

Sri Lankan Children in Immigration Detention in Australia: Human Rights and State Responsibility

A Leelarathna

Legal Unit, Central Environmental Authority, Battaramulla, Sri Lanka

shanikaanjani@gmail.com

Abstract— There are many families in immigration detention in Australia. People who are fleeing Sri Lanka devastated by the ethnic conflict between Tamil Tigers & Sri Lankan government have the same basic needs as decent living standards, social equality, health care and medicine. The Australian government maintains a policy of indefinite mandatory detention of asylum seekers. According to the current legislation in Australia, asylum seekers who arrive by boat, must be taken “as soon as reasonably practicable” to a Regional Processing Country unless the Minister determines otherwise. Sri Lanka has been co-operating with Australia to return these migrants. Children who are in this situation are very vulnerable and need special protection. There are existing international Human Rights and Child Rights standards and mechanisms, but their implementation is unsatisfactory. It is clear that Australia’s system of mandatory immigration detention of children is fundamentally inconsistent with Australia’s human rights obligations such as ICCPR, ICESCR, CRC, Torture Convention and Customary International Law. The children in detention on Christmas Island live in converted shipping containers the majority of which are 3 x 2.5 meters. Children are effectively confined to these rooms for many hours of the day as they are the only private spaces that provide respite from the heat. The lack of school education on Christmas Island for teenagers has had negative impacts on their learning and may have long term impacts on the cognitive development of these children. And also the level of mental distress of children in detention is evident by very high rates of self-harm. The main intention of this paper is to find out the duty owed by Australia and Sri Lanka to these children under International Law. This paper also discusses whether the current standards and mechanisms are sufficient to deal with the current problems and suggest how it could be further developed.

Keywords— Children’s Rights, Asylum seekers, State Responsibility

I. INTRODUCTION

For more than Three decades, there was an ethnic conflict between Tamil Tigers and Sri Lankan Government. According to the United Nations, more than 100,000 Tamil civilians fled to India and other countries in Indian Ocean to escape during the war period and as well

as in the post war situation to Australia. Today, however Sri Lanka embarks on a voyage of Economic and Social development after the end of the civil war in 2009. Therefore, Sri Lanka should consider legal protection for the children in immigration detention in Australia.

There are approximately 100 children in closed immigration detention, according to the inquiries carried out by Australian government. This is a higher number and it is time to look at this issue again with this increase in child detainees. Here, in this paper the author intends to discuss further the ways in which life in immigration detention affects the health, well-being and development of children in immigration detention in Australia.

The author thoroughly believes that immigration detention is an unsuitable setting for children. The main objective of this paper is to point out that current treatment, support and management of children in detention centres contravene Australia’s commitments under the United Nations convention on the Rights of the child (CRC) and also the other legal conventions such as ICCPR, ICESCR, Torture Convention and Customary International Law. The author believes that the current legal situation in relation to children in immigration detention reflects poorly on Australia’s image and the author intends to suggest how the current legal standards could be further developed.

II. METHODOLOGY

This research will be conducted as a literature review based on the secondary sources including text books, International Conventions, electronic data bases, journals etc. Analysing of data for the purpose of giving recommendations had been done by the author.

III. DISCUSSION

In some instances Australia may have been in breach of international human rights in relation to children in immigration detention in Australia. According to the author, the Department of Immigration and Border Protection in Australia, has a duty to all people in immigration detention facilities. The said Department has undertaken the care, supervision or control of people in detention in circumstances where those people might reasonably expect that due care will be exercised.

Due to the particular vulnerability of the children in detain, as well as the high degree of control exercised by the Department over detainees, the scope of this duty of care should be set at a high level and extends to a positive duty to take action to prevent harm from occurring.

According to the current legislation in Australia asylum seekers who arrive by boat must be taken “as soon as reasonably practicable”, to a Regional Processing Country unless the minister determines otherwise. The recent practise is to send all the asylum-seekers who arrive Australia by boat, without getting a valid visa to Christmas Island, Nauru, or Papua New Guinea.

These asylum seekers are kept in jail or custody until the inquiry being finished. Recently the number of asylum seekers who arrive Australia by boat, has decreased due to the awareness conducted through local media. However, there are still families who are fleeing Australia looking for better and secured future there.

When we focused on the most vulnerable group, the children in immigration detention, we realize that Australia’s system of mandatory detention requires that children without a valid visa remain in closed immigration detention until they are granted a visa or removed from Australia, unless the Minister for immigration and Border Protection decides to make a “residence determination” allowing them to live in community detention.

As at 31 January 2015, there were 211 children (aged under 18 years) in Immigration Residential Housing, Immigration Transit Accommodation and Alternative Places of Detention. The number of children in immigration facilities decreased in January due to children completing mandatory processing and being transferred into the community.

Sri Lanka has been co-operating with Australia to return these migrants. Children who are in this situation are very vulnerable and need special protection. Though there are existing International Human Rights and Child Rights standards and mechanisms, their implementation is unsatisfactory. It is clear that Australia’s system of mandatory immigration detention of children is fundamentally inconsistent with Australia’s Human Rights obligations such as ICCPR, ICESCR, CRC, and Torture Convention.

Immigration detainees are protected not only under International human rights treaties and norms, but also under the domestic legal system. Despite that, the Australian Government maintains a policy of indefinite

mandatory detention of asylum-seekers since 1992. Any non-citizen who is in Australia without a valid visa must be detained according to the **Migration Act 1958(Cth)**. The Act provides that a stateless person who has committed no crime, and who has requested removal from Australia and is cooperating with the authorities, may be kept in immigration detention for the rest of their life if unable to be deported or removed. This regulation has confirmed in *Al-Kateb vs. Godwin* [2004] HCA 37 While amendments to the Migration Act (Detention Arrangements) in 2005 require that the detention of children be a “measure of last resort”, unaccompanied minors continue to be detained. However, these people may only be released from immigration detention if they are granted a visa, or removed from Australia.

Immigration detainees are protected under international Human Rights treaties and norms not because of their status as immigrants, but because of the inherent dignity and rights they possess simply by virtue of being human. The Universal Declaration of Human Rights (UDHR), the first global expression of rights to which all human beings are inherently entitled, declared that “[t]he peoples of the United Nations have in the charter reaffirmed their faith in fundamental human rights in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.

Human rights treaties and norms provide protection for citizens of all countries regardless of whether they are living in or outside of the country of birth. Furthermore, for the purposes of human rights standards that govern detention which is the subject matter of this paper, the type of facility where an immigrant is detained is immaterial. All facilities must be held to the same standards.

A.Sources of International Human Rights standards

The sheer volume of human rights treaties and international instruments is indicative of the importance that the international community places on maintaining the inherent dignity accorded to all humans. Australia has remained a supporter of human rights throughout international treaty negotiations. Australia has ratified almost all of the major international human rights instruments. Australia was a founding member of the UN and played a prominent role in the negotiation of the UN charter in 1945. Australia was also one of Eight Nations involved in drafting the Universal declaration.

Australia and Sri Lanka must also comply with *jus cogens* (often called peremptory norms). *Jus cogens* are defined as those norms that are “accepted and recognized by the

international community of states as a whole... from which no derogation is permitted.

Furthermore, Australia is obligated to comply with Customary International Law that emerges “from a general and consistent practice of states followed by them from a sense of legal obligation”. Australian Government may argue that because it has not signed a particular treaty, it is not bound by its terms. But the fact that most other states have signed and ratified these human rights treaties, suggests that there is a general and consistent practice of valuing the human rights contained within them.

The Human Rights of children who are in immigration detention are of special concern of this paper. Liberty is fundamental human rights recognised in major human rights instruments to which Australia is a party, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC). I must mention here that children who are held in detention are particularly vulnerable to violations of their human rights.

In response to increased detention this paper aims to provide the knowledge and tools to hold government authorities accountable for violations of immigrant detainee rights. The first step in this process is to develop a framework for understanding the patchwork of legal regimes under which immigrant detainees derive rights.

There is no set time limit to how long a person may be held in immigration detention in Australia. The period of time a person spends in detention may vary from a few weeks up to a few years, or even longer. Australia continues to have one of the strictest immigration detention regimes in the world. Not only is it mandatory, it is not time limited, and people are not able to challenge the need for their detention in a court. Through this paper, the author wishes to point out the necessity of making an end to this system of mandatory immigration detention because it leads to breaches of Australia’s human rights obligations including its obligations under the ICCPR and CRC not to subject anyone to arbitrary detention. The Convention on the Rights of the Child states clearly that;

- The detention of a child must only be a measure of last resort
- Detention must not be arbitrary.^{xlix}

To avoid being arbitrary, detention must be necessary and reasonable in all the circumstances of the case, and a proportionate means of achieving a legitimate aim. If that aim could be achieved through less invasive means than

detaining a person, then that person’s detention will be arbitrary.

In order to avoid detention being arbitrary, however there must be an individual assessment of the necessity of detention for each person taking into consideration their individual circumstances. A person should only be held in an immigration detention facility if they are individually assessed as posing an unacceptable risk to the Australian community, and if that risk cannot be mitigated in a lesser strictive way. Otherwise, they should be permitted to reside in the community while their immigration status is resolved if necessary, with appropriate conditions imposed to mitigate any identified risks. According to the convention on the Rights of the child;

- Any child deprived of their liberty should be able to challenge the lawfulness of their detention.

For detention to be “lawful”, it must not only comply with domestic law but also international law. This requires that a court must have the authority to order the person’s release if the detention is found to be arbitrary.

Currently, Australia does not provide access to such review, while people in immigration detention may be able to seek judicial review of the domestic legality of their detention; Australian courts have no authority to order that a person be released from detention on the grounds that the person’s continued detention is arbitrary. This is in breach of the Convention on the Rights of the Child.

The Convention also states;

- If detention of children is necessary in order to achieve a particular aim, then the length of detention should be the shortest appropriate period for the achievement of that aim.

In instances where children are detained, a review process is required to monitor detention effectively and assess whether it is justified. The author would recommend that this review process should occur within 72 hours of being detained and should be conducted by an independent body, consistent with the Convention in the Rights of the Child.

- In all actions concerning children, the best interests of the child shall be a primary consideration.

The best interests of the child should be a primary consideration in individual decision making about a child and when developing legal frameworks and policies affecting children. If laws or policies lead to results that are not in the child's best interests, review is necessary.

Aspects of Australia's migration policy therefore sit at odds with the Convention on the Rights of the child. Examples include the requirement to detain child asylum seekers on arrival in Australia, and the requirement to transfer children who are unauthorised maritime arrivals to a Regional Processing Country. Officers are required by the Migration Act to carry out these tasks, regardless of whether it would be in the child's best interests.

The Convention on the Rights of the child provides;

- Refugee children and unaccompanied children are likely to be vulnerable and require particular assistance.

Article 22 of the Convention on the Rights of the child requires that governments ensure that children seeking refugee status are provided with appropriate protection and humanitarian assistance. Article 20 of the Convention on the Rights of the child provides that special protection and assistance is available for unaccompanied children.

Current detention law, policy and practise does not address the particular vulnerabilities of asylum seeker children nor does it afford them special assistance and protection mandatory detention does not consider the individual circumstances of children nor does it address the best interests of the child as a primary consideration [article 3(1)]

Detention for a period that is longer than is strictly necessary to conduct health, identity and security checks breaches Australia's obligations to;

- detain children as a measure of last resort and for the shortest appropriate period of time [Article 37 (b) of CRC]
- ensure that children are not arbitrarily detained [Article 37(b)]
- ensure prompt and effective review of the legality of their detention [Article 37(b)]

Given the profound negative impacts on the mental and emotional health of children which result from prolonged detention the mandatory and prolonged detention , the mandatory and prolonged detention of children breaches Australia's obligation under article 24 (1) of the CRC.

At various times children in immigration detention were not in a position to fully enjoy their rights under articles 6(2), 19(1), 24(1), 27, and 37(c) of the Convention on the Rights of the child. Therefore, it is obvious that prolonged detention is having profoundly negative impacts on the mental and emotional health and development of children.

The mental health care provided to children in immigration detention is severely inadequate. The effects of arbitrary, indefinite and prolonged immigration detention raise serious concerns in relation to the **Convention Against Torture**, with the Australian Human Rights Commissioner reporting a very high prevalence of "mental distress" among detainees, especially long-term detainees. The UN Human Rights Committee has expressed concern about the detention of the mentally ill; in **C vs. Australia** (2002) UN Doc CCPR/C/76/D/900/1999 finding that it amount to cruel, inhuman or degrading treatment and in **Madafferi v Australia** (2004) UN Doc CCPR/C/81/D/1011/2001 finding it was inhumane.

V. RECOMMENDATIONS

1. The Australian government should end the current system of mandatory and indefinite immigration detention. The need to detain should be assessed on a case-by-case basis taking into consideration individual circumstances. That assessment should be conducted when a person is taken into immigration detention or as soon as possible thereafter.
2. The Australian Government should comply with its international human rights obligations by providing for a decision to detain a person or a decision to continue a person's detention, to be subject to prompt review by a court. To comply with article 9 (4) of the ICCPR, the court must have the power to order a person's release if their detention is not lawful.
3. The Australian Government should stop using Christmas Island as a place in which to hold people in immigration detention other than for the shortest possible periods of time.
4. Immediate measures should be taken to reduce overcrowding in immigration detention facilities on Christmas Island.

VI. CONCLUSION

As discussed the above, the duty owed by Australia and Sri Lanka to these children who are in detention in Australia must be clearly identified by the law making

bodies of both of the countries. Therefore, It would be important to amend the domestic legal instruments in order to meet the International Human Rights standards.

ABBREVIATIONS

CRC- Convention on the Rights of the Child
ICCPR- International Covenant on civil and Political Rights
ICESCR- International Convention on Economic, Social and Cultural Rights

REFERENCES

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BIOGRAPHY OF AUTHOR

Anjani Leelarathna obtained LL.B (Second Class Upper Division), from Faculty of Law, University of Colombo and Presently an apprentice at Sri Lanka Law College. The author is also an intern at Central Environmental Authority, Sri Lanka. In 2015; she was awarded the Dean of the Faculty of Law



Award for Jurisprudence