

## NO COMPROMISE, NO QUARTER, NO CONTROLS— NO INTERNATIONAL ASYLUM SYSTEM

### Adrienne Millbank

*Adrienne Millbank responds to an article on asylum-seeker rights in the previous issue of this journal. She argues that the authors are undermining the international asylum system by insisting on open-ended rights for all asylum seekers, irrespective of the merits of their claims.*

Andrew Markus and Jessie Taylor, in ‘No work, no income, no Medicare—the Bridging Visa E regime’,<sup>1</sup> summarise recent advocacy research to draw attention to the plight of asylum seekers in the Australian community on Bridging Visa E (BVE), who may be ‘denied the right to work or to access education, health services or welfare’, and who are ‘therefore dependent on friends, family or non-Government organisations, sometimes for considerable periods’. Asylum seekers without work rights are, mainly, people who have entered the country on visitor visas and lodged a claim for refugee status, but only after being in the country for longer than 45 days. Asylum seekers without work rights or income support are, mainly, people whose claims have been rejected at the initial decision and merits review stages, but who are pursuing their claims through the courts, or appealing to the Minister to use her power to grant a visa to remain in Australia on humanitarian grounds.

Markus and Taylor’s article draws attention to situations of hardship and deprivation among asylum seekers on BVEs that are indeed confronting. This is not how Australia has traditionally done immigration. We have invested massively in settlement programs and assistance to ensure that new settlers, especially humanitarian entrants, are able to participate as soon as possible in mainstream life, including accessing all the services available to the general community.

The attempts of successive governments, over many years, to speed up the processing of asylum claims, to prevent asylum seekers from pursuing failed claims through lengthy court appeals, and to discourage lodgement of weak or late claims, would appear to have failed. The number of asylum seekers in the community without work rights and without welfare entitlements is not known. (As Markus and Taylor note, exact figures have not been available.) It appears however that there could be up to three thousand, and that hundreds are relying for their day-to-day existence on the charity of individuals and philanthropic organisations. That so many people are remaining in Australia for lengthy periods, legally, but without means of support, is concerning. As Markus and Taylor argue, it is a situation that is supportable only because non-Government organisations (NGOs) are ‘stretching the boundaries of their capacities and capabilities’ to meet the daily survival needs of asylum seekers who are ‘denied entitlements’.

Markus and Taylor point to the irony of the situation whereby the NGOs that are the harshest critics of the government’s asylum policy are propping it up, by housing, feeding and providing medical care for hundreds of asylum seekers who would otherwise be left destitute. Markus and Taylor’s article is, however, redolent with irony of another sort: they themselves may be hastening

the demise of the very institution of international asylum that they purport to uphold. Their article epitomises the sort of uncompromising advocacy and criticism of government that is being blamed by refugee experts for not only polarising and closing off the complexity of the asylum debate, but for closing down the asylum system itself.

### **THE ASYLUM DEBATE**

In essence, Western countries' lengthy refugee assessment procedures, with all the safeguards that can be called upon to avoid the possibility of any individual being returned to a situation of persecution or humanitarian risk, have proved unable to cope with asylum seeker inflows since the 1990s. UNHCR statistics show that the majority of these asylum seekers, over 75 per cent, have been found to be neither refugees, under the terms of the 1951 refugee convention, nor people in need of humanitarian protection.<sup>2</sup> However, most have stayed in the countries in which they lodged their claims.

If people found not to need protection do not leave, then refugee assessment processes are pointless. If the asylum system is mainly used by people with weak or fraudulent claims in order to remain in more wealthy countries, it will have little credibility with the general public.<sup>3</sup>

Asylum seeker inflows are the antithesis of the sort of managed migration and humanitarian intakes that Australian and other Western governments are pursuing, as in the national interest, and as acceptable to their established populations. Advocates protest against any government measure to curtail asylum seekers' 'rights'. However, when advocates and courts push these assumed 'rights' to the limit, they make it extremely difficult and expensive, if not impossible, for

governments to process asylum seekers efficiently, in ways that their broader populations find credible. They make it particularly difficult, if not impossible, for governments to withdraw welfare payments or detain or deport those asylum seekers whose claims fail.

In a gesture in their article towards 'balance', Markus and Taylor acknowledge the Australian government's perspective: processing asylum seekers is difficult and costly; the government cannot allow its responsibilities to be abrogated by self-selecting refugees. They offer no suggestions, however, as to how the national-interest responsibilities of the Australian (or any other) government might be reconciled or balanced against the interests of asylum seekers. Nor do they offer any suggestions as to how the interests of asylum seekers in Western countries might be reconciled or balanced against the interests of refugees in Third World camps, waiting to be able to return to their homes or to be resettled elsewhere. Indeed, Markus and Taylor make it clear that they see it as their job simply to provide expression for what some commentators call the 'conspicuous compassion' of advocates—and to suggest that the assumptions informing asylum policy in this country are false and immoral. Their purpose is to provide voice to the claims of support and advocacy groups that 'an injustice of great magnitude' has been perpetrated in Australia, that a regime is in place 'which should never have been tolerated in a prosperous, moral, democratic society'.

### **Bridging visas**

Markus and Taylor see in Australia's bridging visa system evidence of a manipulative and obfuscatory government and bureaucracy pursuing devious and unspeakable ends. Such a situation, they advise readers, existed in the dying days

of the White Australia policy. A more reasonable—and more temperate—analysis would have started with recognition of the particular problems that a country of immigration like Australia, with its highly developed entry and settlement programs, has in reconciling the demands of an increasingly dysfunctional international asylum system with its immigration and humanitarian programs.

Australia's bridging visa system was introduced during the period of immigration law reform of 1989–1992, when the rules under which people could enter and stay were codified and simplified. A universal visa system was introduced, with conditions and entitlements attached to each visa, depending on the purpose and duration of stay. The purpose of bridging visas is to allow people to stay 'lawfully' in Australia, after their 'substantive' visas have expired, while they organise their departure, or while their applications for a new or different substantive visa are being processed. The purpose of bridging visas is not to confer rights and entitlements. Bridging visas come with a declining order of entitlements (depending on the original substantive visa and the situation of the applicant) from A, with full work rights, to F, which enables the release from detention of 'unlawful non-citizens' able to assist with criminal investigations.

A basic principle governing the issuing of bridging visas has been that they should not, in and of themselves, confer any benefits—such as work rights and rights to Medicare and welfare payments. Most asylum seekers enter the country on visas that do not have work rights. The majority of asylum seekers on BVEs have been assessed as not being in need of protection. Managed migration is not compatible with the provision of open-ended access to benefits for people

who do not qualify for a visa. If asylum seekers are provided with a full set of social benefits, it will be difficult to persuade them to leave should their applications fail.

Markus and Taylor, in their exercise in advocacy, provide long listings of 'basic entitlements' that are 'denied' to asylum seekers on BVEs. These include: the right to paid work; to Centrelink (unemployment or disability or special benefits); to Medicare; to subsidised access to tertiary education; to settlement services, including the federally-funded English language program and interpreting and translating services; and to government housing and 'related assistance'. Markus and Taylor do not say why they believe it is reasonable to expect that these rights and benefits should be made available to a person who enters the country as a visitor or tourist just because they lodge an application for a protection visa.

### **The 45-day rule**

To advocates like Markus and Taylor, the 45-day rule, whereby asylum seekers who do not apply for refugee status within 45 days after arriving in Australia are denied work rights, is unacceptable. Asylum seekers keen to obtain employment might be caught out because migration agents 'fail to lodge an application on time', or because they have 'insufficient information', or because they have language difficulties and are 'unable to access representation'.

Markus and Taylor would have been more astute to argue for the preservation of Australia's 45-day rule, on the grounds that it is among the least-harsh of the 'anti-abuse' measures that have been adopted by Western governments over the last decade. And because abuse is threatening the survival of the international asylum system.

Abuse occurs when people apply for protection visas not because they fear persecution, but because they seek what the visa offers. The 45-day rule was introduced in 1997, when visitors from countries that are not refugee-producing, such as Fiji and the Philippines, were applying for ‘the \$30 visa’ (that is, a protection visa), in order to extend their stay in Australia and to obtain work rights and access to Medicare. And migration agents were offering potential clients, for a fee of \$1,000, a three-year stay in Australia with work rights.

In the UK, asylum seekers are denied work rights (for at least 12 months) and, since 2003, the government has also sought to deny them access to welfare support if they fail to lodge their claim for refugee status within a few days of entry. Late or ‘defensive’ claims (lodged to prevent removal after people are found to have overstayed their visa or to be working illegally), along with claims of nationals from long lists of countries deemed ‘safe’, are dealt with summarily in the UK and other European countries, and in the USA. Such claimants may be detained and their processing ‘fast-tracked’ towards removal, often with only ‘non-suspensive’ appeal rights (that is, appeal rights that can only be exercised from overseas).

### **THE RHETORIC OF CRITIQUE**

The claims and demands of the advocates summarised by Markus and Taylor are exaggerated, relentless and absolute. Asylum seekers in Australia on BVEs are ‘deprived’ of long lists of ‘fundamental rights’. The 45-day rule should be abolished because the assumption that this allows ample time to lodge applications is false. It is not reasonable to expect sympathisers who undertake to support asylum seekers let out of detention to pay their health care costs. While asylum seekers with no means of support can avoid desti-

tution and receive medical attention by going into, or staying in, detention, it is not reasonable to expect them to do this because life in closed institutions imposes even greater psychological costs than a life of destitution. The government is placing asylum seekers in a position of ‘enforced poverty’, ‘without entitlements’, and using their suffering to deter other asylum seekers from coming to Australia.

Markus and Taylor rail against the complexity and opacity of the BVE regime and the temporary protection visa regime (whereby ‘illegally’ arrived asylum seekers, that is boat people, are given only temporary visas if found to be in need of protection). They rail against the non-compellable and discretionary nature of the Minister’s ultimate ‘national interest’ power to grant visas on humanitarian grounds. They accuse the immigration department of ‘deliberate obfuscation’. The BVE regime, they claim, fails to ‘facilitate a dignified transition into the Australian community’. Even if a clear deterrent effect could be demonstrated, it is unjustified. The government, they argue, should welcome asylum seekers as economic migrants.

As noted above, refugee experts are warning that such exaggerated and unreasonable claims and demands may be counter-productive. Some of their advice and observations are summarised below.

### **THE EXPERTS AND THE ADVOCATES**

James Hathaway<sup>4</sup>

- International refugee law, as time goes by, serves fewer and fewer people, less and less well.
- Refugee law has fallen out of favour with governments. This is not because of any real belief that the human dignity or refugees should be infringed in the interests of operational efficiency. Rather, there is an overriding sentiment

that there is a lack of balance in the mechanisms of the refugee regime which results in little account being taken of the legitimate interests of governments.

- There is a need to respect the careful compromise between the duty of protection and the continued sovereignty of states that is at the heart of the refugee convention. The refugee convention does not grant all rights immediately and absolutely. To the contrary, it strikes a reasonable balance between meeting the needs of refugees and the legitimate concerns of state parties. Claiming refugee status does not give asylum seekers the right to work or to access public relief systems. Such rights only come with the granting of refugee status.

Matthew Gibney<sup>5</sup>

- Non-entrée policies are the result of Western states escaping constraints on the treatment of asylum seekers imposed by courts, NGOs and advocates pushing a ‘culture of rights’. The exportation of border controls is thus a kind of backhanded compliment to those domestic actors who have challenged the restrictionist direction of policies towards asylum seekers.
- Public discussion of asylum and migration often degenerates into prejudice and posturing. In a world characterised by injustices and huge inequalities, the refugee has become lost from sight. Advocates as well as governments need to be aware of their hypocrisies and the true costs of the current course of action.

Alexander Casella<sup>6</sup>

- Asylum without management leads to abuse, which in turn leads to erosion of the principle of asylum. Thus the preservation of the principle requires

that it be managed.

- The problem is compounded by the atmosphere of confrontation of advocacy groups who have political agendas, people who are using the asylum theme to challenge the system.

Christina Boswell<sup>7</sup>

- The ‘liberal universalist’ ethic that underpins notions of refugee law appears to be practically unworkable. A humane refugee and humanitarian policy is only possible if it is politically sustainable.
- The lack of a coherent basis for their position makes it difficult for advocates of refugee rights to adopt consistent and well-reasoned positions on what policies are acceptable and what are not. Advocates need to be more resourceful in mobilising community support. Values that are located in the tradition of the country will mobilise more support.

Michael Teitelbaum<sup>8</sup>

- In the long term, the only humane and sustainable refugee policy is one that reflects the country’s national interest, including its humanitarian values.
- Advocates react to perceived abuses arising from current laws and practices, without offering effective approaches as alternatives. They may be encouraging a backlash against the very rights and liberties they are seeking to defend. They need to focus on protecting the most basic of liberties, while enabling the nation to exercise its sovereign right to enforce its migration laws effectively.
- Realistically, if every right of legal due process is guaranteed to every asylum seeker, enforceable immigration laws cannot exist in a practical sense. Support for an absolutist position implies an element of unfairness—the

full panoply of legal rights is guaranteed to people who lodge claims for asylum in Western countries, but is not given to all refugees.

Alexander Betts<sup>9</sup>

- Most authors working on asylum issues agree that the political sustainability of the asylum regime, in the real world, depends on its acceptance by the citizens of the state.
- The specificity of refugee entitlements is too often ignored by scholars and advocates. Rights do not accrue to persons under the 1951 Refugee Convention while they are waiting for determination of their status. The presence of asylum seekers in host states is purely provisional. Rights that are oriented towards integration, such as the right to work and to access public assistance programs, are reserved for those found to be refugees.

Helen O’Nions<sup>10</sup>

- The current policy is failing to protect those most at risk. It is now almost impossible for those fleeing persecution to find safe and legal means of travel.
- The reasons for the increasing restrictions in the West cannot simply be attributed to governments satisfying the needs of xenophobic electorates.
- An honest debate is urgently needed and a solution will only be effective

where the interests of both the refugee and the state can be adequately protected.

## CONCLUSION

The experts cited above, and many other researchers and commentators on asylum issues, warn that the international asylum system is in crisis. They point out that advocates who make exaggerated accusations and whose demands of government are unrealistic and politically impossible are only adding to this crisis. In the interest of preserving the institution of international asylum, they argue, ‘scholars and advocates’ need to move beyond responsibility-free declarations of moral outrage.

Australia’s bridging visa regime has been under review for the last six months. Markus and Taylor could, arguably, have been more usefully employed doing the sort of detailed analysis that might convince the government that it can achieve its policy goals through less harsh rules. Or proposing options that represent reasonable compromises and trade-offs. For example, in exchange for limited work or welfare rights for asylum seekers whose claims have been rejected following merits review, support groups might undertake to assist such asylum seekers to accept that they will probably leave the country, and to cooperate with efforts to organise their departure.

## References

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- <sup>2</sup> United Nations High Commissioner for Refugees (UNHCR) asylum statistics are on its website, at <<http://www.unhcr.org/cgi-bin/texis/vtx/home>>
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- <sup>5</sup> Lecturer in Forced Migration, Refugee Studies Centre, Oxford University. See 'Beyond the bounds of responsibility: Western states and measures to prevent the arrival of refugees', in *Global Migration Perspectives*, no. 22, Global Commission on International Migration, Geneva, 2005
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