

Research Brief

REFUGEE STATUS DETERMINATION IN NAURU

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Introduction

Nauru is the world's smallest island nation, stretching to just twenty-one square kilometres. Sitting just below the equator, Nauru is a raised, fossilised coral atoll in the Pacific Ocean. The Nauruan population of about 10,000 people is a mixture of Micronesian, Polynesian and Melanesian descent. They are predominantly Christian and speak Nauruan and English.

Most of Nauru's land area is degraded and unsuitable for habitation, agriculture or other development as a result of phosphate mining over the last century.¹ Almost all of the population lives along the coastal flat areas, making them highly vulnerable to climate change, sea-level rise and natural disasters. The island also faces serious food and water insecurity and is dependent on foreign imports, which is particularly concerning in light of Nauru's struggling economy. According to the Australian government, revenue associated with offshore processing constitutes 'Nauru's most significant revenue stream'.²

Since 13 August 2012, asylum seekers arriving in Australia by boat without valid visas have been subject to 'offshore' or 'third country' processing either in Nauru or on Manus Island in Papua New Guinea (PNG). The terms of these arrangements were originally set out in a

memorandum of understanding between Australia and Nauru signed in August 2012 and were superseded by a new agreement in August 2013.³

Asylum seekers have been sent to Nauru in two cohorts. The first cohort comprised more than 600 adult male asylum seekers who arrived in Australia by boat between 13 August 2012 and 18 July 2013.⁴ While these asylum seekers were transferred to Nauru, others arriving at the same time were transferred to PNG or permitted to remain in Australia. After 19 July 2013, everyone in this cohort who was still offshore began to be brought back to Australia. While it is believed that ‘several hundreds’ of initial decisions were ready to be handed down at this time,⁵ no one transferred offshore in this cohort ever completed refugee status determination (RSD) or received an outcome on Nauru. Instead, they were transferred back to Australia and required to wait (either in the community or in detention) before being permitted to lodge fresh claims for asylum and start the process again from 2015 onwards.

The second cohort comprises asylum seekers who arrived in Australia by boat on or after 19 July 2013. They are subject not only to offshore processing but also a permanent ban on settlement in Australia if found to be refugees, according to a new policy introduced by Prime Minister Kevin Rudd in 2013.⁶ Between July 2013 and September 2014 more than 1350 men, women and children were forcibly transferred to Nauru. The only asylum seekers exempt from transfer and the ban on settlement in Australia were those who arrived in Australia by boat between 19 July and 31 December 2013 and had not been transferred offshore by December 2014, and the families of thirty-one babies who were born in Australia before 4 December 2014 after their mothers were transferred back from Nauru.⁷ No new asylum seekers have been transferred to Nauru since September 2014.

People in this second cohort may be brought back to Australia temporarily in certain circumstances (such as to receive medical treatment or give birth), at which point they are called ‘transitory persons’. However, all transitory persons must be sent back offshore as soon as the reason for their return to Australia has been resolved.⁸ People who are recognised as refugees in Nauru are permitted to stay there on a temporary basis but must find permanent settlement options elsewhere. See [below](#) for more information.

While waiting for an outcome on their claims, all asylum seekers were previously detained at the Nauru regional processing centre (Nauru RPC). In February 2015, the Nauruan government announced the introduction of partial ‘open centre arrangements’ at the RPC, under which some asylum seekers were granted permission to leave between certain hours on certain days.⁹ In October 2015, the Nauruan government announced that the RPC was a completely open centre, thus marking the end of formal detention and allowing refugees and asylum seekers relatively free movement in Nauru.¹⁰ By November 2016, despite the formal ‘opening’ of the Nauru RPC, UNHCR continued to describe the conditions the RPC as a ‘detention-like setting’ in which ‘key aspects of conditions are indistinguishable from previous detention arrangements’.¹¹

Refugee status determination (RSD) in Nauru

Legislation

Between 2001 and 2007, when Nauru hosted two refugee processing centres under the Howard government's 'Pacific Solution', the claims of asylum seekers held in these centres were assessed by either the UN High Commissioner for Refugees (UNHCR) or Australian immigration officials, applying generally the same procedures and standards as they would elsewhere.¹² Nauruan refugee law did not begin to develop until 2011, when Nauru acceded to the 1951 Convention Relating to the Status of Refugees (Refugee Convention) and its 1967 Protocol. At this date, and until October 2012, Nauru did not have any domestic law, process or institutional capacity for the performance of RSD.

In 2012, Nauru passed the *Refugees Convention Act* 2012, which governs Nauru's RSD process.¹³ According to the Nauruan government, this law gives effect to the Refugee Convention:

by incorporating the principles and obligations under the Convention into the laws of Nauru. This ensures that Nauru is satisfying its international obligations while at the same time giving effect to the rights of asylum seekers and refugees.¹⁴

The *Refugees Convention Act* adopts the definition of a 'refugee' set out in the Refugee Convention, and establishes an RSD procedure for determining whether asylum seekers are entitled to refugee status. RSD is formally the responsibility of the Nauruan Secretary for Justice and Border Control (the Secretary). The law also establishes a Refugee Status Review Tribunal (the Tribunal), which is empowered to perform merits review of negative decisions about an asylum seeker's application for refugee status. The Tribunal sits as a three-member panel and must act according to the principles of natural justice. As a final stage of review, some asylum seekers who are not recognised as refugees after merits review may be allowed to apply to the Supreme Court of Nauru for judicial review of their case, if it involves a challenge on a point of law (see [below](#) for more information).

Section 4 of the *Refugees Convention Act* transposes Nauru's obligations under the Refugee Convention 'not [to] expel or return a person determined to be recognised as a refugee to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion' (*non-refoulement* obligations). In 2014, Nauru amended the *Refugees Convention Act* to include recognition of its 'complementary protection' obligations under international law, including its obligations not to return any person to a place where he or she would face a real risk of significant harm (such as being exposed to arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment).¹⁵

Early observations about Nauruan RSD capacity

After visiting Nauru in December 2012, UNHCR returned with significant concerns about the state of Nauru's RSD system, as well as the 'lack of clarity as to the legal and operational

roles and responsibilities of the two States parties to the transfer arrangements'.¹⁶ UNHCR assessed that 'a great deal of preparatory work' needed to be done before it could be said that a functional, fair and effective system for RSD was in place in Nauru, and noted that:

- no substantive assessments of refugee claims had begun at that time;
- no asylum procedures were in place;
- there were no experienced RSD decision makers in the Government of Nauru; and
- no potential candidates had been identified to be a members of the Tribunal and perform independent merits review.¹⁷

UNHCR concluded that 'delays in commencement of substantive processing arrangements for asylum-seekers may be inconsistent with the primary and, arguably, sole purpose of transfer to a 'Regional Processing Centre', namely, to undertake refugee processing in a fair, humane, expeditious and timely way'.¹⁸ A number of asylum seekers detained on Nauru described the lack of clarity about RSD procedures and their timeframes as 'cruel'.¹⁹

UNHCR published a second report on refugee processing in Nauru after visiting the island in October 2013. The *Refugees Convention Act* had entered into force in the intervening period, and UNHCR acknowledged the establishment of a legal framework for RSD as a positive development since its last report. However, UNHCR concluded that the arrangements for the transfer of asylum seekers from Australia, in their totality, still did not comply with international standards. At that stage:

- Nauru had appointed a number of RSD officers, and members of the Tribunal. The RSD officers had received some technical training and were continuing to receive mentoring from experienced Australian decision makers;
- processing had commenced in March 2013, but had then been suspended in July 2013 (after the announcement of Rudd's new policy and a riot on the same day). At the date of UNHCR's visit processing had not yet resumed; and
- Nauru has not yet codified its complementary human rights obligations, nor introduced a statelessness status determination procedure.²⁰

UNHCR noted that despite the establishment of a 'sound' legal framework, Nauru still did not provide a fair, efficient and expeditious system for assessing refugee claims. In particular:

- there remained long delays in processing claims, with only one claim for refugee status having been finally determined and handed down in the 14-month period since asylum seekers began to be transferred from Australia in September 2012 (this delay could have been due in part to the fact that the first cohort of asylum seekers returned to Australia and processing began again for new arrivals after July 2013);
- in its assessment, 'the current expertise and experience of the Nauruan officials is not at a level where they are able to conduct fair and accurate assessments of refugee claims without substantial input from Australian officials'. UNHCR stressed that it was 'essential' for experienced decision makers to continue to provide 'close

mentoring, supervision and support to ensure the fairness and accuracy of assessments, and overall quality control and assurance’; and

- asylum seekers continued to express ‘significant concerns’ about processing delays, and confusion as to whether Australia or Nauru was responsible for the process.²¹

UNHCR again pointed out that the overarching purpose of the transfer arrangement between Australia and Nauru was supposed to be processing, and as such deemed the delays to be ‘unacceptable’ and ‘of deep concern’.²²

The Nauruan RSD system continued to develop over the following months until, in May 2014, the government announced that a first group of families and single adult males had been recognised as refugees and moved into the Nauruan community.²³ The Tribunal subsequently started to perform merits review of cases that received negative initial decisions, and the Supreme Court began judicial review of Tribunal decisions in 2016.

RSD in practice

According to the *Refugees Convention Act* and the Nauruan Refugee Status Determination Handbook (RSD Handbook), RSD in Nauru should consist of the following stages:

- the transfer interview: when an asylum seeker arrives in Nauru they have a ‘transfer interview’ with a representative from the Government of Nauru to collect general biographical information and a summary of their claim. Notes from this interview go on their RSD file, are read by RSD decision makers, and may be used to draw conclusions about the credibility of the asylum seeker;²⁴
- submitting an RSD application: the asylum seeker then begins to prepare their application for refugee status with the assistance of Claims Assistance Providers (CAPS), who explain the definition of a refugee, criteria upon which the claim will be assessed, and the various stages of the RSD procedure.²⁵ As a general rule, only one asylum seeker in each family will complete an application, with other family members and dependent children included under the main claim (unless they choose to have their eligibility for refugee status determined independently).²⁶ Asylum seekers have the right to engage a legal representatives at their own cost;²⁷ practically, however, they likely face difficulties finding and affording lawyers;
- RSD interview: after submitting an RSD application, an asylum seeker has an interview which is supposed to be ‘conducted in a non-intimidating, nonthreatening, and impartial manner, with due respect for the safety and dignity’ of the asylum seeker.²⁸ Interviews are audio-recorded and conducted by RSD officers acting on behalf of the Secretary, at times under the close supervision of ‘mentors’ from the Australian immigration department (the Department of Home Affairs). A CAPS representative usually accompanies the asylum seeker to the interview, however the RSD Handbook states that ‘it is for the [RSD officer] to conduct the interview and it is the role of the [CAPS representative] to intervene only where they believe there has

been some confusion or misunderstanding between the [RSD officer] and [asylum seeker], or where they believe there has been some breach of procedural fairness'.²⁹ An interpreter may also be present if necessary.³⁰ During the interview, the RSD officer will confirm the asylum seeker's biographical data and ask questions about his or her claim. After a short break, the CAPS representative may present further submissions to the RSD officer about the asylum seeker's case;

- assessment of the claim: after receiving all relevant information, RSD officers assess the claim (on behalf of the Secretary) by reference to the Refugee Convention and Nauru's complementary protection obligations under international law, with RSD officers advised that 'Nauru's RSD procedures and principles seek to follow international standards, as used by UNHCR in its RSD processes'.³¹ They may be guided by case law from Australia and elsewhere, but are advised that these cases are 'not authoritative in Nauru, and are therefore for illustrative purposes only', and that they should 'take care to ensure that they do not adopt interpretative tests and approaches from foreign case law which are not part of Nauru's RSD process';³²
- notification of decision: the Secretary is required by law to make a determination on a claim, and then to notify the asylum seeker of that determination, 'as soon as practicable' after they apply for asylum in Nauru.³³ According to the RSD Handbook, the Secretary will 'endeavour' to notify an asylum seekers of the decision within 4 to 6 months of their RSD interview.³⁴ In practice, some asylum seekers remained in detention awaiting a decision for significantly longer than this timeframe. Decisions should be in writing, and notification letters should be delivered to asylum seekers in person by a CAPS representative.³⁵ Negative decisions must include reasons why the asylum seeker failed to meet the eligibility criteria for refugee status, including information about whether the evidence submitted by the asylum seeker was insufficient or not accepted, and all relevant information about the asylum seeker's right to apply for merits review of the decision.³⁶

If an asylum seeker's claim for refugee status is successful, he or she (and any dependent children and family members included in the application) will be allocated a residence either in the Nauruan community or inside the RPC. People recognised as refugees may be granted a series of successive temporary visas to remain in Nauru, are required to reside in the premises allocated to them, 'must not behave in a manner prejudicial to peace or good order in Nauru', and must take 'all reasonable steps' to ensure that any dependents comply with the conditions of their visas.³⁷ Other restrictions that would previously have been attached to a refugee's 'regional processing centre visa' while they were an asylum seeker are lifted, including the prohibition on working and additional limitations on their freedom of movement.³⁸

If an asylum seeker's claim for refugee status is not successful at first instance, he or she may apply for merits review by the Tribunal.³⁹ The Tribunal 'stands in the shoes' of the original RSD officer, and may exercise all of the powers and discretions that officer had.⁴⁰

The Tribunal makes decisions based on the evidence before it, and can affirm or vary the original RSD decision, send the matter back to the Secretary with recommendations, or set the original decision aside and substitute it with its own decision on the claim.⁴¹

If an asylum seeker's claim for refugee status is successful after merits review, he or she will be temporarily settled in Nauru. If not, he or she may be able to apply for judicial review to the Supreme Court of Nauru. Judicial review is only available if there has been a possible error on a point of law; it does not allow for any reconsideration of the merits of the claim.⁴² In making a decision about a case, the Supreme Court is empowered to make an order either (i) affirming the decision of the Tribunal, or (ii) remitting the matter back to the Tribunal for reconsideration in accordance with the Court's instructions.⁴³ Until March 2018, asylum seekers could appeal decisions of the Supreme Court of Nauru to the High Court of Australia, however this avenue is no longer available.⁴⁴

If an asylum seeker exhausts all avenues of appeal, he or she may face deportation to his or her country of origin.

RSD outcomes

In February 2018, the Australian Department of Home Affairs reported that 999 people remained in Nauru of the second cohort of transfers, of which 877 had been determined to be refugees and 122 were 'still going through the process' (meaning their cases were yet to be finally determined).⁴⁵

The search for durable solutions

RSD and the grant of status is not the end of the process for refugees on Nauru. It remains for a durable solution to be found for each person and family.

It is unclear how long refugees will be permitted to remain on Nauru. Australian officials have periodically discussed the possibility of ten- or twenty-year visas,⁴⁶ however according to the Nauruan Immigration Regulations as at July 2018, the regional processing centre visas that asylum seekers and refugees hold cannot be granted for a period exceeding three months.⁴⁷ Nauru has never indicated that it will provide refugees with permanent residency or citizenship. A durable solution must be found for them elsewhere.

Since July 2013, successive Australian governments have firmly and consistently stated that no refugee on Nauru will ever have the opportunity of settling in Australia. The most viable resettlement opportunity for refugees in Nauru is to the United States, under a resettlement agreement between that country and Australia. However it remains unclear how many refugees the United States will accept, and there do not appear to be arrangements in place for those who remain in Nauru. New Zealand offered to resettle a small number of people but as at July 2018 Australia had refused this offer.⁴⁸ Seven refugees agreed to relocate to Cambodia under a controversial agreement between Cambodia and Australia, but four subsequently left Cambodia and it is unclear whether that arrangement remains viable. Two refugees, a father and his teenage son, were resettled in Canada under a family reunification

visa after the man's wife and boy's mother was recognised as a refugee in that country,⁴⁹ but this option is not open to most other refugees in Nauru.

Accordingly, those refugees still in Nauru who have not been accepted for resettlement to the United States will remain in a state of indefinite limbo unless and until an appropriate resettlement country can be found, or Australia allows them to return and settle in the Australian community.

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Endnotes

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² Australian Government Department of Foreign Affairs and Trade, 'Nauru country brief' (undated), <http://dfat.gov.au/geo/nauru/Pages/nauru-country-brief.aspx>.

³ Agreements are available on the Kaldor Centre website at <http://www.kaldorcentre.unsw.edu.au/bilateral-agreements-offshore-processing>.

⁴ Department of Immigration and Citizenship, 'Annual report: 2012-2013' (24 September 2013), <https://www.homeaffairs.gov.au/ReportsandPublications/Documents/annual-reports/2012-13-diac-annual-report.pdf>, 205.

⁵ UNHCR, 'UNHCR monitoring visit to the Republic of Nauru: 7 to 9 October 2013' (26 November 2013), <http://www.refworld.org/docid/5294a6534.html>, 8.

⁶ Kevin Rudd and others, 'Transcript of joint press conference', 19 July 2013, <http://pandora.nla.gov.au/pan/79983/20130731-0937/www.pm.gov.au/press-office/transcript-joint-press-conference-2.html>.

⁷ These exceptions were made as part of the Abbott government's political negotiations to secure votes to pass the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). See: Scott Morrison, 'Reintroducing TPVs to resolve Labor's asylum legacy caseload, Cambodia', 26 September 2014, <http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm218131.htm>; Commonwealth of Australia, *Parliamentary Debates* (Senate), 4 December 2014, http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/031d80d7-61ca-407e-9e56-9e2d9d467e42/toc_pdf/Senate_2014_12_04_3109_Official.pdf, 10,313 (Glenn Lazarus); Scott Morrison, 'Babies born to IMAs transferred from Nauru to remain in Australia', 18 December 2014, <http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm220187.htm>.

⁸ Under the *Migration Act*, an officer may bring a 'transitory person' back to Australia from an offshore processing country 'for a temporary purpose', however they must be transferred back offshore 'as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose'. Transitory persons cannot apply for a visa while in Australia unless given written permission from the Minister for Immigration and Border Protection to do so: *Migration Act*, ss 46B, 198(1A), 198AH, 198B.

⁹ Republic of Nauru, 'Nauru commences open centre arrangements' (25 February 2015), <http://www.naurugov.nr/government-information-office/media-release/nauru-commences-open-centre-arrangements.aspx>.

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- ¹⁰ Republic of Nauru, *Government Gazette No 142* (2 October 2015), http://ronlaw.gov.nr/nauru_lpms/files/gazettes/138257d9f8e4223789b5f93e466d76aa.pdf, 1.
- ¹¹ UNHCR, 'Submission by the Office of the United Nations High Commissioner for Refugees on the Inquiry into the Serious Allegations of Abuse, Self-Harm and Neglect of Asylum-Seekers in Relation to the Nauru Regional Processing Centre, and Any like Allegations in Relation to the Manus Regional Processing Centre' (November 2016), <http://www.unhcr.org/58362da34.pdf>, 8.
- ¹² Senate Select Committee, Parliament of Australia, 'A certain maritime incident' (23 October 2002), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/maritimeincident/report/index, chapters 10, 11.
- ¹³ *Refugees Convention Act 2012* (Nr), available at http://ronlaw.gov.nr/nauru_lpms/files/acts/04525ec728fc03ddb6d3329cf191dc02.pdf.
- ¹⁴ Republic of Nauru, 'Refugee status determination' (undated), <http://www.naurugov.nr/government/departments/department-of-justice-and-border-control/refugee-status-determination.aspx>.
- ¹⁵ *Refugees Convention (Amendment) Act 2014* (Nr), available at http://ronlaw.gov.nr/nauru_lpms/files/acts/fc9345294b9594bdd9364fdd26da4a43.pdf.
- ¹⁶ UNHCR, 'UNHCR Mission to the Republic of Nauru: 3-5 December 2012' (14 December 2012), <http://www.refworld.org/pdfid/50cb24912.pdf>, 1.
- ¹⁷ *Ibid*, 1, 9-10.
- ¹⁸ *Ibid*, 1.
- ¹⁹ *Ibid*, 6.
- ²⁰ UNHCR, above n 5, 8-9.
- ²¹ *Ibid*, 1, 8-9.
- ²² *Ibid*, 9.
- ²³ Republic of Nauru, 'First group of refugees settle into the Nauruan community' (23 May 2014), <http://www.naurugov.nr/government-information-office/media-release/first-group-of-refugees-settle-into-the-nauruan-community.aspx>.
- ²⁴ Republic of Nauru, 'Refugee Status Determination Handbook' (August 2013), http://www.naurugov.nr/media/33067/nauru_rsd_handbook_august_2013.pdf (RSD Handbook), 119, 129.
- ²⁵ *Ibid*, 124.
- ²⁶ *Ibid*.
- ²⁷ *Ibid*, 129.
- ²⁸ *Ibid*, 126.
- ²⁹ *Ibid*, 129-130.
- ³⁰ *Ibid*, 130.
- ³¹ *Ibid*, xi. See also: *Refugees Convention Act*, definition of 'refugee' and 'complementary protection'. RSD officers are advised that they 'must interpret the [Refugee] Convention in accordance with the UNHCR model' (RSD Handbook, vii), meaning in accordance with 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 (and possibly other UNHCR guidelines).
- ³² *Ibid*, xi.
- ³³ *Refugees Convention Act*, ss 6(3), 9.
- ³⁴ RSD Handbook, 136.
- ³⁵ *Ibid*, 145.
- ³⁶ *Refugees Convention Act*, s 9; RSD Handbook, 145-146.

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- ³⁷ Immigration Regulations 2014 (Nr), reg 9(6A), available at http://ronlaw.gov.nr/nauru_lpms/files/subordinate_legislation/f64e9ad9c21b6d3ed4ad32fef369184b.pdf.
- ³⁸ Compare: Immigration Regulations 2014, regs 9(6) and (6A).
- ³⁹ *Refugees Convention Act*, s 31.
- ⁴⁰ RSD Handbook, 19; *Refugees Convention Act*, s 34(1).
- ⁴¹ *Refugees Convention Act*, s 34(2).
- ⁴² *Ibid*, s 43.
- ⁴³ *Ibid*, s 44.
- ⁴⁴ Jeremy Gans, 'High Court's Nauru jurisdiction silently disappears' on Opinions on High, *Melbourne Law School* (6 April 2018), <https://blogs.unimelb.edu.au/opinionsonhigh/2018/04/06/news-high-courts-nauru-jurisdiction-silently-disappears/>.
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- ⁴⁶ Peter Dutton, Interview with Chris Kenny, Sky News Viewpoint, 26 April 2015, <http://pandora.nla.gov.au/pan/143035/20150915-1829/www.minister.border.gov.au/peterdutton/2015/Pages/interview-sky-news-viewpoint.html>; Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, 'Migration Legislation Amendment (Regional Processing Cohort) Bill 2016' (Canberra, 15 November 2016) 21 (Michael Pezzullo).
- ⁴⁷ Immigration Regulations, above n 37, reg 9(5).
- ⁴⁸ Paul Karp and Eleanor Ainge Roy, 'New Zealand seeks deal with Australia to resettle Manus and Nauru refugees', *Guardian* (online), 17 November 2017, <https://www.theguardian.com/australia-news/2017/nov/17/new-zealand-and-png-could-do-deal-on-refugees-peter-dutton-says>.
- ⁴⁹ Jessica Longbottom, 'Asylum seeker pair leaves Nauru 'black hole' to be reunited with family in Canada', *ABC News* (online), 21 February 2016, <http://www.abc.net.au/news/2016-02-21/asylum-seekers-leave-nauru-for-life-in-canada/7187416>.