to any of the refugees. The physical circumstances meant that no images of individual refugees were available. At best, film footage showed distant images of tiny figures under an awning on the deck of the ship.

By the same technique, the stories of the refugees were suppressed. By preventing the press from having any access to the refugees, the Government was able to advance its cynical objectives with dishonest rhetoric, wholly unimpeded by facts. Although the misery of the refugees' situation was obvious enough none of them could be seen as human beings. None of them could tell their stories. Howard's crucial aim was achieved: the refugees were not seen publicly as individual people for whom Australian citizens could have human sympathy.

The importance of that aspect of the government's strategy was made clear on 23 October. On that day, Australia learned that, a few days earlier, a boat had set sail from Indonesia, bound for Australia. It carried over 500 asylum seekers. It sank in mid-ocean, and 353 were drowned. The survivors told the story, in harrowing detail. It was front-page news for days: and the news was dominated by tragic images of individuals and their stories of grief and loss. Suddenly, the asylum seekers really were human beings who called on our human sympathy.

If similar images had been seen during the Tampa crisis, the public response would have been quite different.

The litigation

John Manetta has great human sympathy and a sparkling legal imagination. He was deeply troubled by the stand-off at Christmas Island as it continued day after day. He researched the provisions of the Migration Act, and came to the view that if the army boarded a ship in these circumstances, it was obliged to bring the refugees to shore.

The Victorian Council for Civil Liberties brought an action seeking to compel the Government to perform its duty under the Migration Act and bring the asylum seekers to the migration zone where their applications for asylum could be processed. It also sought habeas corpus in aid of that application.

A solicitor, Eric Vardalis, also brought an application which was heard together with Liberty Victoria's. He was seeking to offer the refugees pro bono legal help in seeking asylum. Several provisions of the Migration Act entitle applicants to the benefit of legal advice. He sought to give effect to that right.

Liberty Victoria's case

Our argument was straight-forward:

Detention

MV Tampa was in Australian territorial waters

It was carrying 460 asylum seekers

They were picked up at sea on or about 26 August

Members of the Australian Defence Force (the SAS) boarded the ship on about 30 August, whilst it was within Australian territorial waters

The asylum seekers were being held on the ship. They were not allowed to leave.

People on Christmas Island were not allowed to launch their boats, and were therefore unable to travel out to the ship

No boat may approach the ship without permission of the SAS

The asylum seekers were not able to communicate with lawyers in Australia

All attempts by Australian lawyers to contact the asylum seekers had failed

Rights

Section 245F (1) of the Migration Act gives an officer power to board a foreign ship that is "outside the territorial sea of a foreign country". An officer, for the purpose of the section, includes a member of the Australian Defence Force (s. 245F (18)(b)). (It also includes the classes of persons identified in the definition of officer in s.5 of the Migration Act).

If an officer boards a ship under s. 245F, he may also:

Search and examine goods: s. 245F (3)(b);

Require persons to answer questions: s. 245F (3)(d);

Detain the ship: s. 245F (8);

An officer who boards a ship may also "detain any person who is found on the ship and bring the person to the migration zone": s. 245F (9).

There is no power to detain the person without bringing them to the migration zone. This is so as a matter of construction. If there is any room for ambiguity about the proper construction of s. 245F (9), it should be resolved so as to conform

to Australia's obligations as a signatory to the Refugees Convention . Article 16 provides that refugees should have free access to the courts. Article 33 prohibits expulsion or return of a refugee in any manner to territories where his life or freedom would be threatened on account of race, religion etc.

If an officer finds an unlawful non-citizen in the migration zone (or in Australia but outside the migration zone and seeking to enter it) the officer must detain the person: s. 189. The person is then, by definition, in immigration detention: s. 5 definition of immigration detention.

An officer may prevent from leaving a vessel anyone the officer reasonably suspects of being an unlawful non-citizen: s. 249(1); or anyone who the officer reasonably suspects of seeking to enter the migration zone and who would be an unlawful non-citizen on entry into the migration zone: s. 249(1AA).

A person who is prevented from leaving a vessel by which they arrived in Australia is in immigration detention: s. 5 definition of immigration detention.

As soon as reasonably practicable after an officer detains a person, he must inform the person of their rights under s. 195 (right to apply for a visa) and the provisions of s. 196 (must be held in immigration detention pending removal, deportation or grant of a visa).

Where a person applies for a visa, the Minister must consider it: s. 47.

Custody

The refugees were in the custody of the Respondents or some of them. Their freedom was subject to restrictions not shared by the public generally.

Their custody on the ship, without being brought to the migration zone was unlawful because of s.245F (9).

Unlawful custody is sufficient to justify a grant of habeas corpus.

The Government's argument

The Government's stance in the litigation was profoundly cynical. It denied that the refugees were detained, and it denied that the Migration Act powers had been invoked. Rather, it said that the refugees (it insisted on calling them "rescuees") could go anywhere in the world other than Australia. It said that the Government had executive power to repel people from its borders, as a necessary facet of national sovereignty. This was a police action, not a migration issue it argued.

Meanwhile, it refused point blank to allow us any contact with the people whose rights we were seeking to protect. On Friday night, when the matter first went to Court, and again on Saturday morning we asked in open Court to be given access to a spokesperson for the refugees. The Commonwealth refused.

The Government's Nauru solution was announced to the refugees on Saturday afternoon. When cross-examined on Sunday, the head of the Department of Immigration and Multicultural Affairs was unaware whether the refugees had even been told of the existence of the litigation which was being conducted for their benefit.

The evidence of the head of DIMA also made it clear that the Government had consciously sidestepped DIMA in order to deal with the manufactured crisis outside the framework of the Migration Act.

Judgment

North J. heard the trial of the action on Sunday, 2nd September through to Wednesday, 5th September. He gave judgment on 11th September. He held that the refugees were unlawfully detained and should be brought into the migration zone to be dealt with according to law. He said:

"In my view the evidence of the Respondents' actions in the week following 26th August demonstrate that they were committed to retaining control of the fate of the rescuees in all respects. The Respondents directed where the MV Tampa was allowed to go and not to go. They procured the closing of the harbour so that the rescuees would be isolated. They did not allow communication with the rescuees. They did not consult with them about the arrangements being made for their physical relocation or future plans. After the arrangements were made the fact was announced to them, apparently not in their native language, but no effort was made to determine whether the rescuees desired to accept the arrangements. The Respondents took to themselves the complete control over the bodies and destinies of the rescuees. The extent of the control is underscored by the fact that when the arrangements were made with Nauru, there had been no decision as to who was to process the asylum applications there or under what legal regime they were to be processed. Where complete control over people and their destiny is exercised by others it cannot be said that the opportunity offered by those others is a reasonable escape from the custody in which they were held. The custody simply continues in the form chosen by those detaining the people restrained."

In the result, his Honour ordered that the refugees be brought to the Australian mainland to be processed in accordance with the Migration Act.

The Appeal

The Commonwealth appealed. The appeal was heard two days later, on 13th September.

In the appeal, the Commonwealth Government developed an argument based on the prerogative of the Crown. It had not formed a noticeable part of the Commonwealth's argument before North J.

The argument was that the inherent powers of any sovereign nation include a power to determine who enters that nation. The power is part of the prerogative of the Crown, and is exercisable by the executive. It may be exercised by the executive regardless of the provisions of the Migration Act.

The counter-argument is this. Parliament may legislate to grant powers to the executive, including powers which are already part of the prerogative. Where Parliament does so, and thereby manifests an intention that the prerogative power should be replaced by the statutory power, then the executive cannot exercise the prerogative power except subject to the conditions imposed by the Parliament. In a constitutional monarchy where Parliament is the supreme body, it cannot be any surprise that Parliament chooses to replace unqualified executive power with regulated executive power.

The position facing the executive when the Tampa entered Australian waters was this: it had power to send migration officers to the ship and to take the refugees into immigration detention. It had power to wait until they landed and then take them into immigration detention. In either case, the refugees would be dealt with in accordance with the provisions of the Migration Act. It asserted however a co-existing right to hold the refugees incommunicado and remove them from Australian waters so that they could be delivered to a compliant neighbour regardless of the wishes of the refugees themselves.

In a 2:1 decision given the following week, the Full Court allowed the appeal and the refugees were subsequently bundled onto Nauru where they remain effectively isolated from Australia. Although the asylum seekers had been in Australian territory, and were bound by Australian law including the Migration Act, they were denied the rights and protections offered by the Migration Act.

The Aftermath

The Commonwealth's success on appeal has many ramifications: constitutional and humanitarian.

Let us be clear about what the majority decided: they held that the executive arm of government has a power, independent of any statutory authority, to expel aliens from Australia, and this notwithstanding that Parliament has passed laws which provide for the circumstances in which, and the means by which, the executive may do so. Thus the executive can choose whether it will subject itself to the minimal safeguards imposed by Parliament, or simply to bring out the gunboats.

The idea that the behaviour of the executive arm of government should be regulated by Parliament is not new. In his dissenting judgment, Black CJ quoted from the monumental History Of English Law written by Sir William Holdsworth, in support of the proposition that there is no room in modern constitutional jurisprudence for an executive prerogative to expel aliens without resort to statute:

" the influences which were making for a denial of this prerogative were beginning to be felt in the sixteenth century; and they gathered strength in the seventeenth, eighteenth, and early nineteenth centuries ...During the greater part of the eighteenth century, there appear to be very few instances in which the Crown used its prerogative to exclude or to expel aliens; and when, at the end of the century, it was thought desirable to exclude aliens, statutory powers were got ... These statutes were passed to exclude aliens who, it was thought, might spread in England the ideas of the French Revolution. They were therefore opposed by the new Whigs who sympathized with these ideas. "

Unfortunately, the Australian Whigs apparently do not sympathize sufficiently with asylum seekers to risk electoral disadvantage for the sake of a principle.

The executive government in Australia has vast powers, given by a vast array of statutes and regulations. The idea that, in addition to those powers given by Parliament, they have a range of overlapping, unregulated powers exercisable outside Parliamentary authority, is truly alarming. The more so when we see the hypocrisy and self-delusion with which they are prepared to exercise it.

What the government says; what the government does. The government's attitude to refugees is irretrievably compromised by its own duplicity. It says one thing, but its words are denied by its acts. It proclaims its adherence to international obligation whilst it betrays them in its conduct.

Sovereignty

Let me give an example. Consider the following words, from a ministerial briefing paper posted on the DIMA website. Mr Ruddock was discussing the latest enhancements to the Border Protection legislation:

Mr Ruddock said the laws ensured that Australia's sovereignty to decide who enters its borders, and who gets to stay here, was put beyond question. But this can be done by turning them away without even looking at their claim for asylum.

Keeping them honest

The briefing paper says: "The (new) laws include: Refusal of refugee status for people refusing to prove their identity by destroying their documents en route. "

How can the government know whether a refugee on the Tampa had destroyed their identity documents en route? How can the government know whether anyone destroyed their identity documents if they refuse to allow them into the migration zone for processing. Where exactly does one go in Kabul in order to obtain travel documents? How does a person who is fleeing persecution apply for travel documents from their persecutors?

If an asylum seeker cannot provide evidence of identity, they may ask the Department to help them. That help will only be given if the asylum seeker agrees to pay the cost of gathering the evidence. I leave it to you to calculate the likelihood that an Afghan refugee could meet the cost of such an exercise.

Helping the most in need

The briefing paper says: "By assisting us in our fight to repel the activities of people smugglers, these new laws will enable us to help those who are most in need of help - those people languishing in refugee camps around the world," Mr Ruddock said.

But those most in need of help are very likely among those who take the most desperate steps to get to Australia. On 19 October 2001, 353 asylum seekers drowned at sea after their boat sank. News of it reached Australia a few days later. 421 of them had crowded onto a boat suitable for 100. Indonesian security forces had herded them onto the boat at gunpoint. Were they sufficiently in need?

The government and the opposition made noises of compassion. The government has agreed to take some of the survivors. Apparently it is necessary to drown at sea to demonstrate the required level of need.

The government's stated concern to help those most in need seems more like a concern to help those whose distress is most visible to the public.

The briefing paper says: "These people have often been living in the most deprived of conditions in refugee camps for many years."

Consider the fact that in a recent affidavit an Iranian woman said the had been held in a Pakistani refugee camp for 9 years before coming to Australia. She was horrified at how much worse were the conditions in the Australian detention centre.

Conditions in detention: promises vs. performance

The preamble to the Refugees Convention includes the following statements of principle and aspiration:

``Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms, ..."

The DIMA website contains a document which sets out the standards which must be maintained at detention centres by Australian Correctional Management, a commercial operation, which is paid to run them. Compare the image with the reality:

``(The operating standards) ensure that the needs of detainees are met in a culturally appropriate way, while at the same time providing safe and secure detention. They focus on areas such as dignity, social interaction, safety, security, staff training, health, accommodation, food, religion, education, and individual care needs."

Here is an eye-witness account of Woomera from an Adelaide solicitor: `` two working toilets for 700 people, both leaking, sand on the floor to "mop up" the leaking effluent four working showers, for 700 people, hot water only available after midnight, not allowed to take food from dining room for children or sick adults, no coffee/tea/food between meals, only water, no air conditioning, fly screens, or heating. Temperatures during the day reach 45 degrees, at night it falls below freezing; there are millions of flies, inmates have to queue for meals, medical attention, phones (two for 1300 people) for up to two hours. Persons seeking medical attention (including painkillers for broken leg, raging fever, tonsillitis, etc) each have to queue in the open for up to 1 1/2 hours to obtain their medication in front of the nurse. Nails may only be cut by the nurse, who will do

ONE person per day, women must queue each day for their ration of tampons/disposable nappies, there is no baby food or formula, one woman with a six month old baby who was struggling to maintain breast feeding was advised to feed the baby powdered chicken stock mixed with water (no sterile equipement of course), food is beyond description; many will not eat it..."

The preamble to the International Covenant on Civil and Political Rights provides, in part:

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights, ..."

Here is a portion of an affidavit of an Iraqi woman in a detention centre. The names are anglicised for security:

1. The adults were handcuffed. I asked to have my handcuffs removed so I could hold Robin, my 2-year old son. The guard did so but two other officers came up. One of he officers dragged me by my hair and pushed me against the wall. They searched my body in a humiliating way after pushing Robin into the corner. He continuously screamed and cried. The guard handcuffed me again and tried to legcuff my child. Two other officers prevented him from legcuffing my son.

2. We arrived in Port Hedland late in the afternoon but were given nothing to eat or drink until the following morning at 8.00am. For around 32 hours the children had no food. We were held in a small room with no toilet or water facilities whatsoever. I repeatedly asked to take my child to the toilet but often had to wait for up to an hour before being escorted to the toilet. A child of two cannot wait and I had to allow my son to relieve himself on to a bundle of clothes in the corner of the room. Later I washed these clothes out when I was taken to the toilet on one of the twice daily toilet breaks.

The Declaration of the Rights of the Child says, in part:

``Whereas the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically,

mentally, morally spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. ``

Here is portion of an affidavit sworn by an Iraqi woman. Again, the names are anglicised for their security and, incidentally, to remind you that these events happened in Australia:

1. On a day in August 2000, on or round 5:00 am about 20-25 Centre Emergency Response Team (CERT) staff broke into our rooms and handcuffed me, my son Andrew and my husband James. They dragged Elizabeth off her bed by her shirt, and together with Alice we were driven to Juliet compound. I observed an officer filming us with a video camera. The Jackson family was taken with us and I observed each member of that family was put in a separate cell.

2. I was put in a cell with Elizabeth and Alice. Later, when we were released after 15 days in Juliet Compound, my husband told me that James had been put in a cell with him, but that later he had been in a solitary confinement cell. Billy, our 5 year old son was also put in a solitary confinement cell.

3. During that 15 days in Juliet Compound I begged the guards to open the door so the children could use the toilet which was located outside the cell. For the first two days this request was refused/ignored. The children had to use a plastic bag which I found in the cell as a toilet. I starved myself for two days as a protest before the guards would allow the children to use the toilet.

4. My son, Andrew, later described to me his experience in detention. He said words to the effect of: "I needed to go to the toilet and called the guards. After a few minutes four guards came rushing down the corridor. They broke into my cell wearing CERT gear and armed with blocking cushions. They pushed me back and held me against the wall. One guard held my legs, the other held my hands behind my back. A third guard used his arm to encircle my neck and hold me tightly. I thought I would choke. The fourth guard swore at me. When I answered back, the officer punched me in the face.

5. In November 2000, our family lodged a complaint against the ACM to the Federal Police. The incident was registered but to date there has been no response conveyed to us. Andrew later tried to hang himself.

And here is a portion of an affidavit of an Iranian man. I have anglicised the names to disguise the family:

1. I was detained with my sister and her family in Port Hedland Immigration Detention Centre (IDC) for 17 months.

2. In April 2001, I was granted a Temporary Protection Visa and released into the community. Perth, where I now live is two and a half hours flight from Derby in Western Australia, which is the nearest town to Port Hedland IDC.

3. I am unable to visit my family in detention as only legal representatives of detainees are allowed into Port Hedland.

4. I made an application to the Department of Immigration and Multicultural Affairs requesting permission to visit my family. A spokesperson told me words to the effect of: "The department can arrange for you and your family to meet outside Port Hedland. This meeting will be at your expense."

5. As I am unable to afford to pay the transport costs for myself and my sister's family to attend this meeting, I have not seen my family since my release from Port Hedland.

6. I have spoken on the phone to my sister or other members of her family almost every night since I was released. We are a very close family. In Iran we lived very near to each other and spent a considerable amount of time together. I saw my sister and her family almost every day. I clearly remember how energetic and happy Jessie and Charlotte were in Iran.

7. Since being in detention Charlotte, now 16-years-old, and Jessie, now 12, have changed completely. While I was in Port Hedland with them they became more and more anxious and distressed. They began to lose interest in eating food and had difficulty sleeping. The whole family is living in a room which is 2.8 by 2.5 metres.

8. I have begun to recover from my experience in detention but am very distressed about the situation of my family. I am sorry we ever came to this country to seek protection. We would not have come if we had known we would be treated like this. We would have tried to go to another country which accepts refugees. I thought Australia was a free country. I thought we would be given protection from the persecution we left behind. Now I think it is no better here than where we came from.

Another refugee reports that she was in a refugee camp in Pakistan for 9 years before coming to Australia. She was shocked at how much worse were the conditions in the Australian camp. Little wonder that refugees have sewn their lips together in protest. Little wonder that others have hanged themselves, and others have burned themselves alive. How much worse must it get before Australians begin to feel uncomfortable about the things which are being done in our country, in our name, by our government?

Compulsory detention: international opinion

Quite apart from the fact that conditions in the camps fall short of any acceptable standard, there is the fact that holding refugees in detention is itself a violation of international obligations. The ICCPR provides that:

``Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

The government argued vigorously, and successfully, that the refugees on the Tampa, in Australian territorial waters, were not entitled to habeas corpus.

The inescapable fact is that the government has not honoured its international obligations, and it hides behind a mask of respectability whilst it treats refugees like non-humans.

At 23 March 2000, there were 3,622 people held in immigration detention facilities of whom 27 people were in Perth, 82 in Maribyrnong, 315 in Villawood, 805 in Port Hedland, 1,105 people in Curtin and 1,288 in Woomera. From time to time, people are held in immigration detention in other locations.

It is notable that a disproportionate number are held in the most remote locations. Woomera is about 6 hours drive from Adelaide, in the middle of the desert. Port Hedland is north of Perth: about an 18 hour drive. Curtin is equally remote. These God-forsaken places, in the least hospitable parts of Australia, hold over 80% of asylum seekers.

In a Departmental briefing paper Mr Ruddock said: ``Australia's Migration Act 1958 requires that all non-Australians who are unlawfully in Australia must be detained and that, unless they are granted permission to remain in Australia, they must be removed from Australia as soon as practicable."

``This practice is consistent with the fundamental legal principle, accepted in Australian and international law, that in terms of national sovereignty, the State

determines which non-citizens are admitted or permitted to remain and the conditions under which they may be removed."

A small truth conceals a great lie. It is true that sovereign nations can decide who may enter their territory. But Mr Ruddock conveniently overlooks other international laws and obligations concerning the treatment of refugees.

In May 2000, the Human Rights and Equal Opportunity Commission reported to the government that its detention regime was in breach of international law. The government has ignored the report.

In 2001 the Australian branch of Amnesty International reported as follows: ``International law demands that detention of asylum-seekers normally be avoided, and resorted to only when necessary, and only for specified reasons: To verify identity, To determine elements of a claim, To deal with cases where documents have been destroyed, To protect national security or public order.

``International law attempts to ensure that detention in any given state is not arbitrary, unlawful and is open to judicial review. Australia, however, mandatorily and automatically detains all asylum-seekers who enter the country without proper documentation.

``Amnesty International is concerned that asylum-seekers - and often refugees - should not be detained for longer than necessary under international law. In Australia, however, many remain in detention for months and sometimes years, including women and children and those suffering torture and trauma. Refugees in detention also find it difficult to exercise their right to legal representation - a right which even arrested criminals are allowed."

A very recent report of the central body of Amnesty International reported on Australia in the following terms: ``Human rights advocates called for a Bill of Rights to safeguard the rights provided in international human rights treaties to which Australia is party. Their concerns were echoed by the UN Human Rights Committee (HRC), which monitors implementation of the International Covenant on Civil and Political Rights (ICCPR), and by the UN Committee on Economic, Social and Cultural Rights. They found that treaty rights have no legal status in Australia and cannot be invoked in domestic courts, leaving gaps in Australia's human rights system and impeding the recognition and applicability of treaty provisions."

In May, the Prime Minister failed to participate in public events to recognize past human rights violations against indigenous peoples and indicated his opposition to proposals for reconciliation

Refugees and asylum-seekers

The Minister for Immigration and Multicultural Affairs sought revisions of international refugee standards to deter irregular movements of asylum-seekers. More than 2,940 "boat people", including 500 children, were automatically detained under the Migration Act, which prohibited courts from ordering their release. Hundreds were held in tents and other improvised detention facilities in remote areas. The national Human Rights and Equal Opportunity Commission investigated allegations that guards ill-treated immigrant detainees and neglected medical care. In September the UN Working Group on Arbitrary Detention had to cancel plans to investigate the immigration detention regime, after the government failed to allow it to visit.

The government claims to exercise its powers in accordance with its international obligations. That is a lie. Australia's systematic detention of refugees directly breaches our international obligations. Its hostile response to such groups as the Tampa refugees is a betrayal of our commitment to the human dignity of refugees.

The government, armed with the largest powers imaginable, turned the full force of those powers on the weakest and most vulnerable people on earth. It did so to placate the relaxed and comfortable, the complacent, xenophobic Australian electorate. It did so in order to take a cheap electoral advantage. Such shabby conduct deserves our contempt.

Sharing the burden

The government's stated concern about conditions in the camps sits oddly with its new policies: the policy is directed at preventing refugees from leaving the country of first arrival in order to come to Australia.

The Refugees Convention provides: 1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally."

But new laws include this: No permanent residency for people who leave a safe country and attempt to enter Australia illegally by being transported to Christmas, Cocos, Cartier or Ashmore islands. They can never bring their families to join them, and cannot re-enter Australia if they leave for any reason.

The briefing paper says: ``The Government's approach comprises three major elements:

1. prevention of the problem by minimising the outflows from countries of origin and secondary outflows from countries of first asylum;

2. working with other countries to disrupt people smugglers and intercept their clients en route to their destination, while ensuring that those people in need of refugee protection are identified and assisted as early as is possible; "

The Refugees Convention provides for countries to share equitably the burden of giving refugees a safe place to live. Consider these aspects of the preamble to the Convention:

``Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,

``Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,

``Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner,..."

The Convention thus records the resolve of the community of nations to share equitably the humanitarian imperative of asylum among all nations, and to ensure that all refugees are treated with the dignity which is the right of all humans. By contrast, the passages from Mr Ruddock's briefing paper make it clear that Australia wishes to take advantage of its geography to minimize the risk that anyone will ever be able to obtain refugee status here.

The briefing paper refers to various "initiatives" of the government's new strategy, including: an information campaign, targeted both domestically and overseas, entitled "Pay the People Smuggler and Pay the Price"; introduction of temporary protection visas to reduce the attractiveness of Australia for those seeking to enter illegally and claim asylum; introduction of legislation to exclude those who have access to effective protection elsewhere from Australia's asylum process; "

International covenants require proper access to the court system of the host country. Article 16 of the Refugees Convention provides: ``A refugee shall have free access to the courts of law on the territory of all Contracting States."

The minister says: ``The government has been concerned about people whose claims for protection have been rejected by DIMA and the Refugee Review Tribunal taking their appeals to the courts - often through the Federal, Full Bench

of the Federal and High courts. The new laws aim to stop this. They provide very limited grounds on which an adverse decision can be successfully challenged in the courts. There has been an increasing trend for people who have had an adverse visa decision to join in class actions to delay their departure. These actions clog up the Australian courts and waste taxpayers money. The new laws state that if a person wishes to seek judicial review it must be done as an individual. No class actions are allowed."

This policy either presupposes that refugees' claims are wrong and a waste of the courts' time, or it disregards Australia's obligations under the Refugees Convention.

The present position

We have a total of 76,000 refugees in Australia at present. They are people who have been accepted into the country after months or years of detention. About 4000 "illegals" arrive here by boat each year. By comparison with other countries, the total number of refugees we have accepted is pitifully small. Asia has 8 million; Africa has 8 million; Europe has 5 million; North America has 1 million. We have 76,000.

We have about 4,000 in detention presently seeking to be accepted as refugees. They have committed no crime, unless it be a crime to flee persecution in a pitiable attempt to give their children and themselves a chance of a life worth living. They are not "illegals": they are human beings.

They are being held in gaol. It is cant to call it detention. Their conditions would not be tolerated in a gaol. Their human rights are ignored.

The future

Last year, over 8 million people arrived in Australia from overseas. Most were short-term visitors. 92,000 were migrants who were given permission to stay here permanently. About half of them came from Anglo-Saxon countries. More optimistically, about half were not from Anglo-Saxon countries. The sky did not fall.

In each of the last 2 years, about 4,000 boat people arrived. So they account for about 5% on top of the orthodox migrant intake. Or one refugee per 5000 Australians. They risk death at sea to get here. That risk is all too real, as recent events show. It can be presumed that they were driven by fear and desperation to embark on such a venture. Those who, like the Tampa refugees, come from Afghanistan are unquestionably fleeing one of the most brutal and repressive

regimes in the world. A regime so bad that we are now engaged, together with the USA, in armed attack on Afghanistan.

We have a choice: imprison asylum seekers, in defiance of international law, or let them into the community after initial screening, whilst their claims for asylum are assessed.

There are 4 reasons why we should let them in.

First, because it is our obligation under international law. This is purely a formal reason, but international disgust at our present stance provides an added reason for adhering to our obligations.

Second, because they are human beings. We must treat them decently: for the sake of their humanity, and for the sake of our own humanity. The way we are treating them diminishes us.

Third, because of the long-term problems for our society if we continue to treat them badly. The world is a much smaller place than it used to be. The events of 11 September demonstrate, with horrible clarity, just how small the world is. Indonesia, where millions seek early refuge, is our near neighbour. The refugees fleeing from Iran, Iraq and Afghanistan are our neighbours. We are close to them all. We cannot ignore them by pretending that culture and geography create a safe distance. They do not. Nor does geography obscure our moral obligations.

If we imprison asylum seekers, they will suffer great physical and psychological harm; they will start their new lives in Australia with a legitimate sense of grievance; they will think Australia and Australians heartless. If that is the result, it is our fault. It is utterly predictable. If we imprison them, it stains our conscience and blights our future as a nation.

Finally, because it costs us so little. Suppose we allow them into the community after brief initial screening. And suppose (against all previous experience of new migrants) that not one of them found a job. And suppose we went so far as to give each of them a living allowance to enable them to live with dignity. That small exercise in compassion would cost each Australian 6 cents per week. Six cents a week is a small price for a clear conscience.

Some of them would not be accepted ultimately as refugees. Of that group, some may not surrender themselves to the Department for deportation. If they manage to stay out of the Department's way, it probably means that they are living law-abiding lives. The rest will be accepted as genuine refugees. We will have fulfilled our legal and humanitarian obligations to them, especially the children.

The alternative is to keep on doing what we are presently doing: ignoring humanitarian imperatives; ignoring international law; ignoring international scorn; and scarring a generation of genuine refugees whose claims to stay here are ultimately accepted. We should not leave out of the equation the devastating effect on these people of the way we treated them in their first few years. These people, who had the courage and wit to get themselves here have already shown, by the fact of arriving here, that they have courage and determination. They will be valuable additions to Australian Society. They are a part of our future. We should not break their spirit before we admit them.

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On 19 April 1984, we adopted a new national anthem. The second verse includes the words:

For those who've come across the seas We've boundless plains to share

I think we meant it in 1984. Do we mean it now?