

BOOK REVIEW*

Future Seekers: Refugees and the Law in Australia

by MARY CROCK and BEN SAUL

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The authors of this volume have impeccable academic credentials. But academic freedoms have been slowly whittled away over the past decade, and some academics are reluctant to voice strong opinions in areas which intersect with politics or funding. Few subjects are so fraught as refugee policy in Australia today. It is a dangerous subject. This fact might cause a reader to expect a carefully academic treatment. But this initial reaction is tempered by the cover photograph: a lonely, exotic figure retreats from a ramshackle boat on a deserted shore. Is this what academic treatises look like today? A quick look at the contents and early anxiety is dispelled: these authors, despite being academics, have the courage to speak plainly about their chosen subject.

This slim volume brings together some of the essential facts about Australia's current refugee policy. It deals with the causes and consequences of refugee flows; it looks frankly at the ambiguous occupation of people smugglers; it confronts the realities of mandatory detention and it analyses the systematic destruction of the legal rights of asylum seekers worked by successive changes to the *Migration Act 1958* (Cth) ('*Migration Act*').

I began reading the book thinking it would simply be a useful primer for anyone wanting to learn the basics of refugee law, and so it is. But in addition it is repeatedly illuminated by its trenchant observations. For example, in chapter 4, it discusses the changes to the *Migration Act*, passed in a fit of exulted fright, in the aftermath of Tampa and September 11. The authors observe bluntly:

It is not just boat people and people smugglers who have reason to fear the new regime that is now in place. In addition to issues of human rights and the way Australia's politicians abused parliamentary process on 26 September, Australia's cavalier attitude to its international legal obligations could operate to isolate the country at a critical time in history. For example, Australia's stance does little for its relationship with Indonesia.¹

The authors go on to discuss the implications of the Government's anti-refugee legislation for race relations and freedom of speech. It's gutsy stuff.

Discussing the issue of mandatory detention, they again desert the academic's tower and tell it like it is:

* Julian Burnside QC. B Ec, LLB (Monash), Barrister (Vic).

1 Mary Crock and Ben Saul, *Future Seekers: Refugees and the Law in Australia* (2002) 40.

The [detention] facilities are jails. Visitors have to be tagged, scanned and assessed before being allowed in. Even the centre in Sydney's suburban Villawood is surrounded by double cyclone fencing, filled with four-metre high razor wire. In appearance, the remote centres are similar to prisoner-of-war camps.²

They are right, but it is somehow surprising to read it set down so plainly. It is unfortunate that this edition of the book came out too late to mention the opening of the newest detention camp, Baxter at Port Augusta. Baxter is a deeply disappointing marker of the Howard Government's capacity for inhumanity. Intoxicated by the electoral popularity of the Government's deterrence strategies, Minister Ruddock described it as a 'family friendly' detention camp: a staggering concept, and surely a high point in Ruddock's literary inventiveness. Baxter's electric fence was publicly described by a senior Department of Immigration, Multicultural and Indigenous Affairs ('DIMIA') officer as an 'energised fence'. And if DIMIA emulates George Orwell in its linguistic reach, it must have studied Kafka to produce a modern facility where all the doors are electronically operated, almost every space is under constant video surveillance, and friends have been separated into different compounds to restrict the possibilities for ordinary social interaction. Smokers have to ask the guards to light their cigarettes for them, and only one cigarette may be bought at a time. Many of the inmates in Baxter were previously held at the notorious camp in Curtin. All say that Baxter is much worse.

The book also deals with the process by which asylum claims are decided. It sketches the practical difficulties which confront asylum seekers when they arrive here and seek to press their claim. Until late 2001, the *Migration Act* contained a provision to the effect that a decision of the Refugee Review Tribunal ('RRT') could not be overturned by a court merely because it contained an error of law, or because it was so unreasonable that no reasonable person could have made it.

In September 2001, the Government decided the scope for judicial review of RRT decisions should be reduced. It introduced the 'privative clause', a provision which says that a decision of the RRT:

- (a) is final and conclusive; and
- (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
- (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.³

As the authors observe: 'This new legislation is very harsh, but it will be some time before people know exactly how tough it is on asylum seekers'.⁴ In June 2002 the Government reduced the scope for judicial review of the RRT even further: the *Migration Act* now in substance removes the requirement for natural justice in the RRT.

Unfortunately, the authors do not spend any time discussing the distinctive quality of the 'justice' dispensed by the RRT. The RRT members do not have to

2 Ibid 84.

3 *Migration Act 1958* (Cth) s 474(1).

4 Crock and Saul, above n 1, 59.

be lawyers. The *Migration Act* does not impose any qualification requirements. They are appointed for a short term: a maximum of five years, sometimes only 12 to 18 months. They can be reappointed. If their decisions please the government, their chances of reappointment appear to improve. The decisions of the RRT are often a matter of life and death, but applicants are not entitled to be legally represented at RRT hearings, even though they are often not skilled in English. The proceedings are generally inquisitorial, and are frequently characterised by sharp, hostile questioning apparently calculated to destroy the applicant's claim for refugee status.

The Justice Minister, Senator Ellison, recently said (apparently with some pride) that the decisions of the RRT were only overturned in about 6 per cent of cases.⁵ This was apparently put forward as a demonstration of the fairness of its decisions. The real explanation for such a low success rate on appeal is that the decisions of the Tribunal are almost completely immune to correction by a court.

It is also unfortunate that the 'Pacific Solution' gets very limited treatment. The policy of deterrence, which evidently includes the conspicuously harsh treatment of refugees in detention camps, has worked: no boats have made it to Australia since the Tampa episode. Not that they have stopped coming: the Government now intercepts them at sea and takes them, against their will, to inhospitable Pacific Islands. The Pacific Solution has profound legal difficulties at its heart, not least of which is that the detention of the refugees on Nauru and Manus Island contravenes the Constitutions of Nauru⁶ and Papua New Guinea⁷ respectively. The subject deserves more detailed treatment than the book gives it. Future generations will surely wonder what our Government thought it was up to when it suborned its impoverished neighbours in order to spare itself the awkwardness of showing kindness to a tiny handful of helpless, terrified strangers in a time of plenty.

Each chapter of the book is prefaced by a list of 'key points', and each chapter has one or more break-out panels in which are found substantial passages from the Human Rights and Equal Opportunity Commission reports, Amnesty International reports, newspaper articles, and so on. Whilst these are invariably interesting, it makes the book a little uneven in the reading: the mind never settles down to relax with just one style. Each chapter also has one or more cartoon illustrations and, although the cartoons are generally quite good as cartoons go, it would be better (to paraphrase Saki)⁸ if they went.

5 Senator Chris Ellison, Minister for Justice and Customs (Speech delivered at the Criminal Lawyers Association of Australia and New Zealand Eighth International Criminal Law Congress, Melbourne, 3 October 2002). The source for this figure was not provided by the Minister. See, for more detailed statistics, Refugee Review Tribunal, *Monthly Caseload Reports 2002–2003 as at 31 October 2002* (2002) 16, table 'Applications for Judicial Review', <<http://www.rrt.gov.au/RRTSTATS.pdf>> at 27 November 2002.

6 See *Constitution of Nauru* art 5.

7 See *Constitution of Papua New Guinea* s 42.

8 Pen name of Hector Hugh Munro. See generally Saki, *The Short Stories of Saki (HH Munro)* (2002) Julian Burnside — Language, Arts, Law <<http://www.users.bigpond.com/burnside/saki.htm>> at 26 November 2002.

Australia has a mixed record in its treatment of refugees. Moments of hysteria have generally been followed by spells of grumbling tolerance. Two points in our history stand out. In 1938 Australia participated in the Evian Conference called by Franklin Roosevelt to discuss the fate of Jewish refugees. Australia's representative walked out, saying: 'We have no racial problems in Australia and no desire to import any'. A boatload of Jewish refugees was, in fact, turned away from Australia: an early instance of border control in which the larger humanitarian landscape was utterly ignored. In 2001 the Howard Government refused to allow the Tampa to land with its rescued cargo of asylum seekers, most of them fleeing the brutal Taliban. This response runs against the grain of Australia's generosity and compassion. The puzzle is: how has such a heartless, brutal and immoral policy survived? It survives principally because the Government has prevented the truth being known to the broader public. It has done this by lying to the public and the press, and by making it virtually impossible for members of the public or the press to see the detention centres for themselves. It has done it by preventing Australians from going to Nauru to see for themselves that we have turned it into an offshore prison.

This book will help bring some of the truth into the public domain. It should be compulsory reading.