

Children Born in Australia's Asylum System

By Asher Hirsch

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Abstract

This paper highlights the precarious situation for stateless children born in Australia's asylum system. While they have a right to Australian citizenship under international law, the Australian Government has placed a range of hurdles in their path to delay and deny citizenship to certain groups within this cohort. Those whose parents arrived by boat after July 2013 face indefinite detention in Australia's offshore processing centres in Nauru and Papua New Guinea. For those born in Australia, they are not granted neither a permanent visa nor citizenship. The only available option for this group is to apply for citizenship under Australian law. However, applicants have faced extensive delays, due in part to the difficulty in proving their identity.

1. Introduction

At least 38 children have been born in Australia to stateless mothers seeking refugee protection in Australia's asylum system.¹ Despite having a right to citizenship under the 1961 Convention on the Reduction of Statelessness ('1961 Convention'), Australia implemented a number of barriers to delay and deny citizenship to stateless children born in its territory. This paper outlines Australia's asylum policies as they relate to stateless children and considers their rights under international law and Australian domestic law.

2. Australia's Asylum System

Stateless people often arrive in Australia seeking protection, either to seek refuge or for a range of other reasons. While not all stateless people are refugees, statelessness can be a root cause of forced displacement and many stateless groups face harassment, discrimination and breaches of their human rights, which would amount to violations of the 1951 Convention Relating to the Status of Refugees ('Refugee Convention'). The Rohingya people of Burma, the Faili Kurds of Iraq and Iran, and the Kuwaiti Bidoon and are all examples of groups which are both stateless and have sought protection in Australia under the Refugee Convention.² Stateless people are often compelled to travel to countries like Australia for protection, through unauthorised channels because they don't have valid documentation. This is because they face significant and often insurmountable challenges in securing the necessary documentation to facilitate travel through authorised channels. This is also stated in the Handbook on Protection of Stateless Persons by the United Nations High Commissioner for Refugees ('UNHCR'), that "statelessness, by its very nature, severely restricts access to basic identity and travel documents that nationals normally possess."³

Australia severely penalises those who arrive without prior authorisation. It is the only country to impose mandatory indefinite detention for asylum seekers who arrive without a visa. From June 2013, those who arrive without a visa, usually by boat, are sent to 'offshore processing' in the island nations of Nauru and Manus Island, Papua New Guinea, while they await third-country resettlement.⁴ There have been numerous reports of sexual and physical abuse, inhuman and degrading treatment, self-harm and suicide taking place in these centres.⁵ Those who arrived in Australia by boat before July 2013 have remained for years in limbo, either in detention or in the community, while they await refugee status determination. Once they satisfy the refugee status requirements, they will be granted a three or five-year temporary visa, after which they are required to reapply for protection. There is no pathway to citizenship for those on these temporary visas. Further, there is no solution offered by Australia for those who are found to be stateless but are not considered refugees. This group faces indefinite detention in Australia, as they cannot be returned to another country.⁶

There have been a number of children born to stateless refugees and asylum seekers in Australia's asylum system. A number of women who arrived in Australia by boat seeking protection were either

¹ Michelle Foster, Jane McAdam and Davina Wadley, 'Part Two: The Prevention and Reduction of Statelessness in Australia- an Ongoing Challenge' (2017) 40 Melbourne University Law Review 456, 477.

² Michelle Foster, Jane McAdam and Davina Wadley, 'Part One: The Protection of Stateless Persons in Australian Law-the Rationale for a Statelessness Determination Procedure' (2017) 40 Melbourne University Law Review 401, 419.

³ United Nations High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons* (2014) 40 <<http://www.refworld.org/docid/53b676aa4.html>>.

⁴ Asher Lazarus Hirsch, 'The Borders Beyond the Border: Australia's Extraterritorial Migration Controls' (2017) 36 Refugee Survey Quarterly 48.

⁵ Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (NewSouth Publishing 2016).

⁶ *Al-Kateb v Godwin* (2004) 219 CLR 562.

expecting a baby upon their arrival or their baby was conceived during the time spent either in a detention centre or in a community while awaiting an assessment of her protection claim. These include children held in offshore detention as well as those in Australia. While the Manus Island detention centre has been set up for single men, the Nauru detention centre holds families and single women. There are approximately over 100 stateless people held on Nauru, and 25 on Manus Island.⁷ Unfortunately, there are no available statistics on the number of stateless children in offshore detention. For those in Australia, as of December 2014, there were 320 stateless people held in closed community detention and 430 living in the community awaiting processing. Of this, 104 stateless children were held in detention, and 239 were in the community.⁸ While it is not clear how many of these children were born in Australia, the Australian Human Rights Commission has noted that since 2013 “at least 12 babies have been born in detention to mothers who have no recorded nationality. These mothers are generally of Rohingya ethnic origin and come from Myanmar where they have no status as citizens and are not recorded in the census.”⁹ Other figures put the number of stateless children born in Australia at 38.¹⁰

There are also a number of stateless children who have been born in Australia after their mothers were brought from the Nauru detention centre to receive medical care. The case of Baby Farouz highlights the situation for these stateless children. In September 2013, the Myuddins, a Rohingya family, arrived on Christmas Island, Australia by boat in order to seek protection as refugees. Due to new policies introduced in June 2013, they were transferred to the Nauru offshore processing centre and denied resettlement in Australia. Latifar Myuddin, who was expecting a baby when she arrived by boat—with a high risk pregnancy—while on Nauru, and therefore was subsequently transferred to Brisbane, Australia to give birth. Baby Ferouz was born on 6 November 2013 at the Mater Hospital in Brisbane. Even though Ferouz was issued a birth certificate, the Australian Department of Immigration deemed him an ‘Unauthorised Maritime Arrival’ like his parents, thereby subjecting him to transfer to Nauru once he was six weeks old. A legal challenge to this designation was lodged, which sought to allow Ferouz to apply for a Protection visa in Australia, and Ferouz and his family remained in detention for 15 months while the challenge was heard and appealed. In October 2014, the Federal Court found that baby Ferouz’s designation as an ‘Unauthorised Maritime Arrival’ was justified, and he would therefore be ineligible to apply for a Protection visa.¹¹

Since the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (discussed below) was passed, Ferouz and other children born in Australia were allowed to remain in Australia and be processed for a temporary Protection visa. Ferouz has also applied for citizenship as entitled as a stateless baby born in Australia. However, the Immigration Minister is yet to grant him citizenship. A discussion of his right to Australian citizenship by birth is further discussed below.

⁷ Elibritt Karlsen, ‘Australia’s Offshore Processing of Asylum Seekers in Nauru and PNG: A Quick Guide to Statistics and Resources’ (*Parliamentary Library, Parliament of Australia*) <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1516/Quick_Guides/Offshore#_Total_number_of> accessed 16 October 2016.

⁸ Department of Immigration and Border Protection, ‘Immigration and Community Detention Statistics Summary’ (2014) <<http://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-dec2014.pdf>> accessed 26 February 2016.

⁹ Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014) 90.

¹⁰ Foster, McAdam and Wadley (n 1) 477.

¹¹ *Plaintiff B9/2014 v Minister for Immigration and Border Protection* [2014] FCAFC 178

3. International Law

The right to a nationality is an essential human right and brings with it, a number of other rights and protections. Article 15 of the 1948 Universal Declaration of Human Rights declares that “Everyone has the right to a nationality”. Nationality entails rights and duties for both the State and the individual. Without citizenship, a person cannot obtain these attached rights or duties, resulting in a lack of opportunity, protection and participation.¹² As Hannah Arendt said, without a nationality, stateless people are denied a “right to have rights”.¹³ The 1954 Convention Relating to the Status of Stateless Persons (‘1954 Convention’) establishes the universal definition of a “stateless person” and provides a core set of principles for their treatment. Article 1(1) of the 1954 Convention defines a stateless person as “a person who is not considered as a national by any State under the operation of its law.”¹⁴

As party to the 1954 Convention, Australia has a number of international legal obligations owing to stateless people. Relevantly, Article 32 requires Australia to “as far as possible facilitate the assimilation and naturalization of stateless people.” Australia must “make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.” This is also reflected in Article 34 of the Refugee Convention. Australia also has obligations towards stateless persons under the 1961 Convention on the Reduction of Statelessness (‘1961 Convention’),¹⁵ which aims to reduce further statelessness through the acquisition of a nationality for those who have a link to a country.¹⁶ Importantly, under Article 1 of the 1961 Convention on the Reduction of Statelessness (‘1961 Convention’), Australia must grant nationality to a person born in its territory who would otherwise be stateless.

4. Domestic Law

Australia does not automatically grant citizenship to a person born in its territory. A person is only granted Australian citizenship upon birth if one parent of the child is an Australian citizen or permanent resident at the time of the birth.¹⁷ Otherwise, a child born in Australia is automatically granted citizenship after residing in Australia for ten years.¹⁸ Thus children born in Australia to asylum seekers or refugees on temporary visas are not eligible for citizenship, unless they can prove that they are stateless.

Section 21(8) of the Australian Citizenship Act 2007 provides citizenship by conferral for stateless children born in Australia, incorporating Australia’s obligations under Article 1 of the 1961 Convention. An application for citizenship by a stateless person will be approved if the Minister is satisfied that the child:

- was born in Australia;
- is not a national or citizen of any country;
- has never been a national or citizen of any country; and

¹² Institute on Statelessness and Inclusion, ‘The World’s Stateless’ (2014) 29 <<http://www.institutesi.org/worldsstateless.pdf>>.

¹³ Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich 1973) 269; Asher Lazarus Hirsch and Nathan Bell, ‘The Right to Have Rights as a Right to Enter: Addressing a Lacuna in the International Refugee Protection Regime’ [2017] Human Rights Review 1.

¹⁴ *Convention Relating to the Status of Stateless Persons*, September 28, 1954, UNTS.360. June. 6, 1960.

¹⁵ *Convention on the Reduction of Statelessness*, August.30, 1961, UNTS 989, September 13, 1975.

¹⁶ Christopher Richter, ‘Statelessness in Australian Refugee Law: The (Renewed) Case for Complementary Protection’ (2005) 24 U. Queensland LJ 545, 548.

¹⁷ *Australian Citizenship Act 2007* (Cth) s 12(a)

¹⁸ *Australian Citizenship Act 2007* (Cth) s 12(b)

- is not entitled to acquire the nationality or citizenship of a foreign country.¹⁹

Amendments introduced in 2008 removed the Minister's discretion to refuse or approve stateless persons becoming Australian citizenships.²⁰ Thus, "provided all these elements are satisfied there is no discretion for the Minister to refuse the child's application for citizenship – that is, the child has a 'right' to conferral of citizenship under 21(8) of the Citizenship Act."²¹

However, while stateless children born in Australia may have a right to citizenship, the government has sought to place a number of hurdles to deter and deny them citizenship. Under the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014, children born in Australia or in an 'Offshore Processing Country' (Nauru or Papua New Guinea) whose parents arrived as asylum seekers by boat are now considered to be 'transitory persons' and 'unauthorised maritime arrivals' under the Migration Act 1958. These children are now subject to the same policies and restrictions which apply to asylum seekers who arrived by boat, including offshore processing and denial of access to permanent protection in Australia.

This change applies retrospectively, meaning that children who were born before the Act came into effect will still be classified as 'transitory persons'. However, as mentioned, as part of the negotiations to pass the legislation, the Australian Government agreed that a small number of children affected by this change, who would otherwise have been subject to offshore processing, will now have their claims processed in Australia. Yet other stateless children born in Australia who were not included in this deal (such as those born after the deal was reached) are not eligible to stay in Australia and will be returned to offshore processing. Even if stateless children are allowed to remain in Australia, they will only be granted a temporary visa, and will not have a pathway to citizenship. Every three or five years they will be required to reapply for refugee status.

The only hope for these children is to be granted citizenship as stateless children born in Australia under s 21(8) of the Australian Citizenship Act 2007. However, it is not clear how many children have been granted citizenship by the Minister for Immigration and Border Protection under this provision. One reason for the Minister's delay in granting citizenship is s 24(3) of the Citizenship Act which provides that the "Minister must not approve the person becoming an Australian citizen unless the Minister is satisfied of the identity of the person." As Foster, McAdam and Wadley note:

...the discretionary nature of the Minister's decision with regard to an applicant's 'identity' under s 24(3), combined with the lack of guidance provided in the Citizenship Act or other relevant legislation or regulations as to the exercise of that discretion, has the potential to limit the protection provided to stateless children born in Australia.²²

This identity requirement has been a significant hurdle for stateless people, who often lack identity documents and other required evidence. As Australia lacks a legislative mechanism for assessing statelessness, delays and denial of citizenship will continue to affect stateless children born in Australia.²³

¹⁹ Australian Citizenship Act 2007 (Cth) s 21(8).

²⁰ *Migration Legislation Amendment Act (No. 1) 2008* (Cth).

²¹ Nick Olle, 'The Law and the Little Boy' *The Global Mail* (11 December 2013) <<http://static.theglobalmail.org/feature/the-law-and-the-little-boy/773/>> accessed 22 January 2015.

²² Foster, McAdam and Wadley (n 1) 473.

²³ Foster, McAdam and Wadley (n 1).

5. Conclusion

Stateless children born in Australia face numerous barriers to obtaining their rights to Australian citizenship. Even though they are born in Australia, the Migration Act classifies children born to boat arrivals as 'Unauthorised Maritime Arrivals'. They are subject to be sent with their parents to offshore processing on Nauru, placing them at direct harm of abuse, inhumane treatment and other human rights violations. Those who remain in Australia are denied a Permanent visa and a pathway to citizenship.

The only option for stateless children to assert their right to citizenship is through an application for citizenship under s 21(8) of the Australian Citizenship Act 2007. While the Minister is not able to refuse an application where criteria is met, proving identity remains a significant hurdle. Without being able to obtain citizenship, stateless children either remain in limbo in Australia or indefinitely detained in Australia's offshore centres.

In order for Australia to uphold its obligations to stateless children under international law, a comprehensive overhaul of Australia's asylum system is needed. A legislative statelessness status determination procedure should be introduced,²⁴ followed by strong rights protections for stateless children. Until Australia reforms its asylum system, it will continue to be in violation of its international obligations.

²⁴ Foster, McAdam and Wadley (n 2).