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CONTENTS

GEOFFREY ROBERTSON QC	<i>JUDICIAL INDEPENDENCE: SOME RECENT PROBLEMS</i>	1
JULIAN BURNSIDE QC	<i>BORDERLINE JUSTICE: DIGNITY AND DECENCY OUTSIDE THE MARGINS</i>	36
BRENNA HARDING	<i>SAME-SEX CITIZENRY: THE GROWING PAINS OF A TEENAGE DAUGHTER</i>	55
JEREMY KANE	<i>SISTERGIRL INSIDE: DOUBLY COLONISED, DOUBLY TRAPPED THE DISCRIMINATING DECISION IN SINDEN V STATE OF QLD</i>	63
ANNE SUMMERS AO	<i>HER RIGHTS AT WORK: THE POLITICAL PERSECUTION OF AUSTRALIA'S FIRST FEMALE PRIME MINISTER</i>	93
THE HON MICHAEL KIRBY AC CMG	<i>PRIVACY PROTECTION AND MEDIA IN AUSTRALIA: UNFINISHED BUSINESS</i>	117

BORDERLINE JUSTICE: DIGNITY AND DECENCY OUTSIDE THE MARGINS

JULIAN BURNSIDE AO QC*

Australia's immigration policy makes a mockery of human dignity through its dehumanisation of rightless refugees. This article narrates the story of a voiceless few who risked their lives in leaky vessels to find freedom in a just and decent society. Instead, what they found was years of emotional and dehumanising abuse brought about through mandatory detention. What does this say about the quality of our society? It is argued that though the social foundation is principally just, it can purge individuals of their self-respect and dignity.

CONTENTS

I	INTRODUCTION.....	37
II	MINORITIES AND THE RULE OF LAW.....	37
III	ASYLUM SEEKERS AND HUMAN RIGHTS.....	38
IV	SAVING ROZITA.....	40
V	THE LAST MAN ON MANUS.....	41
VI	WHEN INDIFFERENCE BECOMES CRUELTY.....	43
	<i>A Bird in a Cage</i>	43
	<i>B Locked in Solitary</i>	44
VII	INDEFINITE DETENTION.....	45
VIII	A JUST AND DECENT SOCIETY.....	48
IX	CONCLUSION.....	50

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I INTRODUCTION

The trouble with fighting for human freedom is that one spends most of one's time defending scoundrels. For it is against scoundrels that oppressive laws are first aimed, and oppression must be stopped at the beginning if it is to be stopped at all.¹

A principal drawback of a modern democracy is that it often tends to overlook the interests of those least empowered. Among those most harshly dealt with in Australia are the poor, the marginalised and the asylum seeker. Asylum seekers count among those who remain 'othered' by Australian society and continue to suffer through an inability to exercise their rights and an existence that is dehumanised.

This article narrates the human impact of Australia's immigration policy and tells the powerful stories of a voiceless few. In doing so it highlights the general invisibility of asylum seekers in the eyes of the law, the desperate situations they face and the impact of administrative and media indifference. Unfortunately, the abandoned fates of refugees have become lost in the public discourse of mainstream media.

What is at stake here is not just the persecution of the refugee; it is the jittery social foundation of a country that purports to embrace human dignity, autonomy, decency and self-respect. The way we allow our institutions to treat citizens and non-citizens reflects on the quality of our society and, though principally just, may still be demeaning. To this end, it makes a mockery of the dignity of the men, women and children who risk their lives in leaky vessels to find freedom in what is purported to be a just and decent society.

II MINORITIES AND THE RULE OF LAW

The establishment of the rule of law was the great product of the constitutional struggles in England during the 17th Century. The rule of law requires that all people, including the government, are subject to the law, and that independent judges are the arbiters of law. Majoritarian rule is the central tenet of democracy. Parliament makes laws that

¹ Henry Louis Mencken, Well of Wisdom.com <<http://www.wellofwisdom.com/henry-louis-mencken/0/quotes-author.html>>.

reflect the will of the majority. In principle, the combination of democracy and the rule of law should achieve justice for all. In practice, it is different.

The difference is largely felt by individuals or groups who are powerless or unpopular. Injustices generally stem from one of two sources: firstly, bad laws that operate harshly against minorities but have the support of the majority who vote and whose interests are not harmed by those laws, and secondly, it is often the case that powerless minorities do not have the practical ability to vindicate the rights given to them by law. Access to justice requires access to lawyers. As Lord Darling noted ironically '[l]ike the doors of the Ritz hotel, the courts are open to rich and poor alike'.

The emergence of the two-party system of government has reduced the relevance and influence of individual parliamentarians almost to vanishing point. Government decision-making, in Australia at least, shows an acute concern for the interests of the majority and very little concern for the interests of unpopular or powerless minorities. And the press, which is capable of drawing attention to abuses of power, occasionally falls asleep at the wheel. It has been notoriously indifferent to some important issues in Australia in recent years.

In this bleak setting, public interest litigation is one of the few ways of achieving justice for the weak. It is no accident that litigation *pro bono publico* (for the good of the public) is synonymous with litigation undertaken for no fee; the rich do not need it. The strong never have difficulty achieving justice. Like a Bill of Rights, public interest litigation is generally concerned with the rights of the weak, the oppressed and the unpopular.

III ASYLUM SEEKERS AND HUMAN RIGHTS

Asylum seekers who arrive in Australia without prior permission are immediately detained. By force of the *Migration Act 1958* (Cth) they must remain in detention until they are given a visa or are removed from Australia.² The government and the media refer to them as 'illegals', but the fact is that to come to Australia without authority and seek asylum is not an offence against Australian law. To the contrary, Article 14 of the *Universal Declaration of Human Rights* guarantees to every human being the right to

² *Migration Act 1958* (Cth).

seek asylum in any territory they can reach.³ Those who come to Australia trying to exercise that right are locked up in desert camps or, under the Pacific Solution, in remote islands.⁴

Australia's system of indefinite mandatory detention has been universally criticised by humanitarian organisations both in Australia and overseas.⁵ Australia's scheme of mandatory detention of asylum seekers has been criticised as a violation of Article 9 of the *International Covenant on Civil and Political Rights*.⁶ Mandatory detention has been promoted by the Australian Government as 'border protection', which has proved very popular in the electorate.⁷ Since the time of white settlement, Australians have lived in dread that we will be swamped by uninvited visitors arriving in small boats. Strangely, the Aboriginal and Torres Strait Islander Peoples, who alone should hold such dread, seem untroubled these days by the arrival of boatpeople. This should be put in context given the rhetoric that surrounds it. Every year, 4.5 million people visit Australia, principally for tourism, study or business. Every year about 200,000 people migrate permanently to live in this country. The number of people who arrive in Australia without authority and seek asylum varies, but generally hovers around one or two thousand.⁸ About 90 per cent of boatpeople are found to have proper grounds for refugee status.⁹ If we consider that there were 15,000 unauthorised arrivals last year, this would mean that border control was successful in about 99.5 per cent of cases.¹⁰ To call this a 'failure of border control' looks like a grotesque exaggeration.

³ *Universal Declaration of Human Rights*, opened for signature 10 December 1948, UNGA Res 217 A (III) art 14.

⁴ Janet Phillips, *The 'Pacific Solution' revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island* (4 September 2012) Parliament of Australia.

<http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/PacificSolution#_ftnref6>.

⁵ Janet Phillips and Harriet Spinks, *Immigration detention in Australia* (23 January 2012) Parliament of Australia

<http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/Detention>.

⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁷ Janet Phillips and Harriet Spinks, 'Boat arrivals in Australia since 1976' (Background Note, Parliamentary Library, Parliament of Australia, 2011).

⁸ Janet Phillips, 'Asylum seekers and refugees: what are the facts?' (Background Note, Parliamentary Library, Parliament of Australia, 2011).

⁹ Verity Edwards 'Boat arrivals almost all get visas', *The Australian* (online) 25 February 2011, <<http://www.theaustralian.com.au/news/nation/boat-arrivals-almost-all-get-visas/story-fn7dlx76-1226011619093>>.

¹⁰ When measured against the total number who arrive here each year (4.5 million).

IV SAVING ROZITA

Rozita arrived in Australia from Iran in mid-1999. She was detained, and while detained, she converted to Christianity. She was baptised in August 2000 after the Department of Immigration lifted its ban on baptism in Detention Centres and she began preaching against Islam. An Iranian man (I will call him Hussein) was in the habit of coming to her talks and taking notes. Late in August, Hussein left Australia voluntarily and returned to Iran. It turns out that Hussein was a Basiji informer who had told the Iranian authorities about Rozita's activities in Curtin.¹¹ Her family in Iran contacted her to tell her she was in great danger if she returned to Iran. Preaching against Islam is a serious offence in Iran therefore if Rozita returned she faced the prospect of being stoned to death.

I have seen an official videotape of two women being stoned to death. This is what happens: they are brought out wrapped from head to foot in a winding cloth and placed in holes about three-feet deep. Dirt is shovelled in around them, so that their bodies are buried to waist level. They are then bombarded with medium-sized stones from all sides. They cannot flinch in anticipation because they cannot see; but they do flinch when each rock finds its mark. Soon, blood begins to seep through the shroud; after a few minutes their bodies sag forward and eventually they collapse completely. Their bloodied skulls are visible through the torn material. They are dragged out of the holes and carried away.

A central fact in Rozita's claim for asylum was that Hussein had returned to Iran and informed on her. Five witnesses gave evidence that Hussein had been in the camp at the time, and that he had taken some of Rozita's writings with him when he returned to Iran. No witness contradicted that evidence. Rozita told the Refugee Review Tribunal (hereafter RRT) Hussein's camp number and his boat number. She asked the RRT to check on Hussein to dispel any doubt about this part of her claim.

But the RRT found, as a fact, that Hussein did not exist. The Tribunal member found, as a fact, that Hussein's existence had been fabricated by Rozita and her witnesses in order to fortify her claim for asylum. When the case came to be reviewed in Court, a subpoena to the Department of Immigration produced documents that showed not only that Hussein existed, but that he had been in the camp at the time when Rozita said he had;

¹¹ Curtin Immigration Detention Centre.

and he had left for Iran at the time she said he had. The Tribunal member had not even bothered to ask the Department whether it had a record of Hussein.

That casual indifference would very likely have led to Rozita's death. When the decision came for review in court, the government argued that it should not be overturned because it was legally irrelevant that the decision was factually wrong. It appeared not to trouble the government that if Rozita had been returned to Iran, she would almost certainly be stoned to death. The court overturned the decision on the ground that a failure to make a simple enquiry on a question, literally, of life and death was evidence of bad faith. This meant that Rozita's case was sent back to the RRT to be reheard. Several months later, I received a phone call from Rozita. She had just received a decision from the Tribunal; her claim for asylum was accepted and she was to be released from detention and given a protection visa. Rozita had been held in detention for three years.

V THE LAST MAN ON MANUS ISLAND

Aladdin Sisalem was a stateless Palestinian. He was born in Kuwait on 15 January 1979 to an Egyptian mother and a Palestinian father. Aladdin was holding an Egyptian travel document for Palestinian refugees, but the Egyptian Authority would not allow him to enter Egypt. He also was prevented from entering Palestine.¹² In short, there was nowhere he could be sent. Since 1990 his family had been seeking permission to live in any country in the world that they could get to, but no country would have them because they had no country of their own. Aladdin made his way to Jakarta where, for the next 12 months, he waited while his application for asylum was considered and then rejected. He went to Papua New Guinea where he applied for asylum and, for his troubles, was arrested, imprisoned and beaten up. He bribed a fisherman to give him a ride across to Saibai Island, which was part of Australia and not then excised from the migration zone.

On Saibai Island he surrendered to Australian Federal Police. He was unquestionably in Australian territory and in the migration zone. Aladdin told them his story and stated he had come to Australia to seek asylum. They then took him to the Department of Immigration to be interviewed. He told them he was seeking asylum. They then took him to Thursday Island, another part of Australia that had not yet been excised from the

¹² Palestinians living in Kuwait at the time of the 1991 Gulf War were accused of siding with Saddam Hussein, and subsequently persecuted.

migration zone. He was interviewed again and, again, he told them he was seeking asylum. Eventually they took him to a small aircraft and said 'your claim for asylum will be processed elsewhere'. He was transferred to Manus Island and locked up in the detention centre created under an agreement between Australia and Papua New Guinea, run by International Organisation for Migration, and paid for by Australian taxpayers. Ultimately, he was told that he had no asylum claim in Australia and he had to deal with the Papua New Guinean authorities.

After some months, all the other detainees on Manus Island were taken to Nauru except for Aladdin. He remained there, a solitary prisoner in a jungle island on the equator. An action for mandamus in the Federal Court was issued, seeking an order that he be brought into Australia and have his asylum claim processed according to law. The government's answer amounted to this:

It is true that he entered the migration zone, so he cannot be taken to Nauru, and be protected from the Papua New Guinea authorities who previously beat him up and gaoled him. He has not got an asylum claim in Australia because the only way you can seek asylum is by filling out Form 866, and although he said he wanted to seek asylum, he didn't ask for Form 866 so we did not give him Form 866. Only if he fills out Form 866 does he have a valid application for a protection visa. Therefore the Minister does not have any obligation to consider his claim for a protection visa. And there is no point giving him Form 866 now, because Form 866 can only be validly completed in Australia.¹³

By this Kafkaesque logic, Aladdin was trapped in the mindless, heartless machinery of malevolent government.

Aladdin Sisalem had been alone on Manus Island since July 2003. It was costing the Australian taxpayer about \$23,000 per day to keep him in his solitary torment.¹⁴ The tabloid press got onto it. They published front-page articles showing the luxury you can enjoy for \$23,000 per day in a hotel in Melbourne or Sydney. They were not driven by compassion but by the politics of envy. It worked all the same. Quickly the government's

¹³ Minister for Immigration and Multicultural and Indigenous Affairs (Cth), 'Respondents' Outline of Submissions', Submission in *VUAQ v Minister for Immigration and Multicultural and Indigenous Affairs*, V1011/2003, 2 December 2003.

¹⁴ Anthony Loewenstein, 'Dumped and stateless on Manus Island', *Sydney Morning Herald* (online), 1 April 2004, <<http://www.smh.com.au/articles/2004/04/01/1080544608721.html>>.

treatment of Aladdin made a laughing stock of the Immigration Department. They reached a quiet settlement. Aladdin now lives in Melbourne.

VI WHEN INDIFFERENCE BECOMES CRUELTY

A Bird in a Cage

A family of asylum seekers arrived in Australia from Iran in early 2001. They came as boatpeople. They were members of a religious minority who have been traditionally oppressed, a group regarded as 'unclean' by the religious majority.

The family fled Iran and ended up in Woomera Immigration Reception and Processing Centre (hereafter Woomera). There, over the next 14 months, the condition of the family deteriorated inexorably. Mother and father, and the two daughters were gradually getting worse until the Child and Adolescent Mental Health Service of South Australia became aware of the problem. They sent a psychologist to speak to the family. He wrote a disturbing report in which, among other things, they say of the 11-year-old:

She refuses to engage in self-care activities such as brushing her teeth. She has problems with sleeping; tosses and turns at night; grinds her teeth; suffers from nightmares. She has been scratching herself constantly. She doesn't eat her breakfast and other meals and throws her food in the bin. She is preoccupied constantly with death, saying 'do not bury me here in the camp. Bury me back in Iran with grandmother and grandfather'. She carried a cloth doll, the face of which she had coloured in blue pencil. When asked in the interview if she'd like to draw a picture, she drew a picture of a bird in a cage with tears falling and a padlock on the door. She said she was the bird.¹⁵

After a number of pages to similar effect the report observed 'it is my professional opinion that to delay action on this matter will only result in further harm to this child and her family. The trauma and personal suffering already endured by them has been beyond the capacity of any human being.'¹⁶ The report urged that the family be transferred from the desert camp to a metropolitan camp where the 11-year-old girl could get proper clinical support. No action was taken, and a month later the psychologist wrote another report trenchantly criticising Australasian Correctional Management (hereafter ACM) and the Department of Immigration and Multicultural and

¹⁵ Julian Burnside, 'Australia's Refugee Policy', in Dean Lusher and Nick Haslam, *Yearning to Breathe Free: Seeking Asylum in Australia* (The Federation Press, 2007) 261.

¹⁶ *Ibid.*

Indigenous Affairs (Australia) for failing to transfer the family to a location where they could seek appropriation help.¹⁷

Eventually the family was transferred to Maribyrnong Immigration Detention Centre in suburban Melbourne. However, on a Sunday night in May 2002 when the mother, father and younger sister were out of the room having their dinner, the 11-year-old hanged herself. She did not know how to tie the knot properly, and was still suffocating when the family got back to the room. She and her mother were taken to the emergency ward of the local hospital where she was put into intensive care. Two ACM guards were outside the ICU so that mother and daughter were still, legally, in immigration detention. The lawyer, who had been looking after their refugee application, heard about this and went to the hospital about 9pm. He spoke to one of the guards and said he just wanted to speak to the mother to see if he could do anything to help. He is well known at the detention centre because he is a regular visitor. He asked to see them and was told he could not because 'lawyers' visiting hours are 9am-5pm'.

B Locked In Solitary

Amin and his daughter, Massoumeh, fled religious persecution in Iran. They arrived in Australia in March 2001. Massoumeh was six years old. They were held in Curtin Immigration Detention Centre, in Western Australia, then in Baxter Immigration Reception and Processing Centre, South Australia. On 14 July 2003, three ACM guards entered Amin's room in Baxter and ordered him to strip. He refused for two reasons: firstly, it is deeply humiliating for a Muslim man to be naked in front of others, and secondly, his daughter was in the room. When he refused to strip, the guards beat him, handcuffed him and took him to the 'Management Unit', which is a block of solitary confinement cells.

Officially, solitary confinement is not used in Australia's detention system.¹⁸ The truth is that the Management Unit at Baxter is solitary confinement bordering on total sensory deprivation. A videotape of a Management Unit cell shows a three-and-a-half-square-metre room with a mattress on the floor. There is no furniture and the walls are bare. A

¹⁷ Ibid.

¹⁸ Jenny Hoskin, 'Treatment of Detainees' (Media Release, 17 July 2002) <http://www.immi.gov.au/media/letters/letters02/ajn_1707.htm>.

doorway, with no door, leads into a tiny bathroom and the cell has no view. The detainee has nothing to read, no writing materials, no TV or radio. There is no company, nor is there privacy because a video camera observes and records everything. The lights are on 24 hours a day and the detainee is kept in the cell 23.5 hours a day. For half an hour each day he is allowed into a small exercise area where he can see the sky.

No court has found him guilty of any offence; no court has ordered that he be held this way. The government insists that no court has power to interfere in the manner of detention. Each 24 hours was relieved only by of a half-hour visit from his daughter, Massoumeh. But on 23 July she did not come. He was told she had been taken shopping in Port Augusta. The next day, she did not arrive for her visit either. He was told that Massoumeh was back in Tehran. She had been removed from Australia under the cover of a lie, without even giving Amin the chance to say goodbye to her.

Amin remained in detention for another eight weeks. It took three applications in court to get him released from solitary. The Government did not contradict the facts, nor did they try to explain why they had removed the child from the country; they argued simply that the court had no power to dictate how a person could be treated in immigration detention. The judge found otherwise and ordered that Amin be removed from solitary confinement and be moved to a different detention centre. The government appealed and failed. Eventually, after Amin had spent another two years in detention, he was given a protection visa.

VII INDEFINITE DETENTION

In November 2003 two cases were heard together by the High Court of Australia.¹⁹ Together they tested key aspects of the system of mandatory detention.

The first case was that of Mr Ahmed Al-Kateb, a stateless Palestinian, who had no country he could go to. He had arrived in Australia a few years earlier, sought asylum, was refused refugee status and remained in detention. Why? Section 196 of the *Migration Act* states that an 'unlawful non-citizen' who is detained must remain in detention until (a) they are given a visa or (b) they are removed from Australia. He had been refused a visa, and it was not possible to remove him from Australia, because there

¹⁹ *Al-Kateb v Godwin & Ors* (2004) 208 ALR 124; *Behrooz v Secretary Department of Immigration, Multicultural and Indigenous Affairs* [2004] HCA 36.

was nowhere to send him. The government's argument was that, although Mr Al-Kateb has committed no offence, he could be kept in detention for the rest of his life. On 6 August 2004, the High Court by a majority of 4 to 3 accepted that argument.²⁰

The second case, heard alongside *Al-Kateb* and decided on the same day, was *Behrooz*.²¹ Mr Behrooz came from Iran and spent about 14 months in Woomera. He could not bear it and escaped in November 2001. At that time Woomera was carrying three times as many people as it was designed to hold.²² The conditions were appalling. Reports from that time suggest that there were three working toilets for the population of nearly 1500 people.²³ The Immigration Detention Advisory Group, the government's own appointed body, described Woomera as 'a human tragedy of unknowable proportions'.²⁴

Mr Behrooz found conditions so intolerable that he, along with a few others, escaped. They made it about seven kilometres and took shelter in a railway shed until they were arrested. Mr Behrooz was charged with escaping from immigration detention. The defence went like this: The *Australian Constitution* embodies the separation of powers. This means that the legislative power is vested in the Parliament (Chapter I), the executive power is vested in the Executive government (Chapter II) and the judicial power is vested in Courts established under Chapter III of the *Constitution*.²⁵ This notion means that one arm of government cannot exercise the powers given to another arm of government. It is one of the very few constitutional safeguards we have in Australia. Central to the judicial power is the power to punish. As a matter of constitutional theory, punishment cannot be administered directly by the parliament or by the executive; punishment can only be imposed by order of the Chapter III courts. Normally, locking people up is regarded as punishment and therefore it is only Chapter III courts that can lock people up. What about immigration detention?

²⁰ *Al-Kateb v Godwin & Ors* (2004) 208 ALR 124 at 124 per McHugh, Hayne, Callinan and Heydon JJ (Gleeson CJ, Gummow and Kirby JJ dissenting).

²¹ *Behrooz v Secretary Department of Immigration, Multicultural and Indigenous Affairs* [2004] HCA 36.

²² Paul Power, *News from the Refugee Council* (15 May 2007) Refugee Council of Australia <<http://www.refugeecouncil.org.au/n/btin/070515-Btin.pdf>>.

²³ Australian Broadcasting Corporation, '...About Woomera', *Four Corners*, 19 May 2003 (Debbie Whitmont), <http://www.multiculturalaustralia.edu.au/doc/fourcorners_aboutwoomera.pdf>.

²⁴ Michael Gordon, 'Demonisation, exaggeration fail to help tragic children', *The Age* (online), 2 August 2002, <<http://www.theage.com.au/articles/2002/08/01/1028157815185.html>>.

²⁵ *Ibid*.

In *Lim's* case in 1992,²⁶ the High Court held that administrative detention could be justified in limited circumstances, principally where it is reasonably necessary to the performance of a legitimate executive function. Therefore, if an asylum claim is to be processed, or if that person is to be made available for removal from Australia, then as long as the detention is reasonably necessary for those purposes it will be lawful even though it is not imposed by a Chapter III court.

The defence in *Behrooz* went like this: Assuming mandatory detention is constitutionally valid, if the conditions go beyond anything that could be seen as reasonably necessary to the executive objectives then that form of detention will be constitutionally invalid because it simply amounts to punishment inflicted by the Executive. The Commonwealth argued that conditions in detention, no matter how inhumane, will never affect the constitutional validity of detention. On 6 August 2004, the High Court accepted the government's argument.²⁷

Sadly, the press paid almost no attention to the decisions in the cases of *Al-Kateb* and *Behrooz*, with all their grim implications for human rights in Australia. One of the most insidious difficulties in protecting human rights and human dignity in Australia is the vast indifference of the press. This in turn means that most members of the public remain cheerfully ignorant of what is happening to a small, unhappy minority. The consequences of indefinite detention are utterly predictable. Detainees languish and lose hope. Some are driven to self-harm – hunger strikes, sewing their lips together, throwing themselves on the razor wire, hanging, swallowing poison; it is an entire catalogue of self-destruction. Suicide among pre-adolescent children is almost unheard of, except in Australia's detention centres.

In Easter 2002, a number of people broke out of Woomera. A large number of Australians staged a protest there and some of the protestors tore a hole in the fence. About 50 detainees climbed out through the hole in the fence, into the arms of 50 or 60 Australian Federal Police who were surrounding the breach. The refugees were charged with escaping from immigration detention. An interesting defence was available to them: The detention centre, as gazetted, extended another 800 metres beyond the fence. The detainees who stepped through the hole in the fence were still inside the detention

²⁶ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

²⁷ *Behrooz v Secretary Department of Immigration, Multicultural and Indigenous Affairs* [2004] HCA 36.

centre. But in order to run the defence, it was necessary to have evidence about exactly what had happened.

In July 2005, I was in Adelaide defending one of the refugees who had been charged with escaping from immigration detention. I went down to the cells (he was still in detention after five years) in order to take him through his evidence and make sure he knew what the case was about, and what he was going to have to talk about. I asked him a few questions, and it quickly became apparent that he had no real recollection of what was going on. He had a powerful interest in remembering, because if he could remember exactly what had happened it would help establish a good defence. Soon I began to realise there was a problem. I thought perhaps he was not understanding my words, so I asked him what his name was. He told me his name. I asked him my name, and he told me. I asked him 'what's your mother's name?' He stared into the distance for about half a minute and said 'I don't know. I can't remember'. I asked him what his brothers' and sisters' names were. He stared into the distance again and said, 'It's too long ago; I can't remember'. I asked him about his childhood, about his growing up. He could remember nothing. His entire past had disappeared. After five years in immigration detention, his mind was so distracted it had torn up all recollection of his past. He did not even know what detention centre he was being held in.

VIII A JUST AND DECENT SOCIETY

John Rawls propounded an interesting, and straight-forward, test for a Just Society':²⁸

- A. Each person has an equal right to the most extensive scheme of equal basic liberties compatible with similar schemes for all.
- B. Social or economic inequalities must satisfy two conditions: Firstly, they must be of greatest benefit to the least advantaged members of the society; and secondly, they must be attached to offices and positions open to all under conditions of fair and equal opportunity.

The Israeli philosopher Avishai Margalit built on this by posing the question: Will a Society that satisfies Rawls' test of a Just Society also be a decent society?²⁹ Put differently, is a Just Society consistent with the presence of humiliating institutions? The

²⁸ John Rawls, *A Theory of Justice* (Harvard University Press, 1971).

²⁹ Avishai Margalit, *The Decent Society* (Cambridge: Harvard University Press, 1996) 271-272.

question is important, especially where we are concerned with the rights of outsiders: people who are not members of the polity in which the question is being asked. Rawls is concerned with the rules that members of a given society may adopt for the distribution of the goods of that society. Margalit's question tests a society by its institutions: a society that tolerates humiliating institutions is not a decent society, regardless of whether those humiliating institutions have local or more remote consequences. That a society tolerates humiliating institutions at all tells us about the decency of that society, even though that institution may humiliate only outsiders.

What does Margalit's question mean? Imagine a village in which food aid is to be distributed. Each villager needs one kilogram of rice. A just distribution may be achieved by visiting each house in the village and handing a parcel to each. An alternative means is to drive through the village and tip the rice parcels off the back of the truck, with police on hand to ensure that no one tries to take more than one parcel. Both methods result in an equal distribution, and thus satisfy Rawls' test of a just distribution. But the second method is humiliating. As Margalit says:

The distribution may be both efficient and just, yet still humiliating. ... The claim that there can be bad manners in a Just Society may seem petty — confusing the major issue of ethics with the minor one of etiquette. But it is not petty. It reflects an old fear that justice may lack compassion and might even be an expression of vindictiveness. There is a suspicion that the Just Society might become mired in rigid calculations of what is just, which may replace gentleness and humane consideration in simple human relations. The requirement that a Just Society should also be a decent one means that it is not enough for goods to be distributed justly and efficiently — the style of their distribution must also be taken into account.³⁰

On the face of it, a society may contain humiliating institutions and yet be a Just Society. But Margalit has a twist. Of all the goods that must be equally distributed, the most fundamental is self-respect. Self-respect precedes other basic goods – freedom of thought, speech and movement, food and shelter, education and employment. This is because self-respect is necessary if a person's existence is to have meaning at all.

³⁰ Ibid 280.

Without the possibility of self-respect, a person's life has no point and pursuit of life's goals is a meaningless exercise; continued existence nothing more than acting out a biological impulse.

IX CONCLUSION

A very important Australian, with whom I do not always necessarily agree, said this on 20 November 2000:

The reason for our different approach to human rights has more to do with the Australian way of doing things. Our pledge is pragmatic, but it's also firmly rooted in an ideological commitment to liberal democratic ideals. I have no qualms in saying that one of our abiding values is that of a fair go for all. Australians care about human rights because they believe strongly in a fair go. They support the underdog and they take particular exception to abuses of power. They see justice and human dignity as the self-evident right of all people. They also prefer to cut through the rhetoric and do something useful.³¹

When Alexander Downer said those words, I imagine that he meant them. He might not repeat them now. His words spoken then do not echo the sentiments of either the Opposition or the government today. And, I'm sad to say, they do not seem to reflect the sentiments of the majority of the public in Australia. The public has an excuse – up until now most ordinary people in Australia have thought that human rights were not an issue, because they were not under threat.

This essay has highlighted the multiple spectres of institutional mistreatment, indefinite detention, systemic indifference and legal invisibility of asylum seekers. The narratives of these men, women and children document years of emotional and physical abuse brought about through mandatory detention. In this respect, their plight often appears fixed in a legal and social purgatory. That this is a continuing reality for many individuals seeking to come to Australia under international conventions is disturbing. The unfortunate reality is though the highest court of the land may sometimes be unable to assist the asylum seeker in receiving justice; their abandonment has also become lost in the public discourse of mainstream media. Moreover, the way we allow our institutions

³¹ Alexander Downer, 'Making a Real Difference to Human Rights' (Speech delivered at the Castan Centre for Human Rights Law, Parliament House, Melbourne, 20 November 2000).

to treat citizens and non-citizens reflects on the quality of our society as a whole and, though principally just, it may still be demeaning.

Although I have concentrated on our treatment of refugees in this essay, the fact is our treatment of Aboriginal and Torres Strait Islander Peoples, the homeless, the disabled and others whose existence is politically meaningless or socially invisible is far worse than it could be. The majority, whose views carry the most weight in Australia today, are unaffected and therefore unconcerned by these issues. But we need to understand this: although human rights abuses in Australia are generally confined to the margins, they nevertheless exist. And they are unjustifiable because we are rich and relatively enlightened. We can treat Aboriginal and Torres Strait Islander Peoples, boatpeople, the homeless, the disabled and others much better than we do. Until we do better, these denials of human rights diminish all of us.

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