

No mean feat to walk the line between refugees and criminals

Australia must find the neutral ground between international criminal law and compassion, writes Matthew Zagor.

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THE controversy surrounding the treatment of Saddam Hussein's former bodyguard Oday Adnan Al Tekriti has hidden what should be the real debate: the inadequate manner in which Australia marries its refugee law obligations with its commitment to international criminal justice.

The Administrative Appeals Tribunal was unable to find strong enough evidence to be satisfied that Al Tekriti had been complicit in serious crimes in Iraq. Without more, this should be the end of the matter. If his case is reopened merely as a result of a few media photographs and political upmanship in the "war on terror", it would undermine the fragile system of refugee law that is already weighted heavily against those accused of serious international crimes.

Much of refugee law concerns a fine balancing act: a compromise between the sovereign rights of states to control their borders, and the obligation that the international community has towards people fleeing persecution in their country of origin.

The 1951 Refugees Convention attempted to strike this balance by enabling states to exclude certain persons who did not "deserve" protection - notably where there are "serious reasons for considering" that a person has committed a serious non-political crime or an offence under international humanitarian law, including the laws of war and human rights law. This covers crimes against humanity, genocide, war crimes, torture and, nowadays, certain terrorist acts - all recognised under international law as matters of universal concern.

The consequences of being excluded might be grave indeed for an asylum seeker, potentially resulting in a return to persecution and possibly death. Given such circumstances, an allegation that a person has committed such crimes should not be levelled lightly.

The level of proof required to establish a "serious reason" for considering that a crime has been committed should be high enough to avoid any miscarriage of justice or allegation of bias against one's political foes. The decision itself should be made by a legally trained official, on the basis of sound evidence that can be thoroughly tested in a court of law. And where the evidence is strong, a country that prides itself on promoting international criminal justice would be expected to extradite or prosecute those accused of such crimes.

Unfortunately, such common sense has not prevailed in Australia. Not only can protection be denied to refugees on the basis of relatively weak evidence of criminality, the Government has yet to prosecute or extradite anyone excluded for having committed an international crime. They either languish in indefinite detention, unable to prove their innocence, or are removed from Australia to become someone else's problem.

Some of the fault lies in refugee law itself. Most worrying is the unreasonably low threshold that will trigger exclusion. Despite UN Refugee Agency guidelines to the contrary, our courts have chosen to interpret the phrase "serious reasons for considering" in such a way that the standard is even lower than the civil "balance of probabilities". In other words, you have a better chance of defending yourself against an unfair dismissal than if you want to avoid being sent back to face torture or death in your country of origin but have been accused of genocide.

Further, whereas criminal conduct is tried before a judge, a decision to exclude someone from the protection of refugee law is made by an administrative official who will not necessarily be legally trained, let alone familiar with the intricacies of international criminal law. Given their huge case loads and productivity targets, it would be surprising if a departmental decision-maker faced with a sympathiser of the Tamil Tigers or Hamas would not choose the easy option of exclusion.

The safety net for such departmental decisions is the Administrative Appeals Tribunal, which has the resources and expertise to conduct a thorough review, even though the test it applies is still far too low. In this sense, the tribunal was probably better placed to assess Al Tekriti's alleged complicity in Saddam Hussein's atrocities than the department. If it couldn't establish Al Tekriti's involvement on a low balance of probabilities, the chances are that the evidence against him was slight indeed. That the Immigration Department didn't appeal against the decision to the Federal Court seems to confirm this.

Unfortunately, the new terrorism legislation may remove this limited but crucial safety net, compounding the difficulties facing an asylum seeker accused of such crimes. For instance, where disclosure of the evidence about alleged terrorist activities is "likely to prejudice national security" - a very broadly defined category of secret evidence in the National Security Information (Criminal and Civil Proceedings) Act 2004 - the asylum seeker may be denied access to the evidence condemning them. The fundamental human rights principle that a person is entitled to know the case against them would go by the wayside. Furthermore, if evidence procured during an ASIO interrogation is used, an asylum seeker would be unable to discuss the circumstances in which the interrogation took place - even to their lawyer - without risking imprisonment.

The UN has not helped matters. Early resolutions of the Security Council appeared to sacrifice the protection of refugee law to the all-encompassing "war on terror", tacitly endorsing the unbalanced use of the exclusion clause.

The system can, however, be improved. At the very least, the Migration Act 1958 could be amended so as to raise the standard of proof required for a decision to exclude. And departmental procedures for dealing with international criminal matters should be enhanced to ensure that relevant legal expertise is brought in when such criminality is alleged. Finally, Australia's jurisdiction over acts of torture - available

for the past 17 years under the Commonwealth Crimes (Torture) Act 1988 and now complemented by the broader coverage of the International Criminal Court Act 2002 - should be exercised.

We need to restore confidence in the system if we are to avoid the public confusion that followed the revelations about Al Tekriti and the finger-pointing that has followed.

Only those against whom there is strong, judicially tested evidence should be excluded from the protection of the Refugees Convention. When such evidence is established, the Government needs to take action to ensure those responsible for such crimes are brought to justice. Even the worst of us deserves due process and judicially imposed punishment rather than a return to human rights violations.

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