**Andrew & Renata Kaldor Centre
for International Refugee Law**

Insights Report
Kaldor Centre Conference 2019

Good decisions: Achieving fairness in refugee law, policy and practice

Every day, decisions are made about whether people need international protection because they are at risk of persecution or other forms of serious harm. The 2019 Kaldor Centre conference explored aspects of refugee decision-making from the micro to the macro level – from individual cases through to wider public policy. It brought together decision-makers, scholars, civil society and people with lived experience of seeking asylum to discuss how we can ensure that refugee decision-making is fair, transparent and protection-sensitive.

The Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney is the world's leading research centre dedicated to the study of international refugee law. The Kaldor Centre undertakes rigorous research on pressing displacement issues in Australia, the Asia-Pacific region and around the world, and contributes to public policy by promoting legal, sustainable and humane solutions to forced migration. Through outstanding research and engagement, the Kaldor Centre has become recognised as an intellectual powerhouse with global impact.

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Keynote and opening addresses

- *The year in review*
  Professor Guy S Goodwin-Gill, Acting Director, Kaldor Centre for International Refugee Law
- *Toward 'fair, transparent and protection-sensitive' credibility judgments*
  Dr Hilary Evans Cameron, former litigator and now lecturer at the University of Toronto

So much comes down to one decision. All the vital, overlapping and sometimes interlocking global, regional and national forced-migration issues that filled the year's survey from Kaldor Centre Acting Director Professor Guy S. Goodwin-Gill can be met or unravel in that moment. Refugee status determination (RSD) is not abstract, as one former refugee put it; 'it is a matter of life and death.'

It is also, too often, stacked against those who seek protection, according to the opening speakers at *Good Decisions: Achieving fairness in refugee law, policy and practice*.

RSD is key to the effective, good faith implementation of the 1951 Refugee Convention and the 1967 Protocol, Professor Goodwin-Gill said. It also provides governments with a form of gate-keeping. Because of these duelling interests, he said, 'perhaps we should not be surprised that some governments tend to load the dice'.

Dr Hilary Evans Cameron described RSD as an obstacle course formed by burdens of proof, standards of proof, and presumptions, which are made more challenging for someone claiming asylum than for someone accused of crime. Criminal law strongly prefers to resolve doubt in favour of an accused, she noted, but the law is not so clear when it comes to someone claiming to be a refugee – despite the fact

> *"Is it worse to deny a claim that should have been granted or to grant a claim that should have been denied?"*
> *– Dr Hilary Evans Cameron*

that refugee claimants are facing the most serious kinds of consequences if their claims are wrongly denied, and that they are an exceptionally vulnerable class of litigant.

Challenging the conventional image of blind Lady Justice, Dr Evans Cameron argued that the law does not expect decision-makers to be neutral. Two questions arise that will force decision-makers to take sides, she noted. How certain must they be before they accept that the allegation is true? And what should they do if they cannot decide whether they are certain enough? The answers to these questions reflect a judgment about whether it is better to err on the side of accepting more false allegations or rejecting more true allegations.

'Which is the wrong kind of mistake in a refugee status determination? Is it worse to deny a claim that should have been granted or to grant a claim that should have been denied?' asked Dr Evans Cameron.

Her own conclusion is that decision-makers should give claimants the benefit of the doubt. While the 1951 Refugee Convention does not explicitly require this, Dr Evans Cameron argued that resolving doubt in the claimant's favour is a foundational normative principle of international refugee law.

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Having analysed hundreds of Canadian RSD rejections, Dr Evans Cameron said judgments about trustworthiness underlie the vast majority of decisions to deny an asylum claim. Often claimants' stories were indeed improbable. But that is the nature of survivor narratives, she said, quoting a man who lived through the Holocaust: 'All survivors can tell you a string of coincidences that border on the weird.'

A growing body of psychological research gives pause for thought about how confidently adjudicators – no matter how experienced – can judge credibility. Dr Evans Cameron noted evidence about human responses to dangerous situations (the evidence runs counter to 'common sense' assumptions); memory (even highly emotional memories are unstable); and popular lie-detection methods (they are about as accurate in determining truth as flipping a coin). 'We cannot make fair and protection-sensitive decisions without this kind of evidence,' she said, adding a challenge: 'Refugee law needs a cognitive revolution.'

In his Year in Review, Professor Goodwin-Gill swept across the wider challenges in refugee law, including 'the very future of the international protection regime itself', not to mention the 'prospects, distant though they may be, of re-establishing Australian law and policy on an even keel, recovering that basic humanity which community outreach tells us, again and again, is still there'.

The Global Compact on Refugees, he said, may prove to be the catalyst the international refugee regime has long needed. But its potential for change will be realised only through action, particularly by States. In December 2019, the Global Refugee Forum – the first of the Global Compact's follow-up sessions – will meet in Geneva and allow States like Australia to step up to the plate and make pledges on key components.

Professor Goodwin-Gill identified how Australia could meaningfully respond to key elements of the Compact: protecting access to asylum, resettlement, complementary pathways, family reunion, integration and the refugee voice.

On protecting access to asylum: 'That's a difficult one for Australia, after so many years of unilateral off-loading,' he said, noting that it would require greater investment in front-loading, independent decision-making, credible appeal and review, and committing to avoid arbitrary detention.

As for resettlement, Professor Goodwin-Gill noted that six years ago, 80 per cent of the refugees in Australia's humanitarian programme came from those identified by the United Nations refugee agency, UNHCR, but last year it was only 23 per cent. 'UNHCR estimates that 1.4 million refugees will need a resettlement place in 2020,' he said. '[Australia] can and should re-commit to the humanitarian imperative, increase the numbers, and pay heed to those in special need.'

Humanitarian programmes need not be the only way to find protection and a future, however, and Professor Goodwin-Gill encouraged Australia to embrace complementary pathways:

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'Australia should think outside the box, and commit to exploring and exploiting alternatives additional to the programme – labour migration, education, training.'

'Integration is a two-way process, and the evidence shows that investment produces results,' he said. 'Australia can and should commit to avoiding marginalisation, by investing in integration through language tuition, skills recognition and acquisition, and other incentives.'

Refugee voices had been unheard for far too long, he said, adding: 'Australia can and should commit to supporting their agency, their involvement, and that of the communities who host them. And beyond our borders Australia should commit to be a voice for refugees, to speaking out for them, and against those who are the cause of displacement.'

"Doctrinal leadership begins from below, from the understanding that we develop in our work with the 'cases' that are peoples' lives; and it often begins in that hard graft, which comes with searching for and locating all the ways – evidential, argumentative, principled – that will ensure that those in need find the protection to which they are entitled."
– Professor Guy S Goodwin-Gill

Nationally and internationally, basic principles of refugee protection would continue to be challenged in the future, Professor Goodwin-Gill said. 'They will need to be advocated strongly from the ground up, filling the vacuum left by the proven inefficiency and harmful outcomes of too many top-down government policies disconnected from life at it is lived.'

Deciding Refugee Claims

- *Street-level bureaucrats, discretion and data: pre-screening protection claims at the border*
  Regina Jefferies, Scientia PhD Scholar, Kaldor Centre for International Refugee Law
- *Assessing asylum claims for members of the 'Legacy Caseload'*
  Edward Santow, Human Rights Commissioner, Australian Human Rights Commission
- *Refugee Status Determination: Mental distress and lethal hopelessness: Challenges for legal professionals*
  Mary Anne Kenny (Associate Professor, School of Law, Murdoch University) &
  Professor Nicholas Procter (Chair, Mental Health Nursing, University of South Australia)
- Chaired by Om Dhungel, Consultant and trainer

There are more than 25 million refugees worldwide identified by UNHCR. Australia provides protection for about 18,000 people a year, yet refugee status determination (RSD) in Australia is complex and not widely understood. This panel unpacked the RSD process, which varies according to how and when someone seeking asylum arrives in Australia.

While much of the public attention focuses on people seeking asylum who came by boat, Regina Jefferies stepped through the process of claiming asylum at Australia's airports. Her research shows how 'hidden decisions' being made in bureaucratic RSD processes – which are not part of legislation or regulation, but rather departmental policy carried out by 'street-level' staff – go on to shape normative protection practices without ever being scrutinised, or in many cases even recorded. For instance, Australian Border Force agents at airport immigration clearance and a Duty Delegate from the Department of Home Affairs Humanitarian Program carry out 'pre-screening' that can determine someone's prospect of lodging a claim, without any legal regulation or review. Such practices, which may breach non-refoulement obligations, build

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to contest and potentially undermine the norm. Yet there are currently no appropriate compliance and data collection measures around such practices. It is unclear whether travelers who raise protection claims in Australian airports are able to put forward their claims, because the claim itself may not be recorded in the entry-screening process due to a decision taken by a 'first instance' government official. This removes the opportunity to scrutinise the decisions, so these 'hidden decisions' may persist and shape the protection space.

As for those people seeking asylum who arrived in Australia by boat, the spotlight has mainly been on those sent for offshore processing in Nauru and Papua New Guinea. However, some 30,000 people who arrived between 2012 and 2014 remain in Australia, a group the Australian Government calls the 'legacy caseload', and Edward Santow's presentation condemned the treatment of these claimants, who have no access to permanent protection. While half of them have received three- or five-year protection visas, a quarter of the cohort still awaits a primary RSD decision. For those who receive a negative primary decision, the only avenue of appeal is to the Immigration Assessment Authority, where they have very limited opportunity to give further evidence or an oral interview. This reduces the capacity to identify and address errors in refugee status determination. Most of these claimants are ineligible for legal support, and their access to healthcare, work rights and other services varies. Referring to the Australian Human Rights Commission's report, *Lives on Hold: Refugees and asylum seekers in the 'Legacy caseload'*, Santow described a group of traumatised people facing destitution, homelessness and worse while they wait for stable protection.

> *"We need a rigorous, robust process to determine whether someone is a refugee and to review decisions to correct for mistakes. The stakes are high. An error can result in an individual being returned to a place where they face persecution or even death."*
> *– Edward Santow*

Mary Anne Kenny and Professor Nicholas Procter advocate for providing trauma-informed support for asylum seekers, with particular attention to those facing extreme wait periods. The researchers articulated the extreme mental distress that the RSD process has on people in the 'legacy caseload', for whom complex trauma, language barriers, and prolonged wait periods often intersect. Professor Procter detailed the disproportionate rates of self-harm, suicide ideation, and attempted and completed suicide among this group, whose members face what he called 'excruciating uncertainty' and 'lethal hopelessness'. Kenny discussed the findings from interviews conducted with legal practitioners working with these refugee claimants. The findings reveal the extent to which lawyers are having to respond to challenging mental health issues, for which they are untrained, due to their clients' extreme distress and the lack of social

support services available to them. For the 'legacy caseload' and those who work with them, the cycle of mental distress is deepening and spreading.

Chair Om Dhungel, who successfully applied for asylum in Australia 21 years ago, held up his acceptance letter saying, 'This is not abstract. When you are actually making that application and waiting for the result and assessment to be done and waiting for the decision, it is traumatic... This is all people are looking for.'

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Good policy, good politics?

- *Nothing about us without us: The role of people with lived experience in decision-making*
  Najeeba Wazefadost, President, Hazara Women of Australia
- *The wealth paradox: Economic prosperity, populism and opposition to refugees and asylum seekers*
  Professor Jolanda Jetten, School of Psychology, University of Queensland
- *How law and policies create barriers to inclusion for refugees and people seeking asylum*
  Dr Sangeetha Pillai, Senior Research Associate, Kaldor Centre for International Refugee Law
- Chaired by Abdul Karim Hekmat, Journalist and photographer

Refugees are too-often an abstract group in political discussion, and panelists in this session demonstrated the deleterious impact that can have on individual and social potential.

Najeeba Wazefadost emphasised her individuality; almost 10 years old when she risked her life to come to Australia with her family by boat, she noted, 'It is the hardest decision for any one of us to decide to leave our country. A break from all one knows about living, how to earn a livelihood, how to live in the society, how to live in the landscape, how to taste, touch and smell.' Refugees must be seen as the real actors, and supported to take effective action at the centre of decision-making. Having established the Asia Pacific Network of Refugees (APNOR), the first regional group for refugees that is led by refugees, Wazefadost has been engaging with the Global Refugee Forum. 'Success is led by those most affected,' she said, emphasising that a sustainable refugee response requires meaningful refugee participation. Already refugees are the first responders; self-reliance is integral: 'It is critical in saving lives.' Wazefadost urged humanitarian organisations to genuinely build the capacity of, and share power and resources with, refugees and refugee-led organisations.

> *"Refugees need to be seen as actors of change not just recipients of aid."*
> *– Najeeba Wazefadost*

Social psychologist Professor Jolanda Jetten has studied attitudes towards refugees, asylum-seekers and migrants in Australia and other countries. Despite conventional political assumptions that economic disadvantage is what drives people to the political right, her work finds no evidence of a correlation between economic conditions and populist voting. The success of Australia's populist minor party One Nation came off the back of five years of economic growth. In the UK, it was middle-class voters – not blue-collar – who led the 'Brexit' vote to leave the European Union. Professor Jetten's work shows that the farther people live from the cities, the more they support populist parties, regardless of their personal or regional economic circumstances. Evidently, she said, support for populist political parties is driven less by economic disadvantage than by psychologically feeling 'left behind' in fast-changing times. Jetten concluded that for social harmony, policy-makers ought to focus less on economics and more on voters' anxieties about losing their power and voice; once those concerns are addressed, she said, people tend to be more open-minded, and more generous toward others, including refugees and people seeking asylum.

The trend in Australian law and policy has been to clamp down on membership in the Australian community, according to research by Dr Sangeetha Pillai. Recent legislation has created new tiers of membership of the Australian community, so that the rights of citizens are harder to gain and easier to lose. It is still possible for newcomers to move through from temporary status, to permanent residents, to Australian citizen, Dr Pillai said, but it has become

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much easier for some people than for others. Citizenship is now practically impossible for some people to obtain, and this disproportionately affects people from refugee backgrounds, for whom inclusion, security and stability are especially important. Recent policy changes – such as 'fast-track' RSD, extended wait times, and temporary protection visas – delay or foreclose refugees' full membership in the community, and the rights that go with it. Earlier Australian

policy was designed to maximise newcomers' conversion rates to full citizens. That policy has shifted, and further barriers – such as tougher residency and English-language requirements – have been proposed. While Australian citizenship used to be almost impossible to lose, citizenship-stripping laws passed in 2015 also have a disproportionate impact on refugees, Dr Pillai said.

Chair Abdul Karim Hekmat, a refugee who came from Afghanistan by boat in 2001, said he had felt the cruelty of Australian politics since that time. He noted that refugees now generally spend at least eight years before being able to reunite with their family or start a stable life in Australia.

Getting to good decisions

- Shahyar Roushan, Senior Member, Administrative Appeals Tribunal
- Justice Melissa Perry, Judge, Federal Court of Australia
- Shaun Hanns, former Protection Obligations Decision Maker, Department of Home Affairs
- Chaired by Shukufa Tahiri, Policy Officer, Refugee Council of Australia

In this fascinating panel discussion, decision-makers working across the spectrum of deciding asylum cases in Australia shed light on the processes and pressures involved.

Panelists described how decisions were made at each level. At the departmental, primary-decision level, Hanns said that before an interview, he would spend some hours researching what he could about the applicant from their file and online research, then conduct the interview and take a couple of days to make a decision. The Administrative Appeals Tribunal (AAT) reviews decisions to refuse or cancel a visa for those outside the 'legacy caseload', including those who arrive by plane or apply for protection while on another visa. Sitting in the middle of the process, the AAT looks at both merits and the law. There is a large volume of cases, and a shortage of members has contributed to a current backlog. At the Federal Court, migration cases comprise a large proportion of its workload. The Court does not undertake merits review, and cannot, for example, grant visas. The Court conducts judicial review only, and understanding these limitations on the Court's powers can be difficult for unrepresented litigants, as the vast majority of applicants are; even lawyers struggle with the complexities of jurisdictional error. When issues arise on the papers in unrepresented matters, courts may consider it appropriate to issue a referral for pro bono counsel. The very vulnerable nature of litigants also highlights the importance of the Minister's legal counsel complying with model litigant principles. Judicial review should also serve to promote better administrative decision-making.

At every level, credibility is a complex assessment requiring cognisance of, among other things, the impacts of trauma, mental health, cross-cultural communication, and the role of interpreters. Adjudicators on the panel all said they safeguard their independence, and aim to be conscious of their biases and of the limits of their experience, remaining open to entertaining the benefit of the doubt. Machine-learning or artificial intelligence technology is not currently a substitute for discretionary or evaluative decision-making in the RSD process in Australia. Panelists noted that in such complex cases, where the law cannot foresee individual circumstances, it is appropriate for decision-making to remain with humans. It was noted by a panelist that other countries, such as the UK, have passed laws providing safeguards for the independence of Tribunal decision-making and establishing a process for the appointment of competent judicial officers, including Tribunal members. Australia might benefit from considering similar approaches.

At each stage, the majority of asylum applicants provide evidence with the assistance of interpreters, often a different interpreter on each occasion. Variations occur – dialects vary, and literal, word-perfect translation is neither possible nor desirable. This means, though, that something as simple as a verb tense can present as a discrepancy in an applicant's story – for instance, did an event happen in the past or present? – and impact on his or her credibility. A high quality of interpreting is therefore essential to fair assessment and procedural fairness. It is also difficult to 'fix' in retrospect: to prove that a decision turned on the quality of interpreting is difficult, expensive and inefficient. The *Recommended National Standards for Working with Interpreters in Courts and Tribunals*, however, serve to facilitate administrative and substantive justice for potentially very vulnerable people, whose needs can be complex.

Legal representation is another concern for asylum claimants, with many having lost government-supported legal assistance in recent years. A lawyer can help clarify for claimants the context and significance of what is being asked of them. However, it was noted that self-represented litigants are not a homogenous group, and that the quality of representatives also varies. Panelists recognised that the experience of the refugee decision-making process can be either empowering or can add to a claimant's trauma. If claimants feel they haven't been listened to or treated respectfully then they may lose confidence in the system. While applicants won't always receive their desired outcome, a respectful process can nevertheless lead to greater acceptance of the decision.

Communicating reasons is important not only for applicants but for the system overall. Written reasons have to encapsulate the decision-maker's true and contemporaneous reasons for making a decision. Writing reasons also requires decision-makers to subject their reasoning to close self-scrutiny, thereby promoting high quality decision-making. In this regard, the Administrative Review Council's *Best Practice Guides, and Practical Guidelines for preparing statements of reasons*, provide helpful practical guidance for decision-makers. Rigorous reasons must be well communicated to promote transparency and accountability.

Full podcasts of conference sessions and further resources are available on our website: www.kaldorcentre.unsw.edu.au

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