

2013 Sir Ronald Wilson Lecture

“Recent Developments in the Law Relating to Refugees and Asylum Seekers”¹

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I should begin as Sir Ronald Wilson would have by acknowledging the traditional owners in the area of the Wadjuk people of the Nyungar and I thank Matthew for his welcome.

I am deeply honoured to have been asked by the President of the Law Society of Western Australia to deliver the 2013 Sir Ronald Wilson Lecture. I would like to acknowledge and thank Dean Curtis for his organisational skills and assistance in making this event happen.

I am also grateful to all of you who have come here tonight to listen to what I have to say.

When I was asked to give this talk on the topic of refugees earlier this year I deliberately chose the broad topic “Recent Developments in the Law Relating to Refugees and Asylum Seekers”. It is, perhaps unfortunately, an area of domestic law that is dynamic and often changing. Ever since I started to practice in this area almost 20 years ago I have found it to be never stagnant.

As the date came closer to deciding what of the myriad of changes that have occurred in this area recently could I focus on, I reflected on the first time I met Sir Ronald Wilson in person.

I was studying law at the University of WA. At the time he came to talk to us he was a retired High Court judge. I had never met a judge in person before and I thought he must surely be like the judgments he had written, fairly dry and (in my progressive student mind at the time) conservative. I could not have been more wrong. He had come to talk about the United Nations Convention on the Rights of the Child. At that time he was the national president of the Uniting Church and was part of a group who were advocating that the Australian Government ratify the Convention. In talking about the Convention he was filled with incredible passion about the protection of the rights of children. Various groups in Australia were concerned about the Convention and its potential interference in family life, in particular that the Convention would “give” children rights which would then place child/parent relationships in jeopardy. Sir Ronald dismissed these claims and said the family was a basic unit in society. The theme in the Convention was that the best interests of children should be protected and where as a society the family cannot provide the environment in which a child can reach their full potential we need to ensure that children’s rights are protected. In 1990 Australia signed and ratified the Convention on the Rights of the Child.

In choosing a topic I thought also of you. What would you like to hear about?

I came to conclude that I would focus on young people, like you, aged between 13- 18 years of age. What if you were to leave your family and your home in order to seek safety and a better future for yourself and your family? What protections would be given to you now that your family could no longer protect you?

One of the best ways to talk about the law and its effects is to reflect upon how they impact upon real people. So I have decided to tell you the story of one young man’s journey from his home, which he left from alone, earlier this year. His name is Mustafa. Mustafa is 14 years old. Mustafa is a refugee.

He was born in Quetta, Pakistan. He and his family are of Hazara ethnicity. They are Shia Muslim. Mustafa has four sisters and one brother. His grandfather was originally from Afghanistan but, Mustafa said, he had left there a long time ago because the Hazara people were not safe there.

According to Minority Rights Group International the Hazara people “*were once the largest Afghan ethnic group constituting nearly 67% of the total population of the state before the 19th century. More than half were massacred in 1893 Today they constitute approximately 9% of the Afghan population. ... The majority of Hazaras live in Hazarajat which is situated in the rugged central mountainous core of Afghanistan.*”² The most recent two decades of war have driven many Hazaras away from their traditional heartland to live on the fringes of Afghanistan and into Iran and Pakistan.

In its 2012 Global Trends Report the United Nations refugee agency, the United Nations High Commissioner for Refugees (UNHCR),³ says that today more people are refugees or internally displaced than at any time since 1994. The report shows that as of the end of 2012, more than 45.2 million people were in situations of displacement compared to 42.5 million at the end of 2011. This includes 15.4 million refugees, that is, people who are forced to move across a border. Of the world’s refugees, children, below age 18, make up 46 per cent of all refugees.

Afghanistan remained the world’s top producer of refugees, a position it has held for 32 years. On average, one out of every four refugees worldwide is Afghan, with 95 per cent located in Pakistan or Iran. Pakistan continued to host more refugees than any other nation, at approximately 1.6 million.

Mustafa’s relatives like many other families, left Afghanistan to avoid persecution and went to Pakistan. Unfortunately the violence against Hazaras has continued there. Sectarian attacks have been mounted against them by extremist militant groups such as the Pakistani Taliban and other Sunni radical groups including Lashkar-e-Jhangvi. While sectarian violence is a longstanding problem in Pakistan, attacks against the Hazara Shia population have increased dramatically in recent years. These attacks have included attacks by gunmen in markets, on buses and, more recently, bombings.

Mustafa’s father worked in construction, he was a bricklayer. His father found it very difficult to continue to find any work in Quetta as the situation became so unsafe. From the time Mustafa was very young his father decided to go to Iran to work for about 2 or 3 months at a time.

Mustafa went to school in Quetta. He is smart and he did very well, he was asked to go up a year at school. In late 2011, when Mustafa was 12 years old, Mustafa’s father called him

² Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples - Afghanistan : Hazaras*, 2008, available at: <http://www.refworld.org/docid/49749d693d.html>.

³ UNHCR, Global Trends Report 2012, available at: <http://unhcr.org/globaltrends/june2013/>.

from the border of Pakistan and Iran, just after he had his passport checked. His father said he was coming home. After that the family did not hear from him again. They suspect he was the victim of an attack on the bus he was travelling on as there had been previous such attacks reported in the months prior to his father's disappearance.

To this day they do not know if his father is alive or dead. Even though he was only 12 years of age Mustafa had to leave school and go to work. He is the eldest boy in the family and with his father gone, culturally it was his responsibility to care and support his family. He began to look for work.

He worked by making rugs near his home, he worked for many different people who needed workers in order to make money. His mother and sisters also worked sewing clothes. During this time attacks in Quetta continued. In January 2013 two suicide bombers targeted a snooker club in Quetta killing 82 people and injuring 121 others.

On 16 February 2013 Mustafa was out in the local vegetable market which many Hazaras frequent getting food for his family. Twenty minutes after he left, at almost 6 pm at night, a vehicle packed with 800 kg of explosives exploded destroying nearby buildings and killing at least 84 people and injuring almost 200 others.

Mustafa told me that he knew the extremist groups were targeting Hazara people. He said that their view was that Hazara people must leave Quetta or be killed. He told me *"It is not safe to go out, it feels like you are a prisoner in your own house, we cannot move. I wanted to be alive and to live."*

Who could he go to for help? He is a Pakistani citizen – could he go to the authorities in that country?

Human rights groups, such as Amnesty International have noted that the Government of Pakistan has done little to protect people *"[t]o Amnesty International's knowledge, no one has been prosecuted for the January 2013 attacks or other targeted killings of Hazaras in recent years. The authorities also have a poor record of prosecuting those who incite attacks on people on the basis of their religious beliefs."*⁴

After the narrow escape from the bomb blast on 16 February 2013 he felt he had to leave Quetta. He said he felt he had no choice; he was the carer of his family and their future. He had to find somewhere safe for them to go. He discussed leaving with his mum and they made the decision he had to leave. He talked to his friends and neighbours who were also talking about leaving and found a smuggler who asked for \$7,000 to take him to Indonesia, once there another \$5,000 to go to Australia. Mustafa was not able to pay him all the money so he borrowed money from relatives and people who knew him or his father and paid him

⁴ Amnesty International (18 February 2013) *Pakistan: Authorities must do more to protect Hazara community from deadly attacks.*

\$5,000 to take him to Indonesia. In late March he left his home alone with no family member and no relative. He was now just 14 years old.

The reasons for movement away from a country of origin are often referred to as PUSH factors. In Mustafa's case the push factor is obvious – lack of security and fear of persecution. For others it may be not so obvious – in recent times the Foreign Minister Senator Bob Carr has stated that many people arriving in boats are leaving their country of origins for economic reasons and that they are in search of a better life. A distinction is made between those who have the economic capacity to leave via a people smuggler and those who cannot. Assumptions are made that they are in some ways “less deserving” of protection.

The use of pejorative labels such as “economic migrants” or that individuals are in “search of a better life” is problematic for a number of reasons. It can depict asylum seekers as opportunistic and privileged. It incorrectly implies that asylum seekers, who are middle class, have economic resources, or have the desire for improved employment prospects are exempt from having been persecuted. But just as the serious risk of violation of civil and political liberties can allow a claim for refugee protection so too can violations of basic socio-economic needs.

In Mustafa's case socio-economic reasons may also be at play, he cannot go to school, he has to work at difficult manual work to support his family. Opportunities for permanent residence, education, relative prosperity and access to employment may be factors that he has to weigh when considering where he would try to seek asylum. These are commonly called “pull factors”. It may also be the case that the choice of destination was determined by people smugglers and the relative costs of potential pathways.

When I asked Mustafa why he decided to go to Australia he wrote, “[B]ecause Australia is the only country that accepts the innocent victims and refugees.”

In March 2013 Mustafa left Pakistan and went to Thailand and then Malaysia. From Malaysia he travelled to Indonesia. Two days after he arrived in Indonesia he registered with the UNHCR. Other asylum seekers who were in Indonesia told him that he would have to wait for about 9 or 10 months before the UNHCR would interview him.

In late June 2013 Human Rights Watch released a report: *Barely Surviving: Detention, Abuse, and Neglect of Migrant Children in Indonesia*.⁵ The report noted that Indonesia has seen a remarkable increase in the number of asylum seekers going from 385 in 2008 to 9226 at the end of February 2013. Of that there are almost 1200 UAMs. Real figures are likely to be much higher than those reported as many do not identify themselves to UNHCR. Human Rights Watch notes the hazards of the onward journey to Australia and states that the UAMs they interviewed said that they would take that risk despite the hazards as it was preferable to waiting in Indonesia.

⁵ Available at <http://www.hrw.org/reports/2013/06/23/barely-surviving>.

Indonesia has not ratified the 1951 *Convention Relating to the Status of Refugees*, or its 1967 Protocol. Read together these two documents provide that signatory states not return people who are refugees to a country where they would face persecution on the basis of their nationality, race, political opinion, religion or membership of a particular social group. Persons found to be refugees are to be accorded certain rights while in a host state – such as the right of freedom of movement, rights to work and access to social welfare.

Indonesia does not have a domestic legal framework to process or protect refugees. The protection of refugees and asylum seekers is left to UNHCR and the International Organisation for Migration (IOM). Those that are detected in Indonesia who are not there lawfully will be detained. Human Rights Watch notes that many children are arbitrarily detained in terrible conditions for months or even years.

I visited Indonesia in January this year as part of a delegation from the Ministerial Council on Asylum Seekers and Detention. We were advised that at that time there were approximately 200 UAMs (mostly Afghan) in detention in Indonesia. UAMs need to be found to be “refugees” before they get assistance from the UNHCR once that happens they can be housed in one of two community houses in Jakarta by an NGO implementing partner. We were advised those shelters had a capacity to house 10 – 20 UAMs each, but at the time we were there they had 60 – 100 UAMS each. Without access to shelter UAMS in detention will not be released.

Others who escape detection by the immigration authorities are left to fend for themselves on the streets. They have no legal status or protection under Indonesian law, they cannot work, and they have limited access to education. They are constantly vulnerable to arrest.

Faced with the potential of living unprotected on the streets for 9-10 months or being detained and desperately worried about his family, Mustafa decided to take a boat. He did not have the \$5,000 for the trip to Australia but the smuggler let him go because other asylum seekers in his group of 15 people paid and fixed it for him so he could go for free.

Mustafa was moved to a house and locked in there all day with a group of other asylum seekers. In the evening they were moved and travelled for about 6 hours to an island. They were put on a boat at about 2 or 3 o'clock in the morning. There were around 72 people on the boat.

After being at sea for 9 hours the boat simply broke apart. Most people on the boat drowned.

Mustafa and 13 others managed to hold onto a part of the boat. We can only imagine what it must have been like for him a 14 year old, holding on desperately to the boat while others drowned around him. He was in the water for 24 hours thinking he was going to die when miraculously a fishing boat happened upon the group and rescued them. 14 survived from the boat and the other 58 perished.

The sinking of the boat was covered by the ABC's Lateline program.⁶

It was after Mustafa was rescued that I came into contact with him and agreed to try to help him to stay in Indonesia, to apply for refugee status there with UNHCR and not get on another boat.

I will leave his story there and come back to it later in the talk.

In Australia, concern over boat arrivals has preoccupied much discussion by politicians, academics and the community.

What are our international obligations toward those who come and seek our protection?

Australia is a party to the Refugee Convention and a variety of other international human rights treaties, including the *Convention on the Rights of the Child*. The key obligation under the *Refugee Convention* is that we not return individuals who arrive here to a place where they may face persecution.

Boat arrivals have been increasing over recent years. There have been peaks and troughs over a long period of time associated with particular waves of asylum seekers. During the early 2000's the highest rate was 4,137 (prior to the introduction of the Pacific solution by the Howard Government). In 2005-2006 there were 57 arrivals, in 2009-2010 there were 5,315 arrivals and in 2011-2012 there were 8,092 arrivals. In 2011-12 889 arrivals (more than 10%) were recorded as UAMs.⁷

A variety of deterrent measures used by government including the use of detention and different methods of processing were not successful in slowing arrivals. I do not have time to go into those measures tonight.

Concerns around the increasing number of arrivals led the Gillard Labor Government to enter into an agreement with the Malaysian Government. Funded by Australia, the agreement involved the transfer to Malaysia of 800 asylum seekers who arrive in Australia by boat. Those that were sent to Malaysia could register with the UNHCR, but with over 90,000 asylum seekers and refugees in Malaysia their chances of resettlement to a third country would be minor. In exchange, Australia agreed to "resettle" 4,000 refugees from Malaysia.⁸ On 24 July 2011 the Minister for Immigration issued an Instrument of Declaration

⁶ ABC, *Asylum seekers still go to sea*, Lateline, 17 April 2013, <http://www.abc.net.au/lateline/content/2013/s3739504.htm>.

⁷ See Angus Houston, Michael L'Estrange and Paris Aristotle, *Report of the Expert Panel on Asylum Seekers*, DIAC (August 2012), Table 12.

⁸ *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement* signed 25 July 2011, available at: <<http://www.minister.immi.gov.au/media/media-releases/pdf/20110725-arrangement-malaysia-aust.pdf>>

authorising the transfer of asylum seekers to Malaysia as a ‘declared country’ under s 198A of the *Migration Act 1958 (Cth)*.⁹ The Minister for Immigration, Chris Bowen, made it clear that UAMs would be included in the group to be sent to Malaysia as part of the agreement. He reasoned that the inclusion was necessary as a deterrent to parents who might otherwise be encouraged to expose their children to perilous journeys to Australia.¹⁰

The announcement of the agreement met with a concerted campaign of opposition, culminating in a challenge in the High Court, brought on behalf of two asylum seekers slated for removal to Malaysia. One of whom was a 16 year old Afghan boy. Concerns about conditions in Malaysia for UAMs were similar to those mentioned already in relation to Indonesia. At worst it was feared they would be subjected to detention, ill-treatment and exploitation, at best they would remain in Malaysia for many years with little or no prospect of resettlement to a third country.

The decision involved, amongst other things, the interpretation and application of the (then) s 198A of the *Migration Act 1958*. Sub-section 198A(1) which provided:
“An officer may take an offshore entry person from Australia to a country in respect of which a declaration is in force under subsection (3).”

The power to “take” people from Australia is clarified in s198A(2) to include the power, exercisable within or outside Australia, to place and restrain a person on a vehicle or vessel; to remove a person from a vehicle or vessel and to use such force as is necessary and reasonable. This is followed by sub-s 198A(3)(a) which empowers the Minister to declare in writing that a specified country:

- (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
- (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and
- (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
- (iv) meets relevant human rights standards in providing that protection; ...

In the decision of *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship*¹¹ a majority of the High Court of Australia found that the terms of s 198A(3)(a) constituted jurisdictional facts such that a declaration would be invalid if made in respect of a country that did not meet the criteria enumerated in the provision. In this case while the agreement attempted to put into place certain protections for the asylum seekers in Malaysia, it could not alter the fact that Malaysia did not have laws which recognised and protected refugees from *refoulement* and persecution.

⁹ See Instrument of Declaration of Malaysia as a declared country under subsection 198A(3) of the *Migration Act 1958*, 25 July 2011, <<http://www.comlaw.gov.au/Details/F2011L01685>>.

¹⁰ Chris Bowen (Minister for Immigration and Citizenship), Transcript of press conference, 8 August 2011, Canberra, <<http://www.minister.immi.gov.au/media/cb/2011/cb169899.htm>>.

¹¹ [2011] HCA 32.

Also in question was the *Immigration (Guardianship of Children) Act 1946 (Cth)*. Under which the Minister for Immigration and Citizenship is the nominal guardian of all unaccompanied migrant children until they “reach majority, leave Australia permanently or otherwise cease to fall within the provisions” of the Act.¹² Section 6A(1) of that Act required that the Minister consent in writing to the removal of any UAM from Australia. The Court found that the declaration in the form of the MOU was not sufficient to constitute written consent. They also said if consent was given the Minister would be required to provide reasons for a decision and such a decision would be reviewable under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*. This meant that the Minister would be required to provide reasons for a decision and that the decision would be reviewable on any of the grounds stated in that Act.¹³

In practical terms, the majority’s decision in *Plaintiff M106* means that no unaccompanied child who comes to Australia seeking asylum can be removed or taken from Australia, unless the Minister as guardian gives written consent to that removal. The Minister is not able to give valid consent unless satisfied that the removal would not be prejudicial to the interests of the child. How the Court should assess the exercise of the power remains untested. However, it is difficult to conceive of many situations in which it is in the best interests of a child to be removed to a third country for the assessment of their claims to protection under the *Refugee Convention*.

In September 2011 the Government unsuccessfully attempted to amend the *Migration Act 1958* and the *Immigration (Guardianship of Children) Act 1946*.

In June 2012 a boat carrying asylum seekers foundered just off Christmas Island, 17 were confirmed dead, 76 unaccounted for (presumed drowned) and 110 rescued. The sinking of the boat reignited debate about how to deal with the issue of boat arrivals. There was legislative debate but a failure to resolve the impasse. The Prime Minister then announced the establishment of an Expert Panel to advise the Government on 28 June 2012.

The terms of reference of the Expert Panel were that they were “to provide advice and recommendations to the Government on policy options available, and in its considered opinion, the efficacy of such options, to prevent asylum seekers risking their lives on dangerous boat journeys to Australia.” The 3 member panel was to report to the Prime Minister before Parliament sat in August 2012. They had 6 weeks.

In its report released in August 2012 the Expert Panel argued for a stronger regional framework to provide incentives for asylum seekers to apply for asylum in other places rather than take dangerous boat journeys. Their recommendations included:

¹² *Immigration (Guardianship of Children) Amendment Act 1994 (Cth)*, s 6.

¹³ Above note 10 at [143] and [146], per Gummow, Hayne, Crennan and Bell JJ.

An increase to the Humanitarian program to 20,000 immediately with 12,000 allocated for refugees. This was recommended to be further increased to 27,000 within 5 years (recommendation 2). The increase to 20,000 places was implemented by the Government.¹⁴

Funding for regional capacity building (recommendation 3). \$10 million was initially allocated to this by the Government.¹⁵

Strategies for improved cooperation with Indonesia, Malaysia and source countries.

These strategies were designed to improve protection for asylum seekers and refugees in the region such that those found to be refugees could safely remain in those countries on an ongoing basis or whilst waiting processing by UNHCR.

The Expert Panel also put forward the “no advantage” principle. It stated that in order to deter people coming to Australia by boat the regional framework needed to work in order to ensure those who pay people smugglers to attempt to enter Australia in an irregular way would not achieve a faster result than those who pursued “regular migration pathways” closer to their home countries. The report also set out a range of “disincentives” designed, they said, not to punish those who were seeking protection but to ensure that boat arrivals to Australia did not gain an advantage over those who stayed in the region.

Key to this was to re-establish regional processing centres (RPC) in Nauru and Papua New Guinea. The Panel said these were required as a “circuit breaker” to stem the current flow of arrivals to Australia. The Panel stipulated that anyone sent to either country would be provided with protection and welfare consistent with Australian, Nauruan and Papua New Guinean law and their international responsibilities, including the Refugees Convention.

At the same time the Panel recommended that given the decision of the High Court in *Plaintiffs M70 and M106* that there would need to be “new legislative” arrangements passed by the Australian parliament in order to effect the establishment of RPCs in Nauru and Papua New Guinea.¹⁶ The Panel did not say what those legislative arrangements should be. The release of the Expert Panel Report was followed immediately by the re-introduction and successful passage of legislation to amend the Migration Act and the Immigration and Guardianship of Children Act.¹⁷ This Act replaced s 198A of the Migration Act with provisions that empower the Minister to make a legislative instrument designating a country as a “regional processing country” if the Minister “thinks that it is in the national interest” to make the designation. Previous requirements concerning the country’s human rights record and capacity were replaced with a stipulation that the Minister must have regard to whether the

¹⁴ Office of the Minister for Immigration and Citizenship (2012). *Refugee Program increased to 20 000 places* [media release]. Issued 23 August, <http://www.minister.immi.gov.au/media/cb/2012/cb189459.htm>.

¹⁵ *Houston report on asylum seekers: Joint Press Conference with Prime Minister Julia Gillard* [press conference]. Canberra: 23 August, <http://www.minister.immi.gov.au/media/cb/2012/cb189443.htm>.

¹⁶ Above note 6 at [3.54]

¹⁷ *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*.

country has provided assurances relating to non-refoulement and the willingness to assess, or allow the assessment, of refugee claims. The assurances need not be legally binding.¹⁸

Problematically, the amending Act also pursued the Government's agenda to remove the Minister's written consent during the removal or deportation process for UAMs. In discussing this issue during debates on the proposed law in the Senate the Government's view of the purpose of the amendment was clear:

*"In effect, the bill before us re-asserts the primacy of the Migration Act with regard to unaccompanied minors and the amendments to the Guardianship Act will also put beyond doubt that the Minister's guardianship ceases when a child is removed from Australia or taken from Australia without a visa or right to return."*¹⁹

Were the safeguards that the Expert Panel stipulated be put into place in the RPCs on Nauru and Manus Island adhered to?

Clearly there were gaps in respect of the conditions in both RPCs prior to the transfer of asylum seekers. Unfortunately I can only address that briefly tonight.

Both the UNHCR and Amnesty International highlighted problems at the RPC in Nauru in the early stages. Accommodation conditions were harsh and legal arrangements for processing asylum seekers were not in place prior to the transfer of asylum seekers to Nauru.²⁰ On Nauru processing did get underway in April 2013 and permanent structures were built, however the RPC was the scene of a riot on 19 July 2013 and the RPC was burnt down. I visited Nauru last week and found that asylum seekers were once again accommodated in harsh conditions and the level of distress and feelings of hopelessness amongst the asylum seekers was significant.

In Manus Island the situation appears to be worse. The UNHCR has also been critical of the lack of appropriate accommodation and the lack of an adequate refugee assessment and protection framework in Papua New Guinea.²¹

While the safeguards that the Expert Panel may have wanted to go into place were not present unfortunately the removal of the human rights provisions from the *Migration Act* means that there may be little opportunity for courts to review this question.

Let's go back to Mustafa and ask: if his boat had not sunk and he had come to Australia in April 2012, what could have happened to him?

¹⁸ *Migration Act 1958*, s 198AB.

¹⁹ Commonwealth, *Parliamentary Debates*, Senate 16 August 2012, 113 (Kate Lundy).

²⁰ UNHCR Mission to the Republic of Nauru, Report 3-5 December 2012 <http://unhcr.org.au/unhcr/images/2012-12-14%20nauru%20monitoring%20report%20final.pdf>; Amnesty International, 'What we found on Nauru', 17 December 2012 <http://www.amnesty.org.au/refugees/comments/30726/>

²¹ UNHCR Mission to Manus Island, Report 15-17 January 2013, <http://unhcr.org.au/unhcr/images/2013-02-04%20Manus%20Island%20Report%20Final.pdf>.

As he would have arrived after 12 August 2012 he could have been sent to a RPC for processing. However to date government policy is not to send unaccompanied minors to Nauru or Manus Island.

More likely had he arrived he would have been detained for a period of up to 3 months and then released into the community under community detention arrangements. There is a backlog now in processing for a visa due to the number of arrivals and if Mustafa had made it to Australia he would be waiting for perhaps around 4 years before his case would be finalised. It is possible that there could be an argument due to his young age that he be able to access processing quicker than others. He could go to school and live in the community. He would be unlikely to have access to family reunion; that is he could not bring his mother and siblings to come to Australia to live with him. He would not be able to leave Australia during the time he was waiting for a visa.

What about staying in Indonesia?

As stated already it would have been difficult to remain in Indonesia and build a life there. His only hope would have been for UNHCR to resettle them.

Human Rights Watch report in its report “*Barely Surviving*” that “*in the three-year period from 2010 to 2012, 826 people were resettled from Indonesia to a third country (in 2010, 176 refugees were resettled; in 2011, 403 were resettled, and in 2012, 247 were resettled).*”²² With very few resettlement places refugees have had to face a long wait.

After the Expert Panel Report there were increased resettlement places offered in the offshore Humanitarian Programme. The Department of Immigration working with the UNHCR did an amazing job of processing and resettling refugees from both Indonesia and Pakistan. There were approximately 1000 people resettled from both countries into Australia. Funding was also provided to help improve the care and protection for unaccompanied minors in Indonesia and Malaysia. These are very positive steps in the right direction.

However the chance of Mustafa being resettled in Australia as a part of that 1000 is incredibly slim. Australia has traditionally been reluctant to resettle unaccompanied minors, this is likely to be because of the guardianship responsibilities under the *Immigration (Guardianship of Children) Act* and the onerous task of ensuring there are adequate legal and care arrangements in Australia for the care of such children. Of the approximately 1000 resettled from Indonesia to Australia up until June 2013, less than 20 were unaccompanied minors.

²² Above note 4, p 9. 86 percent of these people went to Australia, with the remainder to New Zealand, Canada, Norway, Sweden, and the US.

So what incentives are there for UAMs to try to use regular pathways?

Despite the implementation of new arrangements the policy continued to work to mean they would continue to come by boat.

'Barat Ali Batoor, a refugee and Afghan photographer of Hazara ethnicity, explained that the limbo created by the refugee processing in Indonesia was difficult: "After eight or nine months you are called for an interview, and then there's more time to wait for the result. It's taking years, and people's families are back home, needing money. At least on the boats, you know your fate in 36 hours, in 24 hours." Barat knew the risks he and his fellow refugees faced: "People sell everything to come here, and they will have nothing if [the boat goes down]."'²³

Even after the establishment of RPCs, over the last year there have been approximately 23,000 arrivals by boat. The increase in arrivals has created real challenges for the Government. It is the largest movement of people by boat to Australia. It is a challenge that requires a regional, coordinated response focussed on protection for those that need it. It is not one that will be addressed in the short to medium term by deterrence measures alone.

Unfortunately it is a challenge that has occurred in an election year. Both the Government and Opposition are looking for a quick fix to a humanitarian problem.

On 19 July 2013 the Rudd Government announced that all people seeking to come to Australia by boat will never be allowed to resettle in Australia. Instead all arrivals, including unaccompanied minors, will be sent to Papua New Guinea for processing and if found to be refugees will be resettled in Papua New Guinea.

The Australian Government has signed an agreement with Papua New Guinea but to date it is not clear how this sits with the previously entered into MOU with PNG.

What happened to Mustafa?

After his boat sank he and the other survivors of the accident went to live in Bogor, Indonesia. Some of the others went on other boats to Australia but Mustafa was too scared to take that route again. We made contact with the UNHCR and argued for them to give priority to assessing his case on the basis of his young age and the trauma he experienced on the boat. He received some support from the IOM in terms of food and some shelter. He had an interview with the UNHCR in Jakarta in June 2013. He was found to be a refugee. He moved to some accommodation for unaccompanied minors in Jakarta.

²³ Above note 4, p 9.

He told me he could not go back to Quetta. He remains worried about the safety of his mother, his sisters and his brother. He has trouble sleeping and he talks to his mother when he can. She is sad and worried for him.

About two weeks ago he received the news that he would be offered resettlement to the United States. He is lucky. I am very happy for him. He is disappointed he did not come to Australia but he will be safe.

UAMs that come to Australia in the future will not be so lucky.

Concluding comments

Sir Ronald Wilson later on in his career as the President of the Australian Human Rights and Equal Opportunity Commission looked at the situation of Aboriginal children who had been separated from their family and said that "*indigenous families and communities have endured gross violations of their human rights. These violations continue to affect indigenous people's daily lives.*" We have recognised this wrong today and have said sorry to those affected. I hope that we soon recognise the wrongs we are doing to refugees and asylum seekers, especially the children.

Thank you very much for your attention and I am happy to answer any questions you have.