



## Malaysia People Swap

In a joint statement with Malaysian Prime Minister Datuk Seri Najib Tun Razak on May 7 2011, then Prime Minister Julia Gillard announced an agreement had been reached to swap 800 future irregular maritime arrivals from Australia with 4000 UNHCR recognised refugees from Malaysia over the next four years.<sup>1</sup> Although the details of the plan are yet to be fully revealed, a number of myths about this so-called 'solution' have already arisen in the media. Here are the facts.

### **MYTH 1: The Labor government is offering boat arrivals a tough but fair choice.**

As a result of this new policy, Gillard's advice to future asylum seekers is, 'Don't get on that boat...what it will mean is you have given your money to people smugglers, you have risked your life at sea and you will be at a real risk of ending up in Malaysia instead.'<sup>2</sup> Gillard fails to outline the consequences for asylum seekers who take her advice. This would be to either (1) stay and face persecution; or (2) remain in a country of first asylum where two-thirds of the world's refugees face exile without basic rights for an average of 20 years,<sup>3</sup> hardly a fair choice.

### **MYTH 2: Australia is swapping 'illegal' asylum seekers for a greater number of 'genuine' refugees**

Asylum seekers who enter Australia undocumented are not illegal under the Refugee Convention or Australian law.<sup>4</sup> Those who are determined to be refugees – which includes the vast majority of boat arrivals – have an equal right to be protected as those waiting in overseas camps. No human being is more or less deserving of freedom from persecution. Furthermore, asylum seekers are not required to remain in countries such as Indonesia or Malaysia that are not signatories to the Refugee Convention and are either unable or

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<sup>1</sup> Malaysian National News Agency, 'Joint Statement By Prime Ministers Of Malaysia, Australia On People Smuggling,' *Bernama.com*, <http://www.bernama.com/bernama/v5/newsgeneral.php?id=584652>, 07 May 2011.

<sup>2</sup> Samantha Maiden, 'Prime Minister Julia Gillard gambles on asylum seekers,' *Herald Sun*, <http://www.heraldsun.com.au/news/national/the-malaysia-solution/story-e6frf7l6-1226051823034>, 08 May 2011.

<sup>3</sup> For more on the conditions of countries of first asylum, see the ASRC's, 'Myths, Facts and Solutions,' <http://www.asrc.org.au/media/documents/myths-facts-solutions-info-apr-2011.pdf>, p 11.

<sup>4</sup> See the ASRC's, 'Myths, Facts and Solutions,' <http://www.asrc.org.au/media/documents/myths-facts-solutions-info-apr-2011.pdf>, p 3.

unwilling to provide asylum seekers with a durable solution and the basic necessities of life.

### **MYTH 3: Labor's new policy sends onshore asylum seekers to the 'back of the queue.'**

The new policy will only apply to unauthorised arrivals by sea and not unauthorised arrivals by air. If the Gillard government was truly concerned about mythical queue jumpers, why do they choose to only selectively target unauthorised boat arrivals? The answer is that neither the Labor government nor the Opposition are interested in any misplaced notions of fairness; only the potential political gain from exploiting popular anxiety about being flooded by 'boat people'.

Furthermore, there is no just and orderly queue that boat arrivals have 'jumped'. Less than one percent of all refugees in the world are able to access UNHCR processes for resettlement. In addition, there are 15.4 million refugees in the world. If every one of them managed to get to UNHCR processing, it would take 192 years to clear.<sup>5</sup> The 'queue' is a fantasy used to justify the shifting of Australia's responsibility to the world's most vulnerable people offshore.

### **MYTH 4: Removing 800 asylum seekers to Malaysia is cost-effective**

Then Immigration Minister Chris Bowen announced that it would cost \$76 million to fly the 800 asylum seekers from Malaysia to Australia.<sup>6</sup> The cost of processing asylum seekers while living in the community is roughly equivalent to the income rate paid through the Asylum Seeker Assistance Scheme (ASAS). The government spent \$9 million dollars on this scheme to provide services to 2802 asylum seekers already living in the community over the entire 2009–10 financial year. At that rate, \$76 million would provide for 23,661 asylum seekers living in the community for one year. While this does not include any additional health, counselling and case management costs, the total figure is undoubtedly significantly lower than flying asylum seekers to Malaysia. Of course, the human costs of deporting asylum seekers to inhumane conditions are incalculable.

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<sup>5</sup> UNHCR's latest statistics report that there were 15.4 million refugees in the world in 2012 while only 80 000 places were earmarked for resettlement. See 'UNHCR Global Trends 2012', See [http://unhcr.org/globaltrends/june2013/UNHCR%20GLOBAL%20TRENDS%202012\\_V05.pdf](http://unhcr.org/globaltrends/june2013/UNHCR%20GLOBAL%20TRENDS%202012_V05.pdf)

<sup>6</sup> Samantha Maiden, 'Prime Minister Julia Gillard gambles on asylum seekers,' *Herald Sun*, <http://www.heraldsun.com.au/news/national/the-malaysia-solution/story-e6frf7l6-1226051823034>, 08 May 2011.

**MYTH 5: The asylum seekers transferred to Malaysia by Australia will be treated humanely.**

A recent investigation by Amnesty International reports that refugees and asylum seekers in Malaysia are abused, exploited, arrested and locked up –in effect, treated like criminals.<sup>7</sup> Malaysia has not signed the Refugee Convention (and other key human rights treaties) and so does not officially recognise refugee status. Asylum seekers and even UNHCR registered refugees have no right to work in Malaysia and receive no assistance from the government. Many must resort to working without authorisation in dangerous and dirty jobs just to survive, exposing them to abuse and exploitation. 6000 asylum seekers and refugees are caned annually in Malaysia, a practice that Amnesty International describes as ‘torture’.<sup>8</sup>

**MYTH 6: Asylum seekers will get ‘special treatment’ to ensure they are treated with dignity and respect**

The joint statement released by Gillard and the Prime Minister of Malaysia declares that ‘transferees will not receive any preferential treatment over asylum seekers already in Malaysia.’<sup>9</sup> Chris Bowen specifically stated that asylum seekers ‘should not get special treatment in terms of access to any particular welfare or work rights’.<sup>10</sup> On 2 June 2011, a draft document of the agreement was leaked to the media which revealed the Malaysian government was proposing to remove all references to human rights and ensure transferred asylum seekers were not subject to the Refugee Convention but ‘Malaysian laws, rules, regulations and national policies’.<sup>11</sup>

Bowen has insisted that identity tags will ensure transferred asylum seekers will be treated with ‘dignity and respect’, however, Malaysian authorities have a history of destroying ID cards issued by the UNHCR. Malaysian refugees have reported that authorities threw away their UNHCR documents before arresting them.<sup>12</sup> Still others said they could only avoid arrest or detention by

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<sup>7</sup> Amnesty International, ‘Abused and Abandoned: Refugees Denied Rights in Malaysia,’ <http://www.amnesty.org/en/library/asset/ASA28/010/2010/en/2791c659-7e4d-4922-87e0-940faf54b92c/asa280102010en.pdf>, 16 June 2010.

<sup>8</sup> Amnesty International, ‘Case study: NianVung, a refugee caned in Malaysia after fleeing Myanmar,’ <http://www.amnesty.org/en/library/asset/ASA28/015/2010/en/26559f81-7b42-49e9-a1a9-2fb33b2a15ad/asa280152010en.pdf>, 6 December 2010.

<sup>9</sup> Malaysian National News Agency, ‘Joint Statement By Prime Ministers Of Malaysia, Australia On People Smuggling,’ *Bernama.com*, <http://www.bernama.com/bernama/v5/newsgeneral.php?id=584652>, 7 May 2011.

<sup>10</sup> Minister for Immigration and Citizenship, ‘Chris Bowen Interview with Fran Kelly,’ ABC Radio National Breakfast, <http://www.minister.immi.gov.au/media/cb/2011/cb165151.htm>, 9 May 2011.

<sup>11</sup> ABC Lateline, ‘Malaysia edits rights out of refugee deal’, <http://www.abc.net.au/lateline/content/2011/s3234297.htm>, 02 June 2011.

<sup>12</sup> Amnesty International, ‘Abused and Abandoned,’ p. 11

paying a bribe.<sup>13</sup> Very rarely are police held to account for the abuses they commit. Given the lack of integrity and oversight over Malaysia's immigration practices, neither the Malaysian nor the Australian government is in any position to guarantee that asylum seekers won't be abused.

### **MYTH 7: Asylum seekers will not be placed in detention**

The Malaysian High Commissioner in Canberra has said that the transferred asylum seekers would not be placed in detention, but instead would 'mingle' in the community while their claims were processed.<sup>14</sup> It has since been revealed that the transferred asylum seekers would have spent six weeks in a new Australian funded holding centre before being released into the community.<sup>15</sup> Once released into the community, the Australian government cannot guarantee asylum seekers will not be arrested by immigration authorities and sent to one of Malaysia's detention centres.

Amnesty International reports that asylum seekers and refugees, *including those with UNHCR documents*, are susceptible to arrest and detention in 'filthy and overcrowded' conditions. Many are held for months without access to lawyers and with no way of appealing against their detention. Once in the centres, detainees lack proper health care, sufficient food and clean drinking water. Children are held with adults and abuse by detention staff is rife. Between 2002 - 2006, 1300 detainees died in immigration detention, prisons and jails due to inadequate access to healthcare.<sup>16</sup>

### **MYTH 8: Asylum seekers will be protected while living in the community**

While living in the community is preferable to detention, asylum-seekers and refugees in Malaysia face the daily prospect of being arrested and detained in squalid conditions and are vulnerable to abuse and violence in their homes, in public and at their places of work. During immigration raids, police employ violent tactics to extort money from them, or to intimidate and harass them. Women refugees and asylum seekers are often the targets of violence, including sexual or gender-based violence. They have little protection against such violence, with minimal access to lawyers, medical treatment, safe

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<sup>13</sup> Amnesty International, 'Abused and Abandoned,' p. 11.

<sup>14</sup> Malaysian National News Agency, 'Malaysian Envoy: Asylum Seekers Will Be Treated With Dignity,' *Bernama.com*, <http://www.bernama.com/bernama/v5/newsgeneral.php?id=584836>, 8 May 2011.

<sup>15</sup> Paul Maley and RowenCallick, 'Special rights for Malaysia refugees', *The Australian*, <http://www.theaustralian.com.au/national-affairs/special-rights-for-malaysia-refugees/story-fn59niix-1226072026262>, 9 June 2011.

<sup>16</sup> US Department of State, '2010 Country Reports on Human Rights Practices – Malaysia', <http://www.unhcr.org/refworld/topic,4565c2251a,4565c25f239,4da56dadb,0.html>

houses and other necessary support. 'My daughter is only 12. Local men have tried to take her twice already,' one woman, a Rohingya refugee from Myanmar, told Amnesty International. 'I went to the police but they've done nothing. How can I protect my daughter? At night they come to our house and demand money or a girl. We move but it keeps happening. We don't know what to do.'<sup>17</sup>

**MYTH 9: Asylum seekers will be put in a queue and get a fair chance to be resettled.**

The exact size of Malaysia's asylum seeker and refugee population is not known, however, estimates vary from 90,000 to over 170,000 asylum seekers and refugees. The UNHCR has acknowledged that a large number of people of concern to it remain unregistered. Limited funding and a difficult operating environment mean that the needs of the refugee population currently outweigh the capacity of UNHCR to respond adequately.<sup>18</sup> Asylum seekers must wait to undergo the refugee status determination process before being recognised as refugees. Given there is only limited numbers, not all will be submitted by UNHCR for resettlement. For example, only 5,865 refugees were resettled in 2008 and 7,509 in 2009.<sup>19</sup> Clearly, the prospects of resettlement for up to 170 000 asylum seekers and refugees in Malaysia are dim.

**MYTH 10: The Malaysian People Swap was a legitimate policy option.**

The Malaysian People Swap deal was found illegal by the High Court in August 2011. The High Court held in a 6 to 1 judgment, that because Australia's Migration Act was contravened because it only provided for the removal of people to countries which provided legal protections to asylum seekers in line with the Refugee Convention. Malaysia is not a signatory to the Refugee Convention and lacks domestic legal protections for asylum seekers. Since the High Court judgment, unfortunately the Australian Parliament has legislated to allow an arrangement such as the Malaysian People Swap deal, with disregard to Australia's international obligations.<sup>20</sup> It is likely that there will be another legal challenge to the newest government policy regarding offshore arrivals removal to Papua New Guinea and it is unlikely to comply with international law.<sup>21</sup>

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<sup>17</sup> Amnesty International, 'Abused and Abandoned,' p. 15.

<sup>18</sup> Amnesty International, 'Abused and Abandoned,' p. 3.

<sup>19</sup> Amnesty International, 'Abused and Abandoned,' p. 17.

<sup>20</sup> Department of Immigration and Citizenship,

<http://www.immi.gov.au/legislation/amendments/2012/120818/lc18082012-01.htm>

<sup>21</sup> Professor Ben Saul, <http://theconversation.com/rudds-png-plan-unlikely-to-comply-with-international-law-16250>