Limiting Good Faith: 'Bootstrapping' asylum seekers and exclusion from refugee protection

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I. Introduction

Good faith is an important principle in international law. It underpins the observance of treaties,[1] and their interpretation.[2] Good faith also has a role outside treaty law — for example, equitable principles such as the doctrine of clean hands may be considered general principles of international law.[3] However, as international law generally binds states rather than non-state actors, the principle of good faith usually does not apply to individuals, even when international law recognises individual rights. It would be worrying if 'inalienable' human rights were dependent on the absence of wrong-doing. Individuals may be punished under the criminal law and deprived of certain rights in order to protect others — indeed, international law still tolerates the death penalty.[4] However, human rights do not depend on a person having clean hands. Despite this, the concept of good

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1 Art 26, Vienna Convention on the Law of Treaties (23 May 1969), 1155 UNTS 331.

2 Ibid art 31.

3 The status of the doctrine of clean hands in particular was discussed by the International Law Commission in the context of diplomatic protection. While concluding that the doctrine should have no place in the context of diplomatic protection, Special Rapporteur Dugard referred to the frequent practice of states asserting the doctrine in inter-state relations. He noted that this practice made it 'difficult to sustain the argument that the clean hands doctrine does not apply to disputes involving direct inter-State relations … [I]n no case has the [International Court of Justice] stated that the doctrine is irrelevant to inter-State claims.' J Dugard, Sixth Report on Diplomatic Protection, 11 August 2004, UN Doc A/CN.4/546 [6]. On the other hand, he pointed out that equally the claim had not yet been upheld: ibid [18].

4 See art 6, International Covenant on Civil and Political Rights (16 December 1966), 999 UNTS 171.

faith has been applied in some refugee cases in order to prevent certain asylum seekers from invoking the protection from *refoulement* to a place of persecution.[5]

In the context of claims for refugee status, absence of good faith refers to the situation where a person has created or, perhaps, strengthened, a claim to refugee status by doing something deliberately to draw the adverse attention of the authorities in his or her country of origin. In some cases, there may be no previous history of persecution or political activity. Consequently, these cases are sometimes labeled 'bootstrapping' cases — as the person pulls him or herself up by the boostraps, creating the very basis of the claim to refugee status. This is perjorative language and in some cases the characterization is questionable. However, the terminology it is also quite evocative and will sometimes be used in this article.

This article will critique the use of good faith against asylum claims. The article begins (part II) with a comparison of two of the leading cases in the area, *Refugee Appeal No 2254/94 Re HB* (*Re HB*)[6] (New Zealand Refugee Status Appeals Authority) and *Danian v Secretary of State for the Home Department* (*Danian*)[7] (English Court of Appeal). Part III argues that the preferable approach is that of the Court of Appeal in *Danian's Case*, based on a reading of the 1951 Convention Relating to the Status of Refugees (Refugee Convention)[8] in light of the law relating to limitations on human rights. In part IV, the article will consider the relevant Australian legislation, establishing a rule excluding from consideration certain conduct by asylum seekers within Australia.[9] Part V turns to consider the Australian High Court's decision interpreting this legislation in *Minister for Immigration and Citizenship v SZJGV*; *Minister for Immigration and Citizenship v SZJXO*.[10] Part VI of the article examines the role of credibility, in particular, the impact that a credibility finding about 'bootstrapping' conduct should have on other evidence relevant to a refugee claim. Part VII briefly considers the possible chilling effect of the Australian legislation on asylum seekers' political freedoms in Australia. Part VIII of the article canvasses the policy underlying the invocation of good faith in refugee cases — namely, whether international refugee law is undermined if some individuals are able to use refugee law as a migration tool and whether there are alternative ways of combating abuse. The premise of this article is that while states have legitimate concerns about the potential for abuse of the

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5 The principle of *non-refoulement* is enshrined in art 33, 1951 Convention relating to the Status of Refugees (28 July 1951), 189 UNTS 137.

6 Refugee Appeal No 2254/94 Re HB (New Zealand Refugee Status Appeals Authority, 21 September 1994), <http://www.unhcr.org/refworld/docid/3ae6b6910.html>. (Hereinafter referred to as *Re HB*.)

7 *Danian v Secretary of State for the Home Department* [1999] EWCA Civ 3000 (13 October 1999), <http://www.unhcr.org/refworld/docid/3e71 dd564.html>. (Hereinafter referred to as *Danian*.)

8 Above n 5.

9 Section 91R(3) Migration Act 1958 (Cth).

10 *Minister for Immigration and Citizenship v SZJGV*; *Minister for Immigration and Citizenship v SZJXO* [2009] 238 CLR 642. (Hereinafter referred to as SZJGV and SZJXO).

asylum system, return of a person to the country of origin despite an objective risk of persecution is not the answer. As a matter of law, the Refugee Convention does not admit an exception to its provisions on the basis of abuse, and the policy concerns of states must be addressed in other ways.

II. Thesis and Antithesis — *Re HB* and *Danian* Contrasted

Possibly the best known and most thoroughly reasoned decision invoking the concept of good faith in an asylum claim is the decision by the New Zealand Refugee Status Appeals Authority (RSAA) in the case of *Re HB*.[11] This case concerned an Iranian who, during his first two interviews with New Zealand authorities 'insisted that he was not in fear of persecution in Iran and had come to New Zealand only to find a better life for his family.'[12] However, he did, in the end, claim refugee status, alleging that he had taken a copy of Salman Rushdie's *Satanic Verses* into Iran and he had told friends he was interested in exploring Christianity. He was found not to be credible and he appealed to the Refugee Status Appeals Authority, which also found he was not credible. He then arranged for his wife and children to travel to New Zealand, apparently believing that if his family was present it would strengthen his case, but the family was intercepted in Bangkok. He then publicised his case on television and in print media, including a newspaper that circulated in the area in which the Iranian embassy was situated. He made a second unsuccessful claim to refugee status, and appealed again to the RSAA. While his case at the second appeal was first articulated both on the basis of the adverse publicity as well as his original claim (concerning the Satanic Verses etcetera), he eventually confessed to the RSAA that the original claim was entirely fabricated. Accordingly, his asylum application now rested on the argument that the Iranian authorities would know he had claimed asylum in New Zealand and that he had claimed falsely to have a copy of the Satanic Verses in Iran.

The RSAA rejected his second appeal. According to the RSAA, there were two alternative bases for denying refugee status. One basis for the decision was the absence of a well-founded fear of persecution: the asylum seeker simply was not a refugee as defined in the Refugee Convention.[13] The alternative basis for the decision was that the asylum seeker should be denied the protection of the Refugee Convention because of a lack of good faith.[14]

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11 *Re HB*, above n 6.

12 Ibid 1. The facts as described in this article are all drawn from the RSAA decision at 1–4.

13 Ibid 18. A refugee is a person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence … is unable or, owing to such fear, is unwilling to return to it.' Art 1A(2), Refugee Convention, as modified by the 1967 Protocol relating to the Status of Refugees (31 January 1967), 606 UNTS 267 (hereinafter 'Refugee Protocol').

14 *Re HB*, above n 6, 32.

After a thorough review of extant case-law and the views of publicists, including Professors Grahl-Madsen and Hathaway, the RSAA held that it was the 'intention' of the Refugee Convention to provide protection only to those who were fundamentally marginalised by the state, not those who 'as a stratagem, deliberately [manipulate] circumstances to create a real chance of persecution which did not previously exist.'[15] The RSAA reinforced this reading of the Convention by reference to policy factors, namely that the entire system of refugee status determination may be brought into disrepute:

> While bona fide refugees are required to pass through a stringent examination of the circumstances of their case, a mala fide sur place[16] applicant is free to engage in the most outrageous and cynical conduct, [and] the more outrageous and cynical, the surer the prospect of success. The bona fide asylum seeker would have little choice but to follow suit. The end result would be a system entirely lacking in integrity and indeed, entirely lacking in purpose. Asylum seekers would be able to demand, as of right, the grant of refugee status simply because that status was sought. A person could become a refugee as a matter of his or her own choice.[17]

The RSAA noted that there were apparently approximately 50 Iranians waiting for the opportunity to make similar bad faith claims.[18]

By contrast, the English Court of Appeal found in *Danian*[19] that there was no basis for applying the concept of good faith against asylum seekers. The case involved a Nigerian man who had resided in the United Kingdom (UK) for a lengthy period prior to his application for asylum and who had become involved in pro-democracy activities in the UK.[20] There were two unsuccessful applications for asylum, the first decision resting on a finding that Mr Danian was not credible, the second resting on the finding that Mr Danian's pro-democracy activities would not be such as to bring him to the attention of the Nigerian authorities and that he had acted in bad faith. The case proceeded to the Immigration and Appeal Tribunal, which found Mr Danian was excluded because of lack of good faith, although it also appeared to consider that Mr Danian was not at risk of persecution. The case then went to the Court of Appeal. The Court considered that it was necessary to look at the objective evidence concerning Mr Danian's claim, noting some concerning gaps in the evidentiary record, including a highly plausible claim that Mr Danian had been tortured in Nigeria and a letter showing that Mr Danian's

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15 *Re HB*, above n 6, 30.

16 A 'sur place' refugee is someone who becomes a refugee once outside the country of origin, either because of a change in circumstances in that country or because of some action by the asylum seeker. The Convention definition of a refugee merely requires that a person be outside the country and unable or unwilling to return because of well-founded fear. It is not required that the departure from the country of origin was precipitated by well-founded fear.

17 *Re HB*, above n 6, 30.

18 Ibid 31.

19 *Danian*, above n 7.

20 The facts, which are rather complex, are described in the judgment of Lord Justice Brooke: *Danian*, above n 7, 1–10.

political activities commenced earlier than determined by the official who heard the second asylum claim.[21]

The Court also ruled on the legal issue concerning good faith. Neither Lord Justice Brooke nor Lord Justice Buxton, who delivered separate judgments, with which Lord Justice Nourse concurred, could find adequate support in the extant jurisprudence for the use of good faith against asylum claims.[22] They rejected the argument that there was an implied limitation to the Refugee Convention.[23] Both of them placed emphasis on the express limitations in the Convention — for example, the exclusion clauses in Article 1F.[24] Both pointed out that as an applicant who engages in bad faith activity may have limited credibility, in practice many such applicants will not be able to succeed in their claims.[25] Brooke LJ, relying in part on UNHCR's submission in the case, pointed out that it may be questionable whether the relevant conduct or material will come to the attention of the authorities in the country of origin, and further, that it may be seen for what it is and therefore ignored by the country of origin.[26]

Buxton LJ questioned the characterization of cases like Mr Danian's as involving bad faith. He pointed out that in cases where there is,

> a long history of opposition to the regime of a particular country, albeit expressed privately and without bringing it to the attention of the authorities, it is very difficult to decide what, if any, part of that history should be excluded from the 'acting' of the applicant for the purpose of applying the exclusive motive test; and very difficult to say that the only motive for the later and more demonstrative expression of opinion was to create a case under the Convention.[27]

He went on to say that,

> the present problem is not soluble by recourse to general principles such as that a person cannot take advantage of his own wrong. It is indeed very difficult to state what is the 'wrong', in terms of fraud or breach of the law, committed by a person such as Mr Danian; and … in any event … the Convention does not incorporate a judgmental or disciplinary element, so as to deprive a person who has once behaved fraudulently from any further protection.[28]

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21 Ibid 10–12 (Brooke LJ). Lord Justice Buxton agreed that the IAT needed to reconsider the facts, referring to additional concerns with the Tribunal's fact-finding process: *Danian* above n 7, 23–24 (Buxton LJ).

22 *Danian* above n 7, 15–20, (Brooke LJ); 26–28 (Buxton LJ).

23 Ibid 14 (Brooke LJ); 25 (Buxton LJ).

24 Ibid 13 (Brooke LJ); 26 (Buxton LJ). (Art 1F of the Refugee Convention excludes certain persons from refugee status, namely those who have committed crimes against peace, war crimes or crimes against humanity, those who have committed a serious non-political crime prior to entering the country of refuge, and those who have committed acts against the purposes and principles of the United Nations.)

25 Ibid 22 (Brooke LJ); 29–30 (Buxton LJ).

26 Ibid 21 (Brooke LJ).

27 Ibid 24 (Buxton LJ).

28 Ibid 30 (Buxton LJ).

Lord Justice Brooke concluded that even in cases where an asylum seeker has created a claim to refugee status deliberately, if there is a real chance of persecution, the Convention applies.[29]

Since *Danian's Case* was decided, the European Qualification Directive has adopted certain measures concerning good faith.[30] According to Article 4(3)(d) of the Qualification Directive, the 'assessment of an application for international protection … includes taking into account: whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country.' In addition, Article 5, which deals with sur place claims to refugee status, provides in paragraph 3 that 'without prejudice to the [Refugee Convention], Member States may determine that an applicant who files a subsequent application shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin.' These provisions have been criticised because of the possibility of breaching the Refugee Convention,[31] although there is

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29 Ibid 22 (Brooke LJ).

30 *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of the Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise need International Protection and the Content of the Protection Granted* [2004] OJ L 304/12. The Qualification Directive attempts to harmonise the application of the definition of a refugee in the Refugee Convention and Refugee Protocol among the member states of the European Union.

31 The United Nations High Commissioner for Refugees has expressed the view concerning art 5(3) that:

> [t]here may be instances where an individual outside his or her country of origin who would otherwise not have a well-founded fear of persecution acts for the sole purpose of "manufacturing" an asylum claim. UNHCR appreciates that States face difficulty in assessing the validity of such claims and agrees with States that the practice should be discouraged. It would be preferable, however, to address difficult evidentiary and credibility questions by appropriate credibility assessments. Such an approach would also be in line with Article 4(3)(d) of the Directive. In UNHCR's view, such an analysis does not require an assessment of whether the asylum seeker acted in "bad faith" but rather, as in every case, whether the requirements of the refugee definition are in fact fulfilled taking into account all the relevant facts surrounding the claim. There is no logical or empirical connection between the well-foundedness of the fear of being persecuted or of suffering serious harm, and the fact that the person may have acted in a manner designed to create a refugee claim. The 1951 Convention does not, either explicitly or implicitly, contain a provision according to which its protection cannot be afforded to persons whose claims for asylum are the result of actions abroad. The phrase "without prejudice to the Geneva Convention" in Article 5(3) would therefore require such an approach.
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> *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted* [2005] OJ L

debate about what the provisions really mean.[32]

The English Court of Appeal has examined the provisions of the Qualification Directive as translated by the relevant paragraph of the Immigration Rules,[33] and

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304/12 of 30.9.2004, 17 <http://www.unhcr.org/refworld/docid/4200d8354.html>. Similarly, with respect to the provisions on good faith in the proposed recast Qualification Directive (which are identical to the provisions in the current Qualification Directive), the Meijers Committee has suggested that 'it should always be assessed whether the requirements of the refugee definition are in fact fulfilled taking into account all the relevant facts surrounding the claim. The Meijers Committee would furthermore like to emphasize that it is very well possible that a person could create in 'good faith' circumstances giving rise to a well-founded fear of being persecuted. The Committee recognizes that [t]here may also be instances of persons "manufacturing" asylum motives while being outside their country of origin. However, this raises issues of evidence and assessment of facts and credibility, which are covered by article 4.' Note of the Meijers Committee (Standing Committee of experts on international migration, refugees and criminal law) on the proposals for recasting the Qualification Directive (COM (2009) 551) and the Procedures Directive (COM (2009) 554), 4 February 2010, 4 <http://www.statewatch.org/news/2010/feb/eu-meijers-cttee-qual-proced.pdf>.

32 Storey, eg, makes a case that the Qualification Directive is intended to be consistent with the Refugee Convention, that arguably all the provisions do is raise a presumption that a subsequent claim is a bad faith claim and that at the end of the day this simply goes to credibility. See H Storey, 'EU Qualification Directive: a brave new world?' (2008) 20 *International Journal of Refugee Law* 1, 26–28. On the other hand, this may be a rather benign reading of the art 5(3) since it contemplates that states may decide not to grant refugee status and the proviso that this is 'without prejudice' to the Refugee Convention is, as Storey acknowledges, rather unclear. Helene Lambert, while pointing out that these provisions are merely minimum standards, rather than mandatory, argues that they are inconsistent with the requirements of the Refugee Convention. See H Lambert, 'The EU asylum qualification directive, its impact on the jurisprudence of the United Kingdom and international law' (2006) 55 *International & Comparative Law Quarterly* 161, 172.

33 Rule 339P of the UK Immigration Rules appears to be a reasonably benign provision when compared with the terms of the Qualification Directive. Rule 339P states that,

> [a] person may have a well-founded fear of being persecuted or a real risk of suffering serious harm based on events which have taken place since the person left the country of origin or country of return and/or activities which have been engaged in by a person since he left [t]he country of origin or country of return, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin or country of return.

Immigration Rules 2010 (UK), rule 339P, <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11/>. By contrast, German law implements art 5(3) of the Qualification Directive and this has been upheld as consistent with the Refugee Convention, albeit with a justification that is not based on law but a bald statement of the policy imperative of preventing abuse. See the Decision of the German Federal Administrative Court, BVerwG 10 C 27.07, OVG 11 LB 75/06, translated in (2009) 21 *International Journal of Refugee Law* 538. One can only imagine the outrage from legislators if this was to become the normal judicial approach to statutory interpretation.

has held that these do not simply overrule *Danian's Case*: *YB (Eritrea) v SSHD*.[34] In general the Directive does not bar claims to refugee status based on bad faith, at least with respect to first time applicants for protection. According to Lord Justice Sedley in *YB (Eritrea)*, what is critical under the Qualification Directive is whether the authorities in the home country 'will realize, or be able to be persuaded, that the activity was opportunistic and insincere. In that event … the fear of consequent ill-treatment may be unfounded.'[35] This then becomes a matter of fact and may be difficult to review.[36]

III. Good Faith and the Law Regarding Limitations on Human Rights

Which of these decisions —the Court of Appeal decision in *Danian* or the decision of the RSAA in *Re HB* — is preferable? It is argued here, that when the Refugee Convention is viewed as part and parcel of international human rights law, particularly the law relating to limitations on human rights, it is apparent that the Court of Appeal decision in *Danian* is the better interpretation of the Refugee Convention.

The position that the Refugee Convention forms part of the corpus of human rights law is now generally accepted[37] and rightly so given that the Convention refers to the Universal Declaration of Human Rights[38] in its preamble and may be said to have looked forward to the adoption of the core UN human rights instruments.[39] Under human rights law, limitations are to be construed strictly.[40] It follows that where a human rights treaty includes express limitations on particular rights, no implied limitations should be read in to these rights. This is particularly

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34 *YB (Eritrea) v Secretary of State for the Home Department* [2008] EWCA Civ 360. (Hereinafter YB (Eritrea).

35 Ibid [15].

36 See, eg, *EM (Zimbabwe) v Secretary of State for the Home Department* [2009] EWCA Civ 1294.

37 For a discussion of the development and a justification of the human rights approach, see M Foster, *International Refugee Law and Socio-Economic Rights: Refuge From Deprivation* (2007) ch 2.

38 Universal Declaration of Human Rights, GA Res 217A (1948).

39 For a list of the nine core human rights treaties of the UN system, see <http://www2.ohchr.org/english/law/index.htm#core>.

40 See, eg, the statement in the Siracusa Principles that '[a]ll limitation clauses shall be interpreted strictly and in favor of the rights at issue': Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, UN Doc E/CN.4/1985/4, annex [IA3]. The Siracusa Principles can be viewed as 'soft law' relevant to the interpretation of human rights treaties, and as a 'subsidiary source' of international law under art 38(1)(d) of the Statute of the International Court of Justice, as they represent the views of 'eminent publicists'. The view that limitations on rights are to be construed strictly is in fact a reflection of the approach taken by judicial and quasi-judicial bodies responsible for interpreting human rights treaties such as the European Court of Human Rights and the Human Rights Committee.

true when the provision concerned permits no reservations, as is the case with Article 33 of the Refugee Convention.[41]

While the European Court of Human Rights has permitted implied limitations to the right of access to a court, which itself is a right implied into Article 6 of the European Convention on Human Rights, it has rejected the idea of implicit limitations where particular rights already provide for limitations.[42] The Human Rights Committee, responsible for the supervision of the International Covenant on Civil and Political Rights (ICCPR or Covenant), has made a similar pronouncement in its general comment on the obligation under Article 2 of the Covenant.[43] Indeed, although this is subject to some debate, many are of the view that those Covenant rights which are expressed in unqualified terms are only subject to any express general limitations or derogations clauses (such as Article 4 of the ICCPR).[44] For example, the experts responsible for the Siracusa Principles on the limitation and

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41 See art 42 Refugee Convention concerning reservations. Art 33 is in one sense, then, non-derogable. See E Lauterpacht and D Bethlehem, 'The scope and content of the principle of *non-refoulement*: opinion' in E Feller, V Turk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 87, 107. For detailed discussion of the related question as to whether art 33 represents *jus cogens* see J Allain, 'The Jus Cogens Nature of *Non-refoulement*' (2001) 13 *International Journal of Refugee Law* 533; A Duffy, 'Expulsion to Face Torture? *Non-refoulement* in International Law' (2008) 20 *International Journal of Refugee Law* 5.

42 See *Golder v United Kingdom* (1975) 18 Eur Court HR (ser A) [44]. Admittedly, the Court relied on the fact that the limitations clause in art 8 was particularly clear in its terms that no other limitations could be applied. Nevertheless, the lesson is that there can be no point in making a seemingly exhaustive provision for limitations, only then to permit implied limitations. Thus, the Venice Commission simply states that the European Court of Human Rights has rejected implied limitations in the case of 'qualified rights.' See Venice Commission, Opinion on the Protection of Human Rights in Emergency Situations, Opinion No 559/2006 (4 April 2006), 8 <http://www.venice.coe.int/docs/2006/CDL-AD(2006)015-e.pdf>.

43 > The legal obligation under Article 2, paragraph 1, is both negative and positive in nature. States parties must refrain from violation of the rights recognized by the Covenant, any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restriction be applied or invoked in a manner that would impair the essence of a Covenant right.
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> General Comment No 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, 26 May 2004, UN Doc CCPR/C/21/Rev.1/Add.13, [6].

44 See the discussion of art 27 of the Covenant and whether it may be subjected to implicit limitations similar to those contained in the express limitations provisions contained in the right to freedom of conscience and religion, or only limitations that flow from the boundaries of other rights (for example, human sacrifice violates the right to life and is therefore impermissible) or general limitations and derogations clauses, in M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005) 666–67.

derogation provisions in the International Covenant on Civil and Political Rights were of the view, that '[n]o limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself.'[45]

Of course, Article 5 of the Covenant contains an express provision that militates against implied limitations: '[n]othing in the present Covenant may be interpreted as implying … [the rights'] limitation to a greater extent than is provided for in the present Covenant.' By constrast, the Universal Declaration on Human Rights (UDHR) contains a limitations clause that appears to be of general application but its savings clause (Article 30) does not contain the same proviso concerning limitations as Article 5 of the ICCPR. However, even an apparently general limitations clause cannot affect the non-derogable nature of some rights such as the prohibition on torture, contained in Article 5 of the UDHR.

It is clear that a general limitations clause cannot be invoked in any and all circumstances. The International Covenant on Economic, Social and Cultural Rights ('ICESCR') has both an apparently general limitations clause (Article 4) and a savings clause identical to the one contained in the International Covenant on Civil and Political Rights (Article 5). The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights state that Article 4 of the ICESCR is there to serve a protective function — to ensure that any limitations imposed meet certain criteria, not as an invitation to impose limitations.

> Article 4 was primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State.
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> The article was not meant to introduce limitations on rights affecting the subsistence or survival of the individual or integrity of the person.[46]

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45 Siracusa Principles, above n 40, [IA1]. Julie Debeljak makes a slightly different point concerning the general limitations clauses in national bills of rights such as the Victorian Charter of Human Rights and Responsibilities Act (2006) (Vic), namely that these generally phrased clauses do not even account for the existence of non-derogable rights. See J Debeljak, 'Balancing Rights in a democracy: the problems with limitations and overrides of rights under the Victorian Charter of Human Rights and Responsibilities Act 2006' (2008) 32 *Melbourne University Law Review* 422, 433–34.

46 The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 8 January 1987, UN Doc E/CN.4/1987/17 annex, [46], [47], <http://www.unhcr.org/refworld/docid/48abd5790.html>. The Limburg Principles have a similar legal status to the Siracusa Principles (see the explanation above n 40.) The Limburg Principles have influenced the approach of the Committee on Economic, Social and Cultural Rights and the Committee is viewed as an authoritative interpreter of the Covenant. In its General Comment on the Right to Health, eg, the Committee notes that art 4 was intended as a protection for individuals, rather than as permission for limitations: General Comment No 14: the Right to the Highest Attainable Standard of Health (Art 12), 11 August 2000, UN Doc E/C.12/ 2000/4, [28].

It follows that even where a treaty has an apparently general limitations clause, there will be certain limitations that are simply incompatible with the nature of the rights protected by the treaty.

A reading of the Refugee Convention in light of its object and purpose supports the conclusion that an implied limitation concerning good faith should not be read into the Refugee Convention. As previously noted, Article 33 is non-derogable in the sense that states parties may not make reservations to it. There are a number of express clauses in the Convention that deny or lift protection, and they are premised on one of three factors. First, surrogate protection as a refugee is not available if there are other legitimate sources of protection. For example, refugee status may cease under Article 1C(5) or (6) if there is a fundamental, stable and durable change of circumstances in the country of origin,[47] while Palestinians 'protected' by the UN Relief and Works Agency for Palestine Refugees in the Near East are excluded from international protection under Article 1D. Similarly, Article 1E provides that '[t]his Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country', while the second paragraph of Article 1A(2) of the Convention requires persons with multiple nationality to have a well-founded fear of persecution in all the countries of their nationality in order to be recognised as refugees. Second, if the refugee is dangerous, posing an unacceptable risk to the host community, protection against *refoulement* may be lifted (Article 33(2)). Third, some persons — war criminals, for example — are deemed unworthy of protection as a refugee and are therefore excluded under Article 1F. None of these three categories — the person is already protected, dangerous or unworthy of protection — sit well with an implied limitation for a person who has created their own claim to refugee status. True, the person did not have a protection need prior to the 'bootstrapping' behaviour, but this is a very different situation to a person who is going to be safe in the country of origin and to whom the cessation clauses apply. It is also a very different situation to the person who poses a threat to the country of asylum or who has done something so evil that he or she is deemed unworthy of protection.

The cause of the person's marginalization — the manipulative action by the asylum seeker — is irrelevant. The deliberate nature of asylum seekers' actions are irrelevant in other cases — for example, a gay person is not required to exercise 'discretion' and avoid persecution.[48] Similarly, a dissident is not required to refrain from exercising his or her freedom of expression in order to avoid persecution. Why should we excuse the actions of a persecutory state by focusing on the actions of the asylum seekers in 'bootstrapping' cases? Goodwin-Gill has argued that 'there is no … basis for distinguishing … between the innocent bystander to whom

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47 See, eg, UNHCR, 'The Cessation Clauses: Guidelines on their Application' (April 1999) <http://www.unhcr.org/refworld/pdfid/3c06138c4.pdf>.

48 See *S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 (hereinafter S395/2002).

political opinions are imputed by the persecutor, and the less than innocent bystander whose self-interested actions lead the persecutor also to impute political opinions to the person concerned.'[49] Manipulation is hardly of the same moral magnitude as a war crime or other persecutory behaviour, and it could not possibly be acceptable to return a manipulative person to persecution. Our focus should remain firmly on the actions of the persecutory state and on whether we become complicit in its actions.

There is some risk of undermining political support for the institution of asylum if 'bootstrapping' claims are successful. However, this it is not the same sort of moral challenge raised by people excluded under Article 1F. Persons excluded under Article 1F pose a problem for the institution of asylum because although they may need protection, the underlying rationale for *non-refoulement* is the avoidance of complicity in persecutory behaviour, whereas to grant asylum to a war criminal (as opposed to prosecuting them) is to be complicit in their persecutory activities. When the Refugee Convention was drafted, it was thought appropriate to exclude such persons from refugee status. Today, although it may still be appropriate to deny such a person the status of a refugee, it may be doubtful whether a blanket exception from protection would be accepted if the Convention were drafted today. The modern prohibition on *refoulement* to a place of torture is absolute and will apply to persons excluded from refugee status.[50] Even if we accept the exclusion clauses in the Refugee Convention on their own terms, a 'bootstrapping' asylum seeker requires protection and is neither dangerous nor unworthy of protection in the same sense as a war criminal. Therefore, a reading of the ordinary words of the Convention in light of their context and the Convention's object and purpose requires that no implicit limitation concerning good faith is read into the Convention.

IV. The Australian Position: Turning a Blind Eye, Instead of Giving the Benefit of the Doubt

In Australia, legislation has been adopted on the relevance to a refugee claim of conduct within Australia. Section 91R(3) of the Migration Act provides that:

> For the purposes of the application of this Act and the regulations to a particular person:
>
> (a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;
>
> disregard any conduct engaged in by the person in Australia unless:
>
> (b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a

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49 G S Goodwin-Gill, 'Danian v. Secretary of State for the Home Department, Comment: Refugee Status and "Good Faith'' (2000) 12 *International Journal of Refugee Law*' 663, 670.

50 *Saadi v Italy* (European Court of Human Rights, App. No 37201/06, 2008).

> refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.

The legislation was in part a response to the confused case-law that had developed in Australia, as well as the then Minister for Immigration's concern that some asylum seekers could manipulate the system.[51] The section is itself rather confusingly drafted, as it is unclear to whom the direction 'disregard' applies.

Apart from its infelicitous drafting, three features of the legislation stand out. First, the legislation is not concerned, or at least not solely concerned with so-called 'bootstrappers' who create the entire basis of their claim for refugee status, but any conduct designed to *strengthen* a claim to refugee status. The comments of Buxton LJ in *Danian*[52] that it is difficult to tell which acts are relevant in such situations are very pertinent and caution against such a sweeping provision.

The second notable feature of the legislation is that a person is not simply excluded from refugee status because they have acted in bad faith. Rather, the legislation sets up an evidentiary exclusion. This could be viewed as a narrower approach than that adopted in *Re HB*. On the other hand, certain activities are disregarded even if they result in an objective risk of harm. The legislation therefore could have the effect of denying refugee status on the basis of bad faith, although the result is achieved by ignoring the relevant evidence, at least in those cases resting entirely on the asylum seeker's conduct, as opposed to some other evidence that supports an objectively well-founded fear of persecution.

During a regional conference of the International Association of Refugee Law Judges,[53] the chair of the panel on good faith, Rolf Driver FM, developed a useful hypothetical to explore the impact of section 91R(3). In this scenario, an asylum seeker with no previous history of political activities arrives in Australia, engages in bad faith political activities in Australia, and is sentenced to death in absentia on the basis of these activities. As the death sentence is not conduct of the applicant, it should not be disregarded under the legislation. In other cases, however, there may not be such tangible consequences that can be divorced neatly from the ignored conduct. Thus, the criticisms previously leveled at the RSAA decision in *Re HB* (Part III above) are equally applicable to the Australian legislation: on what basis may bad faith exclude someone from refugee status given that there are a number of express exclusions which are all based on something more significant to the purposes of the Convention than 'bootstrapping' behaviour?

The third and final important feature of the legislation is that it reverses the burden of proof. Rather than the Minister or delegate being satisfied that the person engaged in conduct to strengthen the claim to refugee status as opposed to acting

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51 For a discussion of the previous case law and the Minister's motivations, see B Hely, 'A Lack of Good Faith: Australia's Approach to "Bootstrap" Refugee Claims' (2008) 4(2) *The Journal of Immigration and Refugee Issues* 66, 67–70.

52 See text accompanying n 27 above.

53 Australasian Chapter meeting held in February 2010 at the University of New South Wales.

on a genuine belief, the onus is on the applicant to satisfy the Minister that any conduct engaged in within Australia was *not* for the purpose of strengthening the claim to refugee status. This is problematic given that the general principle applicable in refugee status determination is that the applicant gets the benefit of the doubt. As stated in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*:

> While the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.[54]

Why, given the principle of the benefit of the doubt, should it be *assumed*, unless the applicant proves *otherwise*, that any activity undertaken within Australia *must* be for the purpose of strengthening the claim to refugee status?

V. Section 91R(3) Before the High Court

The High Court has considered whether, if conduct is excluded from consideration under section 91(3), the section also prohibits adverse credibility findings based on the conduct which then cast doubt on other evidence adduced in support of the claim for refugee status. The cases of *Minister for Immigration and Citizenship v SZJGV; Minister for Immigration and Citizenship v SZJXO*[55] involved two asylum seekers who claimed to be Falun Gong practitioners. In each case, decision-makers at the lower levels (the Minister's delegate, followed by the Refugee Review Tribunal) had determined that the practice of Falun Gong in Australia, and, in the case of SZJXO, participation in demonstrations in Australia, all were for the purpose of strengthening the claim to refugee status.[56] Adverse inferences were then drawn from this finding to conclude that SZJGV had not previously practised Falun Gong in China and that SZJXO would not practise Falun Gong if returned to China. Consequently, their claims to refugee status failed.

On appeal, the Full Federal Court held that conduct excluded as a result of section 91R(3) could not be relied upon in any way by a decision-maker. By a majority of four to one, the High Court overturned the Full Federal Court's decision. While the dissentient, Justice Hayne, adhered to a literal interpretation of section 91R(3), the two joint judgments of the majority held that a purposive

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54 UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (2nd ed, 1992) [196].

55 *SZJGV and SZJXO* above n 10.

56 The facts of the cases are described in the judgment of Justices Crennan and Kiefel: *SZJGV and SZJXO* above n 10, [28]–[34] (Crennan and Kiefel JJ).

interpretation should prevail. Chief Justice French and Justice Bell, and Justices Crennan and Kiefel held that given the mischief which section 91R(3) was designed to meet, it was contrary to the section's purpose to disallow a decision-maker to make adverse credibility findings on the basis of the excluded conduct and consequent negative findings about other evidence supporting the asylum seeker's claim to refugee status.[57] The majority also held that only conduct which was *solely* for the purpose of strengthening the claim to refugee status was to be excluded.[58]

VI. The Subjectivity of Fear and the Weight of Credibility

A very important question that arises with respect to s 91R(3) in light of its interpretation by the High Court is the relevance of credibility to the assessment of well-founded fear of persecution. The joint judgment by Justices Crennan and Kiefel in *SZJGV* and *SZJXO*[59] confirms the traditional view that well-founded fear has two elements — a subjective element (the person is afraid), and an objective element (the fear is well-founded).[60] This view has been challenged in the Michigan Guidelines on Well-Founded Fear.[61] According to the Michigan Guidelines, refugee status determination is really about an objective assessment of risk. One of the concerns driving that proposition is the fact that decision-makers can ignore objectively well-founded apprehension of risk on the basis that lack of credibility means there is no subjective fear of persecution.[62] Consequently, the

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57 *SZJGV and* SZJXO, above n 10, [46]–[65] (Crennan and Kiefel JJ); [9]–[13] (French CJ and Bell J).

58 *SZJGV and* SZJXO, above n 10, [59] (Crennan and Kiefel JJ); [13] (French CJ and Bell J).

59 *SZJGV and SZJXO*, above n 10.

60 Ibid [53] (Crennan and Kiefel JJ). The traditional view is well-established in the Australian jurisprudence.

61 Michigan Guidelines on Well-Founded Fear, <http://www.law.umich.edu/CENTERSANDPROGRAMS/PRAL/Pages/guidelines.aspx>. The present author was a signatory to this set of guidelines and was the convenor of the colloquium that adopted the fifth set of guidelines. There have been five sets of Michigan Guidelines, including, most recently, the Michigan Guidelines on the Right to Work. All five sets of guidelines are available at <http://www.law.umich.edu/CENTERSANDPROGRAMS /PRAL/Pages/guidelines. aspx>. Participants in the colloquiua that led to the adoption of the Michigan Guidelines have been a mix of 'eminent publicists' and more junior colleagues in the field of refugee law, meaning that the guidelines may be appropriately referred to as a guide to interpreting the Refugee Convention and related human rights treaties. The Guidelines have been frequently referred to by courts, though not always followed. The approach of the Guidelines on Well-founded Fear clearly departs from the traditional approach to refugee status determination in one respect (the question of subjective fear), but they are valuable precisely because of the new angle taken to this fundamental aspect of the refugee definition.

62 In *Ghasemian v Canada*, the Canadian Federal Court found, *inter alia*, that it was open to refuse refugee status in a 'bootstrapping' case on the basis that there was no subjective fear, regardless of the objective evidence of persecution. See *Ghasemian v Canada (Minister of Citizenship and Immigration)* 2003 FC 1266. The Court found for

Michigan Guidelines adopt the position that 'fear' simply refers to an apprehension of harm.[63]

The guidelines address the question of credibility in some detail. According to the guidelines, 'an applicant's testimony may only be deemed not credible on the basis of a specific, cogent concern about its veracity on a significant and substantively relevant point.'[64] The guidelines also provide that '[e]ven where there is a finding that an applicant's testimony is not credible, in whole or in part, the decision-maker must nonetheless assess the actual risk faced by an applicant on the basis of other material evidence.'[65]

Given that the High Court's decision in *SZGJV and SZJXO* means that it is open to a decision-maker to draw adverse inferences from conduct occurring in Australia which may then infect the entire refugee claim,[66] the advice in the guidelines to think about what credibility findings relating to one part of the evidence mean for the whole claim and to consider evidence beyond the applicant's story is sound. It may well be that being found not credible with respect to sur place activities infects the whole refugee claim. On the other hand, is it not possible that a person who indeed has a well-founded fear would try to strengthen the claim in order to ensure they do not have to return, even if there is a risk of bringing further attention from the authorities? Could fear, particularly the subjective fear which it is assumed on the traditional approach that all refugees must have, cause behaviour that is unreasonable or irrational? Furthermore, as Lord Justice Sedley asks in *YB (Eritrea*), to find that credibility is low as the Court did in *Danian* is 'to beg the question: credibility about what? He has … already been believed about his activity and (probably) disbelieved about his motive. Whether his consequent fear of persecution or ill-treatment is well-founded is then an objective question. And if it *is* well-founded, then to disbelieve him when he says it is a fear he now entertains may verge on the perverse.'[67]

VII. Potential Chilling Effect of Section 91R(3)

Apart from the crucial question as to whether a person requiring protection will lose it as a result of section 91R(3), another potential problem with section 91R(3) is the message which the reverse onus of proof may send to asylum seekers about the extent to which they may exercise their civil liberties in Australia. On the one hand, the legislation certainly does not say that asylum seekers cannot exercise political freedoms in Australia. It only says that such exercises will be disregarded in the particular context of determining refugee status, and then only in certain

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the applicant on other grounds, and was prepared to review some of the evidence relied upon in order to find Ms Ghasemian not credible.

63 Michigan Guidelines on Well-Founded Fear, above n 61, [4].

64 Michigan Guidelines, ibid [11].

65 Michigan Guidelines, ibid [12].

66 *SZJGV and SZJXO*, above n 57.

67 *YB (Eritrea)*, above n 34, [13] (Sedley LJ).

circumstances. Moreover, according to the majority in *SZJGV* and *SZJXO*,[68] it is only conduct for the *sole* purpose of strengthening the claim to refugee status that is excluded. However, the assumption that all such action might only be taken for strengthening a refugee claim arguably has a chilling effect,[69] especially given the High Court's ruling that adverse inferences may be drawn about the rest of the claim to refugee status.[70]

If aware that any activity undertaken in Australia could be disregarded because of an assumption that it is manipulative behaviour, an asylum seeker might feel intimidated from exercising their civil liberties, such as the ability to protest against their home country's policies. The chilling effect is even more likely now it is clear that adverse inferences may be drawn about the claim to refugee status in general. The message is 'take care', as it will be assumed these activities are for the purpose of generating a refugee claim and they might be used against the asylum seeker to cast doubt on the rest of his or her claim.

VIII. Deterring Abuse of the Asylum System?

One last issue to consider is the policy underlying section 91R(3), other instruments and jurisprudence that utilise the concept of good faith against asylum seekers; namely the fact that there is a risk of the system being abused and a possible decline in political support for the Refugee Convention. *Re HB* and other cases from New Zealand[71] appear to involve applicants who are manipulative and not credible. Often, the case-law involves applicants who have been unsuccessful in one claim for refugee status and then engaged in political activity. However, caution is called for. Perhaps previous inactivity within the country of origin is itself motivated by Convention reasons. As Justices McHugh and Kirby note in *S395/2002*,[72] the case in which it was argued that two Bangladeshi men claiming fear on the basis of their sexuality would act discreetly, inaction or discretion may be related to fear:

> The reasons of the Tribunal show … that it did not consider whether the choice of the appellants to live discreetly was a voluntary choice uninfluenced by the fear of harm if they did not live discreetly. It did not consider whether persons for whom

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68 *SZJGV and SZJXO*, above n 10, [58]–[60] (Crennan and Kiefel JJ); [13] (French CJ and Bell J).

69 This argument was made in submissions to the Senate Legal and Constitutional Committee at the time that the Bill containing s 91R was introduced into parliament. See Hely, above n 51, at 74–75.

70 See *SZJGV and SZJXO*, above n 57.

71 At the regional conference of the International Association of Refugee Law Judges held in Sydney in February 2010, the Deputy Chair of the RSAA, Rodger Haines QC, gave numerous other examples of such claims, including *Refugee Appeal No 2226/94 Re LRR* (16 October 1996) in which, four days after arrival in New Zealand, a citizen of the People's Republic of China (PRC) visited the Chinese Consulate in Auckland to deliver a letter that was critical of the PRC government and which also stated the author's intention to claim refugee status in New Zealand.

72 *S395/2002*, above n 48.

> the government of Bangladesh is responsible condone or inculcate a fear of harm in those living openly as homosexuals, although it seems implicit in the Tribunal's findings that they do. Nor did the Tribunal's reasons discuss whether the infliction of harm can constitute persecution where an applicant must act discreetly to avoid that harm. Nor did they discuss whether, if the appellants wished to display, or inadvertently disclosed, their sexuality or relationship to other people, they were at risk of suffering serious harm constituting persecution. [73]

This reasoning could apply equally to political dissent. Perhaps we should not assume that manipulative applicants, even those who make a second claim for refugee status, are simply subverting the asylum system in order to migrate to another country. Perhaps these claims are in fact symptomatic of subjective fear of the regime in the country of origin: fear that has previously prevented dissident activity.

If that line of reasoning is not convincing, perhaps the following lessons from the case-law may be more persuasive. In cases where the only evidence is the applicant's story, their credibility may be entirely shot. Indeed, the chilling impact of adverse inferences referred to in section VII above could well serve a safeguarding function against those 'bootstrapping' applicants who are aware of the ruling by the High Court. Were section 91R(3) not on the books, it would be necessary to move to an objective assessment as to whether the matter would come to the attention of the authorities and whether or not they would perceive it as opportunistic — that is, behaviour which is best ignored rather than punished. In fact, in *Re HB*, the New Zealand RSAA found this was the case — there simply was no objective basis for refugee status.[74]

One should, of course, add a note of caution. It would not be possible in all cases to rely on oppressive regimes viewing the matter in the same way as the authorities in the state of asylum. As argued previously,[75] such cases require that the focus should be on the unreasonable behaviour of the country of origin, rather than the behaviour of the applicant.

If some are still not persuaded that this really is not a big practical problem, perhaps it is worth discussing whether there are alternative ways of deterring what may be viewed as abuse of the asylum system. In the Swiss and German law as at the time of the RSAA decision in *Re HB*, a distinction was drawn between *non-refoulement* and asylum. There might be some scope to discriminate in the sort of status a manipulative or 'bootstrapping' asylum seeker receives. However, it has to be borne in mind that if a person gets protection from *non-refoulement*, they are also entitled to protection of their basic human rights. Discriminatory regimes such

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73 *S395/2002*, ibid [35] (McHugh and Kirby JJ). See also the discussion concerning the likelihood of Lesbian, Gay, Bisexual, Transsexual or Intersex people 'coming out' in a country of refuge in N La Violette, '"UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity": a Critical Commentary' (2010) 22 *International Journal of Refugee Law* 173, 203.

74 *Re HB* above n 6, 18.

75 See the quotation from Goodwin-Gill in the text accompanying above n 49.

as the visa regime under the 'Pacific Solution',[76] or the complementary protection regime under the Qualification Directive,[77] or the system in the United States which distinguishes between asylum, withholding of removal, and deferral of removal[78] are difficult — sometimes impossible — to square with international human rights.

It is difficult to justify a differentiation in the rights granted to two people simply because one requires protection from persecution, while the other requires protection from torture. Any wrong-doing on the part of the protected person needs to be accounted for in a way that does not simply involve the stripping of a person's rights. Once in state territory, a person is entitled to protection of all their human rights. If it is not possible to return the person, conditions placed on admission (such as injunctions against working which are, of course, common in the case of visitors) may be viewed as violations of non-discrimination norms such as the free-standing equality provision in Article 26 of the ICCPR as well as unjustified limitations on other substantive rights (such as the right to work in the example previously given), because they may not be considered reasonable and proportionate. Not surprisingly, then, the provision within the Qualification Directive concerning reduction of benefits to 'boostrapping' refugees is a perfect study in ambiguity. It provides that, '[w]ithin the limits set out by the Geneva Convention, Member States may reduce the benefits of this Chapter [Chapter VII], granted to a refugee whose refugee status has been obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a refugee.[79] Chapter VII is expressly stated to be 'without prejudice' to the rights in the Refugee Convention.[80]

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76 See P Mathew, 'Australian Refugee Protection in the Wake of the Tampa' (2001) 96 *American Journal of International Law* 661, 673–74.

77 The discriminatory nature of the complementary protection regime under the Qualification Directive as compared with refugee protection under the same instrument has been criticized, eg, by Jane McAdam. See J McAdam, *Complementary Protection in International Refugee Law* (2007).

78 The US distinguishes between asylum (discretionary remedy for refugees) and withholding of removal (mandatory remedy for refugees who meet the high standard of proof ie, that persecution is 'more likely than not') and withholding of removal for a person claiming protection against *refoulement* to a place of torture and mere 'deferral' of removal for a person claiming protection against *refoulement* to a place of torture. The rights attaching to status under each of these remedies ranges from a high level of protection including the right to apply for permanent residence and then citizenship in the case of asylum, to the very tenuous level of protection attaching to deferral of removal with respect to potential torture victims who are caught by one of the 'bars' to protection (such as certain criminals, terrorists or persecutors).

79 Qualification Directive above n 30, art 20(6). The European Commission's proposal for a recast Directive would remove art 20(6). See Commission of the European Communities, Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted, COM (2009) 551, 2009/xxxx (COD).

80 Qualification Directive above n 30, art 20(1).

An alternative option might be to treat a bad faith claim as an offence. Indeed, in some jurisdictions there might already be relevant offences (such as perjury) on the books. The sentence could take the form of restorative justice — for example, community service. This could be a way of ensuring that the goal of protection from persecution is preserved while deterring 'bootstrapping' claims and assuaging community concerns about abuse. Community service avoids the economic and social costs of imprisonment and allows the person to contribute to the society whose faith in the system of refugee protection might otherwise be undermined.

On the other hand, perhaps prosecutions for such an offence might simply draw attention to the possibility of abusing the asylum system. Perhaps at the end of the day the preferable course of action is for decision-makers faced with successful 'boot strapping cases' to underline the importance of credibility and, in Australia, the High Court's finding that adverse findings may be made about all bases of a claim to refugee status, in the hope that these warnings are sufficient to deter other bootstrapping behavior.

IX. Conclusion

It would be useful to compile data on the number of 'bootstrapping' cases, including data from jurisdictions where the only weapon is credibility findings — which, it should be stressed, are a powerful weapon that often work to the detriment of *bona fide* refugees.[81] It seems very likely that few successful cases would be found. Therefore, decision-makers, policy-makers and the public should not be exercised by 'bootstrapping' asylum seekers. Rather, the focus should be on the conduct of governments — both within the countries of origin and countries of refuge. Persecutory treatment of manipulative asylum seekers should not be condoned, and the potential chilling consequences of deploying good faith against such asylum seekers should be viewed with concern. In reacting to 'bootstrapping' asylum seekers, countries of refuge begin to look rather like the countries from which refugees have fled,[82] and, more importantly, they risk *refoulement* of persons who are objectively at risk of persecution. The ultimate irony is that states parties to the Refugee Convention are the entities explicitly bound to observe the Convention in good faith.

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81 See, eg, the discussion of a 'refusal mindset' on the part of UK decision-makers in J A Sweeney, 'Credibility, Proof and Refugee Law' (2009) 21 *International Journal of Refugee Law* 700, 702–03.

82 As journalist Peter Mares has written of Australian deterrence mechanisms with respect to unauthorized arrivals who seek protection, '[t]he more we seek to deter asylum seekers and refugees through harsh treatment, the more Australia comes to resemble those repressive nations from which they flee.' P Mares, *Borderline: Australia's Response to Refugees and Asylum Seekers in the Wake of the Tampa* (2nd ed, 2002) 264.