

David Corlett

Do We Have Obligations To Those We Sent Back?

David Corlett

Research Associate, Politics, La Trobe University

David Corlett is a research associate in Politics at La Trobe University. He has worked with refugees and asylum seekers in the community sector and as an academic. In mid-2004 he traveled to the Middle East and Asia to research the plight of failed asylum seekers returned from Australia. His book, *Following Them Home: The Fate of the Returned Asylum Seekers* (BlackInc) was published earlier the year.

Abstract

Australia has returned failed asylum seekers to places of insecurity and uncertainty. In some instances it has returned people to situations in which they have been treated brutally. The government claims that these people returned voluntarily after undergoing a thorough refugee determination process. David Corlett will speak on his fieldwork experiences following returned asylum seekers to Afghanistan, Pakistan and Iran and how he sees Australia's obligations to these people.

David Corlett

Do We Have Obligations To Those We Sent Back?

Australia has undertaken, by signing the 1951 Refugee Convention and its accompanying 1967 Protocol, not to return refugees to situations in which they will be persecuted.

There are a host of other conventions that Australia has also signed which commits it not to return people to situations in which they will have their fundamental human rights violated – including the Convention Against Torture and the International Covenant on Civil and Political Rights – although unlike the Refugee Convention, the status of these other international instruments have a precarious footing in Australia's protection determination process.

This paper is concerned with Australia's return practice and the obligations Australia ought to have to those it returns. It is based on my mid-2004 research with people whose applications for protection in Australia were rejected and who were returned to the Middle East and Asia. My book, *Following Them Home: The Fate of the Returned Asylum Seekers* (Black Inc, 2005) is predominantly the product of this fieldwork.

Following Them Home describes the plight of those Australia returned. In it, I argue that Australia returned people to situations in which they continued to face unacceptable risks. Australia returned people to situations where they lived in fear and insecurity. Some had been treated brutally. Many of the people I met continued to live with the mental scars from the wounds that they said were inflicted on them in Australia's duty of care.

There was, for example, 'Mohsen', an Iranian. He spent years in Australia's mandatory detention regime, during which time he was subjected to what we know now as the usual humiliations that occur within that system. He attempted suicide on more than one occasion and escaped twice.

When Australia began pressuring Iranians to return, Mohsen started to worry. He realised that his behaviour in detention put him in the front line of those people the Australian Government wanted to rid itself of. The government was planning to focus its pressure on those asylum seekers in detention who were most vulnerable and those who had caused trouble in the past.

With the threat of forced return and his psychological deterioration in detention, Mohsen decided to sign to 'voluntarily' return to Iran. He did not think that he would be safe. Rather, he told me that given that he was so psychologically damaged that he was prepared to take his own life, it would be better to risk being killed in the land of his parents.

On return, Mohsen told me that he was immediately detained and tortured for what he guesses was about forty days. Eventually, he escaped from a medical centre and fled to Turkey where he was jailed for being there illegally. He escaped the Turkish jail with the help of other Iranians who, when they heard his story, realised the seriousness of Mohsen's plight. He then fled to Greece and is now in another European country seeking asylum there.

Mohsen was returned to a situation in which he was persecuted. Australia's onshore protection determination system got it wrong. One of the reasons that Mohsen told me that he wanted to tell his story – and it was a story he told with great difficulty both because of the trauma involved in recalling it and because he was terrified that the Iranian authorities may still be able to track him down – was so that his RRT member who said that he did not have protection needs would understand that the decision was wrong. Mohsen told a friend that, because of his torture upon return, he had 'lost his soul'. Such a cost is a high price to pay for a wrong assessment.

Yet I suspect that the Australian Government may be tempted to mount a technical-legal defence against the suggestion that by returning Mohsen to a situation in which he was persecuted Australia breached its non-refoulement obligations. The line would be that Mohsen wanted to return. He signed a voluntary repatriation agreement and returned of his free will. He chose to return to Iran and in so doing put himself in the position that he was persecuted.

Such a position, however, would be barely defensible. Mohsen's return was not voluntary in any meaningful sense. He felt compelled to return. He feared that he would be forcibly repatriated unless he signed to return. This was a fear that the Australian government was keen to promote. Indeed, it deliberately set out to promote it. And while a return without physical force posed risks, a forcible return would have drawn even more attention to him.

Nor was it only fear that meant that Mohsen's decision to return was involuntary. His failing psychological state – a product of being detained for years in Australia's immigration detention regime – meant that the decision to return was not a decision made freely. Rather, and like so many I spoke with during the course of my fieldwork, Mohsen's decision to return was in large part an attempt to save his mind and a sense of his own humanity.



Mohsen's plight is, to be sure, at an extreme end of my research findings. Yet there were others I met who were also subjected to serious brutality after being sent from Australia or from Australia's camps in the Pacific.

I met with an Afghan man in the Pakistani city of Quetta, who, like some 400 other Afghans had returned from Australia's Pacific Solution. This man was convinced that to remain on Nauru would bring

only further psychological harm. The prospect of reuniting with his family was the final motivation to return to Afghanistan. But by the time he got back to Afghanistan, his family had fled. So he began an epic search across three countries to find them. He ended up in Iran where the police caught him. He was jailed for a month during which time he was beaten and tortured by being put into a drum and rolled. He was eventually released and fled Iran into Pakistan where he is living the life of an illegal immigrant.

Or there was a young man whom I call in my book Abdullah. He also returned from Nauru in order to be with his family. He travelled to his village to find that, while he was away, they had gone and a man from his village had taken over the family's land. This man, 'Uncle', threatened to kill Abdullah if he sought to reclaim his family's land so Abdullah fled Afghanistan a second time. He stopped in Pakistan for a while then went to Iran. From Iran, Abdullah thought he would try to get to Europe so he organised with a smuggler to cross into Turkey. The journey was harrowing and Turkish authorities eventually captured Abdullah. He was beaten by the Turks and then thrown back over the border where the Iranians also beat him. He was sent back to Afghanistan but this time fled straight back to Pakistan. When we met, Abdullah guessed that he was about 17 years old.

Since I returned from my fieldwork, Abdullah has become increasingly desperate. Terrorist violence in Pakistan against Shi'ites is ongoing. Most of the Afghans with whom I spoke and who sought protection in Australia were ethnically Hazara and most Hazaras are followers of the Shi'ite branch of Islam. The people with whom I spoke felt, therefore, very much the target of anti-Shi'ite terrorist violence. As well as this, Abdullah and the other Afghans I spoke with in Pakistan fear the Pakistani police which they say threaten them with jail or return to Afghanistan should they not pay substantial bribes.

As his desperation has grown, Abdullah has become increasingly keen to find a place where he can be safe and where he can begin to build something of a life for himself. He called me some time ago saying that he wouldn't be in contact for a couple of months. He was going to Islamabad with a smuggler in another attempt to get to Europe.

A couple of months later, I spoke to Abdullah again. He had gone to Islamabad but said that he had been caught by the police and sent back to Afghanistan. He travelled to Kabul and then thought that he would see if his parents had returned to his village. They had not. Instead, the 'uncle' detained Abdullah for several weeks before Abdullah was able to convince him that he hadn't intended to return to Afghanistan and that he did not want to reclaim the land.

Abdullah travelled to the border of Pakistan and was picked up by the Pakistani border guards. He said that he was detained for about a month before he was released again. He continues to live in fear of terrorists and the police. He also lives in desperate boredom, his thoughts oscillating between his next attempt at escaping to a place of security and utter despair.

What can these stories tell us about Australia's return policy and practice and its obligations?

There is considerable evidence to suggest that these men – and many other Afghans who returned from Australia and its Pacific Solution – ought to have been found to be refugees.

Some months ago, when considering the case of an Afghan Hazara Shi'ite whose application for ongoing protection had been rejected by the Immigration Department and the Refugee Review Tribunal, the Full Federal Court found that while the Taliban was no longer the central government in Afghanistan, this did not equate with the fact that the man, referred to as 'QAAH', was safe from persecution.¹

As I have already noted, most of the Afghans with whom I spoke in Afghanistan and in Pakistan were Hazara Shi'ites. They are people who face precisely the same risk of persecution from which QAAH was saved. Indeed, the people with whom I spoke had stories largely similar to those who remained on Nauru and have, in the end, been found to be refugees and are now in Australia. The main difference between those I met and those who are now in the Australian community as refugees is that those I met could tolerate detention no longer. In his book, *Freeing Ali*, Michael Gordon quotes a letter from the prominent migration agent Marion Le to the Minister for Immigration. Le is the only independent legal advisor to have been permitted to travel to Nauru to speak to the detainees there. She discovered that many of the people whose cases had been repeatedly rejected were indeed refugees and that the decision-makers had got it wrong. Le wrote in the letter: 'How many Afghans, who gave up their claims and returned to their region, only to flee again into Pakistan and Iran, were also poorly served by our decision-making process?''²

I doubt we will ever know the answer to this question and I suspect that there is little interest on the part of government to discover the answer. But I also suspect a significant number of the many hundreds of Afghans who returned from camps in Australia and the Pacific may have been wrongly assessed. If this is so, it represents a large-scale breach of Australia's obligations not to return refugees to situations in which they risk being persecuted.

Yet even if the Australian Government got it right and these people were not refugees, ought they have been returned? It seems to me no. Even if they were not individually targeted for persecution on Convention grounds, the return of people to a place that was clearly still in the throes of violent conflict and where there was no rule of law, is unjustifiable. And the Australian Government ought to have known that this was the case. There was, even before the UNHCR issued revised country information about Afghanistan in early 2004, a widespread understanding that Afghanistan was not safe. This highlights the need for a complementary protection regime in Australia which ensures that people who, while not refugees in the strict legal sense, are granted protection from other forms of human rights violations.³

1. QAAH v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 136 (27 July 2005) available online at <http://www.austlii.edu.au/au/cases/cth/FCAFC/2005/136.html>.
2. Michael Gordon, *Freeing Ali: The Human Face of the Pacific Solution* (Sydney: University of New South Wales Press, 2005), 109.
3. See for example, The Refugee Council of Australia, The National Council of Churches in Australia, Amnesty International Australia, 'Complementary Protection: The Way Ahead', April 2004. Available online at <http://www.refugeecouncil.org.au/docs/current/comp-protection-model.pdf>.

The Australian Government might also suggest that it did not make Abdullah and others travel from Afghanistan and Pakistan. They were not beaten or tortured in Afghanistan. And Australia could not control their fates in countries to which they travelled illegally in any case. Australia purely facilitated their return to their homeland.

Again, I think that such an argument would be dubious. Australia created the environment in Nauru, from which these men felt compelled to escape. The conditions on Nauru – including the lack of resources – contributed to these men losing contact with their families. And this loss of their families set off a train of events which led to the abuse in Iran and Turkey. Given what Australian officials ought to have known as they were returning these and hundreds of other Afghans, Australia should be seen as considerably responsible for the fate of these people. Australia ought to have known that there was a reasonable likelihood that these men would need to flee Afghanistan (as reports indicated that many were doing) and that the countries into which they would flee would be unwelcoming to say the least.



Not everyone with whom I spoke was returned to situations of profound lack of safety. In *Following Them Home*, I suggested that several of the Iranians I met were not refugees at the time that they arrived in Australia. It is possible that some of the Afghans, those who can live in Pakistan without being harassed by Pakistani officials because they have access to Pakistani documents, similarly did not face persecution in Pakistan, although they did face a broader threat of terrorism on account of their ethnicity and religion. People without protection needs broadly understood should probably have been returned. The problem with Australia's return practice is that by the time people who ought to have been returned were returned, they had been damaged by their detention in Australia.

The story of the Kadems raises such concerns. They are a family, including four boys and two young girls, who were returned to Iraq. The family was returned in a state of unspeakable disrepair. The father and mother had both considered taking their own lives because of what they had endured in Australia; one son had become psychotic and a heroin addict and the other sons had self-harmed.

And there is the case of the Palestinian man, sent to Thailand because while he was not recognised as a refugee, Australian immigration officials seemed to accept that his fears of returning to Syria were indeed real. The United Nations High Commissioner for Refugees is currently paying for his psychiatric care in Bangkok – his ill-health, he says, is the consequence of his time in Australia.

These cases raise different obligations beyond those associated with the need for protection (although the case of the Kadems and of the Palestinian man also reiterate the failure of the Australian system to protect those who need it).

Many of the people Australia has returned continue to suffer the effects of their treatment in Australia. Returnees spoke of ongoing psychosomatic symptoms. They also spoke of something deeper. They said

that they had lost their humanity in Australia's detention camps – both here and in the Pacific Solution. They spoke of no longer being able to connect with people in the way that they once did. Some also spoke of being institutionalised in Australia's detention regime.

There seems to be an increasing recognition, across the Australian community, including in government, that the long-term detention of asylum seekers causes significant harm to those caught within it.⁴ That such harm is done to people while they are in Australia's duty of care means that Australia ought to be considered to have obligations towards them.

The damage inflicted on asylum seekers in Australia's refugee determination system also highlights the counter-productiveness of Australia's response to asylum seekers: it seems to me to make no sense to destroy the dignity of people, to undermine them to such an extent that they cannot make decisions, and then expect them to make the seemingly impossible choice to return to the place they once fled.



Return clearly poses a dilemma. Arriving in Australia does not entitle non-citizens to remain here. The protection determination process exists to sort out those who need protection in Australia from those who do not. People who do not have protection needs ought to be returned. If they are not, the onshore refugee determination process risks becoming a de-facto migration stream. Should this occur, the institution of asylum is diminished. Indeed, it is for this reason – to protect the institution of asylum both domestically and internationally – that advocates, academics and government ought to seriously engage in a discussion about return. Gibney and Hansen have argued that the failure on the part of liberal democratic states to return rejected asylum seekers has led to the development of mechanisms designed to exclude asylum seekers from accessing the scarce resource of protection in these states.⁵ If they are correct, the failure of such states to return has contributed to the diminution of protection more generally. People concerned with enhancing protection need, therefore, to engage in discussion about return.

Yet my research suggests that Australia has been all too willing to return people to precarious situations. Such people are now beyond Australia's sovereign jurisdiction. They are in the territory of other sovereign states. Nonetheless, Australia ought to be understood to have obligations towards these people. They sought protection here and instead were returned to places in which they were persecuted or in which their basic human rights were threatened. Others were returned after being psychologically damaged by Australian policies and practices. Australia should now seek to make amends for its political and policy failures. It should create a means by which those who were returned to situations of danger or who were returned as broken people could, if they desire to do so, return to Australia in an attempt to rebuild their lives.

4. See for example, Federal Court of Australia, *Sv Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2005] FCA 549 (5 May 2005). Available online http://www.austlii.edu.au/au/cases/cth/federal_ct/2005/549.html.

5. Gibney and Hansen, 2003, 'Deportation and the liberal state: the forcible return of asylum seekers and unlawful migrants in Canada, Germany and the United Kingdom,' *New Issues in Refugee Research* (Working Paper No.77), available online at www.unchr.ch.