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What is a Bogus Document? Refugees, Race and Identity Documents in Australian Migration Law

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Introduction

In 2020 an Iraqi refugee applicant – assigned the 'identifier' of DVH16 by the Australian Federal Circuit Court – challenged a finding that he had provided 'bogus documents' as evidence of his identity, nationality or citizenship in breach of the Australian *Migration Act 1958* (ss 5, 91WA). The original decision-maker in DVH16's case found his Iraqi Certificate of Nationality and National Identity Card to be bogus and that DVH16 had not given a reasonable explanation for providing these bogus items. The opportunity to provide a reasonable explanation clearly presented a challenge for DVH16, since in his view his documents were genuine (*DVH16 v Minister for Immigration* 2020).

As required by the *Migration Act 1958*, he was nonetheless given the opportunity to respond to the Department of Home Affairs Document Examination Unit (DEU) findings that his documents were bogus. In his response by email to a Departmental delegate, DVH16 wrote:

> hello Mr.Adam you send me email that you say my documents are (bogus document) i don't understand my documents are real what kind of prove you want me to give you for that because i don't understand please let me know thanks [sic] *(DVH16 v Minister for Immigration 2020* [34]).

On appeal DVH16's legal representation argued that, amongst other things, the above email indicated that the Department had not given DVH16 sufficient particulars as to why his documents were bogus to allow him to answer the claims. In the Federal Circuit Court of Australia, Nicholls J disagreed. Nicholls J found that DVH16 was given an opportunity to

provide a reasonable explanation as to why his documents were not bogus; in making this finding he rejected the argument that the methods used by the Department to find the documents were bogus needed to disclosed to DVH16 under the Act. DVH16's appeal failed and his overall application for refugee protection was refused.

Under Australian law, a refugee who provides a 'bogus document' as evidence of 'identity, nationality or citizenship' without a reasonable explanation cannot be granted refugee status. The refusal of refugee status applies even if the person is otherwise found to be a refugee in need of protection (*Migration Act 1958* ss 91W, 91WA). The reforms were introduced under the *Migration Amendment (Protection and Other Measures) Act 2014* (Cth), which simultaneously established that the Minister must refuse to grant a visa where an applicant has 'destroyed or disposed of documentary evidence' of their identity without a reasonable excuse (*Migration Act 1958* ss 91W, 91WA). The Australian federal government presented the new provisions as another means to realise the never-finished task of securing the national border against the 'fake refugee immigrant', the 'welfare-fraud immigrant' and the 'criminal immigrant' (Razack 2000, 189; Parliament of Australia 2014b).

In relation to comparable requirements that refugees present 'proper' identity documents for entry into Canada, Sherene Razack has identified what she calls the 'rhetoric of betrayal'. She argues the differential treatment of refugees without acceptable identity documents is structured by a concealed racist logic that:

> relies for its coherence on a national story of a Canada besieged and betrayed by bodies of colour. "Proper" identity documents become defensible … as a way of separating the deserving from the undeserving and as a way of dealing with the inevitable duplicity of people of colour (2000, 186).

In line with Razack, the Australian bogus document reforms also tell a story about deception, siege and race, even as the storyline is hard to pin down 'because its racist structure is not overt' (Razack 2000, 186). The same rhetoric of betrayal and deceit explicitly runs through the bogus document reforms, as well as the justifications provided in support of them. The reforms imagine and address the unidentified, raced body as actively deceiving the state, not in a general and unspecified manner, but through the use of a bogus identity document.

In this chapter I explore how the Australian reforms, with their focus trained on the deceit of the document rather than the document-holder, create another site for the assessment of deceit and duplicity. I read the bogus document reforms as a form of racial profiling where suspicion moves from the body and onto the document, and continues to shift between these sites. As the assessment of the fraud moves away from the person, away from speech and testimony and towards the object of the document, this brings into play new authoritative scientific and forensic discourses attached to the "expert" assessment of documents. In the Australian context this has included the Department of Home Affairs ('the Department') 'Document Examination Unit', which is deployed as yet another strategy to defend the state from the 'fake' and duplicitous refugee seeking entry.

I investigate the reforms and the demand for genuine refugee identity documents in three parts. Part One addresses the introduction of the bogus document reforms, their justification and content, demonstrating how the bogus document functions as a stand-in for the bogus refugee and the duplicitous person of colour seeking illegitimate entry into the state. Part Two places the reforms in the already-vexed context of refugee applicants' relationship with official identity documents. It reads the legislation as requiring refugees to present a 'stable self' as evidenced by particular kinds of documents in exchange for protection (Lyon 2001), even as the absence of documents is arguably intrinsic to, or at least extremely common for, people seeking refugee status. Part Three examines the small body of case law in relation to the reforms, focussing on what triggers a 'reasonable suspicion' that a document is bogus and addressing what the cases tell us about how the Department, and in particular the DEU, determines whether a document is bogus. Here, I draw on Simone Browne's notion of 'digital epidermalization' and Joseph Pugliese's idea of 'infrastructural whiteness' to think about how 'the body materializes with and against' identification technologies (Browne 2010; Pugliese 2012). I explore how their analysis of raced surveillance and interpretative practices associated with identity documents and biometric technologies are productive in understanding the purpose of the reforms and how they operate.

Part One: How do you define bogus?

Razack's analysis of the demand for proper identity documents within Canadian refugee law as deploying a rhetoric of betrayal emerges clearly in the reforms that established bogus

documents as a barrier to refugee protection in Australia (Razack 2000, 187). In commending the reform bill to Parliament, then Immigration Minister Scott Morrison invoked a familiar imagined asylum seeker: a bogus one. Here, though, the bogus refugee was not only lying in a general and unspecified manner. This imagined asylum seeker was specifically falsifying identity by submitting bogus documents to cheat a way into refugee protection. As this figure loomed in the background, the Minister justified the amendments on the basis that 'Australians need to be confident that those who are found to be refugees are in fact who they say they are'. He also stated that '[t]hese measures make it clear that Australians expect protection visa applications to be made in good faith, and with full disclosure of identity' (Parliament of Australia 2014b, 7278 Scott Morrison).

The Minister's speech gave the impression that 'Australians everywhere' were concerned with modes of identity verification in visa application processes. Other Liberal National Party MPs reported that people on the NSW Central Coast tell them 'everyday' how much they appreciate the Government 'stopping the boats', and that people in the NSW electorate of Robertson want to have 'even more confidence' in the integrity of the Government's management of refugee status determination processes (Parliament of Australia 2014b, 10027 Lucy Wickes). Numerous government speakers in support of the Bill paraphrased the same justification, stating that the reforms were required so 'we can be sure that those who are found to be refugees are, in fact, who they say they are.'

Alongside the justification that 'we need to know they are who they say they are', the amendments were justified on the basis of concerns about an unmanageable backlog of asylum claims and exorbitant delays in the processing of refugee claims (Parliament of Australia 2014b, 7278 Scott Morrison). Here, non-nationals, with bogus documents and purporting to be refugees are not only threats to national security, criminals hiding in plain sight or duplicitous brown people seeking entry, but more prosaically are responsible for clogging up refugee status determination processes and compromising the 'integrity of decision making' in order to 'extend their time in Australia' (Parliament of Australia 2014b, 7278 Scott Morrison). Even though the problem of extended delays may appear to be a benign procedural matter, the 'huge backlog' caused by unidentified or mis-identified

asylum seekers also conjures up Razack's notion of a 'nation besieged' by countless and unmanageable immigrants and refugees seeking to enter (Razack 2000, 191).

The Australian reforms are not unique insofar as they punish or seek to banish non-citizens who provide false or misleading information when seeking permanent or temporary entry into the state.[1] The use of the term 'bogus', though, is unique to the Australian legislation. While the *Migration Act* does not provide a definition of the word 'bogus' nor define what is and is not a document, it does provide a definition of a 'bogus document'. Section 5 of the Act tells us a bogus document 'in relation to a person' means 'a document that the Minister reasonably suspects is a document that'

- 'purports to have been, but was not, issued in respect of the person'; or
- 'is counterfeit or has been altered by a person who does not have authority to do so'; or
- 'was obtained because of a false or misleading statement, whether or not made knowingly' (*Migration Act 1958*).

The definition centres on various acts of deception and fraud. The second arm of the statutory definition, that a bogus document 'is a document that is counterfeit' is perfectly circular. It provides the basis for a broad discretion in determining whether a document meets the statutory definition of bogus (*Migration Act 1958* s 5).

The adjective bogus stands out in comparison to the generally sparse and restrained nature of legislative language. The word and its etymology are worth considering further, given the prevalence of rhetoric regarding 'bogus' refugees in Australian political discourse (Pickering 2001). Bogus, Anatoly Liberman notes, 'has the reputation of a word of unknown etymology' (Liberman 2017). The words *tantrabobus* and *tantrabogus* were recorded in the late eighteenth century as a Vermont colloquialism for an ill or odd-looking object (Liberman 2017). However the word bogus is generally traced back to the period of the 1820s when it was used to refer to 'an apparatus for counterfeit coining' and then in the 1840s, also in reference to the coins themselves ('no luggage, no nor nothing, but a roll of bogus'). By the mid-century, it was used as an adjective whose meaning had shifted to signify something

[1] For example, the relevant Canadian legislation uses the term 'misrepresentation' to capture different forms of immigration fraud, including the provision of fraudulent documents or making oral misrepresentations as part of a visa application (Macklin 2014).

that was spurious, falsified or counterfeit in a general sense, similar to contemporary usage ('the whole thing was bogus'). A 'bogus caller' was one of the 2011 additions to the Oxford English dictionary's bogus entry, defined as a 'person who visits or telephones someone under false pretences' (Oxford English Dictionary n.d."bogus"). A 'bogus refugee' is not listed. However, the extremely common trope of the 'bogus refugee' in political discourse means that the statutory use of the term, albeit in relation to the document, immediately extends to and implicates the document holder. The implication is that a bogus document belongs to the bogus refugee, despite the fact that the reforms permit the refugee applicant to provide a reasonable excuse for the transgression.

Alongside Razack's analysis of the threat of false papers, the obvious problem with the bogus document is that it disrupts the state's capacity to 'identify and enumerate its population and separate it by legal status' (Horton 2020, 4; Scott 1998). As noted, the vision of Australians 'everywhere' concerned with the stable identities of asylum seekers and non-citizens was at the centre of the rhetoric explaining the reforms. This rhetoric was explicit in connecting the absence of identity papers – and other forms of identification – with both security and risk. Lyon traces the return to the body as a means of identification, and the shift in documenting individual identity away from 'predominantly print based information' to biometrics and electronically stored data. He highlights how the body itself is 'scrutinised and interrogated' as a source of surveillance data, noting that '[i]nformation for identification may now be extracted from the body that can override the person's own claims to a particular identity' (Lyon 2001, 291). While he is careful to acknowledge that there is nothing entirely new about this, he does trace the way in which certain identity documents and forms of identification both create a 'stable self' in the eyes of the state *as well as* bring the 'stable' or identified body into an extended and increasingly networked system of surveillance (Lyon 2001). Thus, the refugee without documents, or worse still, with an undetected bogus document, is not only potentially unidentifiable but also un-surveilled or unseen – representing a real and present threat to the state 'forced to defend itself from bodies bent on betraying its trust' (Razack 2000, 187).

Part Two: Refugees and authentic identity documents go together like…

Although the Australian reforms indicate otherwise, there is nothing simple or straightforward about refugees' relationships with identity documents, real or fake. Critically, prior to the Australian amendments, the regulation of bogus documents was not specifically directed towards those seeking refugee protection (*Migration Act 1958* s 103). Bogus documents were and are addressed elsewhere in the Act as grounds upon which any visa granted 'based on incorrect information' may be cancelled. The Act also sets out that in general any bogus document that is 'given, presented, produced or provided' is forfeited to the Commonwealth (*Migration Act 1958* ss 487ZI, 487ZJ). Bogus documents, and false and misleading information more generally, are also regulated by Public Interest Criterion (PIC) 4020, which attaches to the grant of most other non-protection visas. Under the PIC, the Minister must be satisfied of the applicant's identity and that the applicant has not provided a bogus document or false or misleading information. It also establishes that an applicant may be barred from making a further visa application for up to 10 years for failing to establish identity; or up to 3 years for providing bogus documents or false information (Migration Regulations 1994 Schedule 4).

Notably, prior to 2014, the provisions governing evidence of identity for refugee applicants did not mention 'bogus documents'. The relevant section only addressed circumstances where the Department directly requested a protection visa applicant to 'produce … documentary evidence of the applicant's identity, nationality or citizenship', and an applicant refused or failed to comply with the request without a reasonable excuse. Such a failure allowed the Minster to 'draw any reasonable inference unfavourable to the applicant's identity' and nothing further (*Migration Act 1958* s 91W, No. 62 of 2013).

The reforms' specific focus on refugee applicants, and in particular the introduction of mandatory cancellation based on identity documentation is significant. The process of determining refugee status has been theorised as 'one of the most complex adjudication functions in industrialized societies' (Rousseau, Crépeau, Foxen and Houle 2002, 43). The complexity of the task is due to the unique elements of the decision-making process, which not only involves the applicant's first-person testimony as a central source of evidence, but

frequently includes the translation of evidence across at least two languages; communication across a significant cultural divide; the requirement that the decision-maker have knowledge of the cultural, social and political environment in the applicant's country of origin; and the need for both the applicant and decision-maker to have the 'capacity to bear the psychological weight' of potentially distressing evidence of an applicant's experiences of persecution (Rousseau, Crépeau, Foxen and Houle 2002, 44). To determine the authenticity of documents, decision-makers must also have administrative knowledge of a country, to understand if and how official identity documents are issued, by whom and what (if any) factors determine their validity.

The process is especially difficult because of the regular absence of any kind of documentary evidence, let alone documentary sources that are reliable, probative and verifiable (Vogl 2013). This absence of documentary evidence includes identity documents, but extends beyond them. Documentary evidence going to the occurrence of particular events, travel routes, employment and education history, and places of residence is also rare. The problem with the reforms is that the possession of, and need for, counterfeit identity documents to leave one's country of origin — alongside the difficulty of accessing identity documents — is intrinsic to, or at the very least, common to many refugees' experiences. Indeed, by virtue of seeking refugee status, an applicant is claiming that the government or local state authority (the same government or local authority that *issues* documents) is an agent of persecution, or is unwilling to provide protection from persecution. As Macklin notes 'it would be fundamentally unfair to impose on claimants an unreasonable burden to produce evidence, given the conditions under which they flee their countries of origin and the difficulty of obtaining documents from home once they have arrived in the country of asylum' (Macklin 1998, 136).

This is, however, exactly what the legislation does. Even though it also encompasses the possibility that an applicant might have a reasonable explanation for producing a bogus document or failing to establish identity, the starting point is that a refugee applicant will be able to provide documentation to allow the Australian government to establish who they are. And while providing bogus documents or destroying documents operate as grounds to deny refugee status under the reforms, having authentic documents certainly does not

mean that a claimed identity will be found to be authentic, or necessarily strengthen a claim to refugee status. Since a dangerous relationship with a home state government is an element of the refugee definition, having *authentic* documents (which one is compelled to produce) can be taken as evidence of the inauthenticity of the claim. For example, the possession or use of a genuine passport to leave one's country of origin is regularly interrogated as evidence that the refugee applicant is not a person of interest to his or her government. The 'damned if you do, damned if you don't' situation facing refugees in relation to identity documents is captured in detail by Macklin, in reflections on her experience as a refugee decision maker in Canada. She notes that the following 'pattern of reasoning' is not uncommon:

> Claimants are rejected because they are unable to furnish sufficient identity documents or documents proving residence in a refugee camp etc. Some claimants protest that they are unable to obtain documents and are met with the reply that other claimants manage to do so … Soon, all claimants show up with the requisite documents, having learned through the grapevine that the failure to produce documents will lead to rejection. Predictably, decision makers become suspicious of the authenticity of documents, and may even send them for forensic testing where (not surprisingly) a number will turn up as fake. This, in turn, is used to impugn the credibility of claimants, and can lead directly to rejection (1998, 136).

Macklin also notes that when decision-makers discover that it is possible to illicitly purchase documents which cannot be identified via forensic testing, the result is that the probative value of documents begins to be undermined altogether (1998, 136).

What Bibler Coutin has described as the 'double bind' of possessing legal documentation for migration to the United States applies to refugees seeking protection in Australia. Punishing refugees for knowingly or unknowingly holding particular documents, which may be necessary for departure from their country of origin, challenges the idea that having identity documents is normatively better or more secure for non-citizens (Yngvesson and Coutin 2006). Horton notes the way documents can operate to constrict migrants' possibilities, as well as the potentially 'disqualifying, right-limiting character of the passport as a marker of nationality' (Horton 2020, 8; citing Torpey 2018, 155 (emphasis in the original)) Documents may, as Lyon notes, operate to increase the power and control of the state over migrants' lives and be used to undermine or dismiss one's own self-narrated identity. Documentation and biometric records leave migrants open to 'bureaucratic inscription' and surveillance at various and overlapping levels of government (Horton 2020,

4; Dehm 2018). Bibler Coutin has extended this analysis, noting in her ethnographic work that the precise effect of certain documents for non-citizens can be so arbitrary and opaque that it is hard to predict. She describes 'the quasi-magical power of papers and records to transform persons by regularizing or criminalizing their presence' whereby documents 'create opportunities and double binds: they are key to obtaining legal status, but they also can make legalization impossible' (Bibler Coutin 2020, 133)

Part Three: Forming 'Reasonable Suspicions' and Finding Bogus Documents in the Case Law

To date, only a small number of cases raise the two key provisions in the Act dealing with bogus documents for refugee applicants, and fewer still directly address these provisions. It is rare that the Department's finding that a document is 'bogus' is a contested fact before the courts, and so the document-as-object hangs in the background or is brushed aside, after an applicant concedes that they provided a bogus document and the case turns on another aspect of the reforms. This means a minority of cases raise the question of how precisely to identify a potentially bogus document and fewer still detail the proof-making processes used to show a document is or is not bogus. In cases where a document's inauthenticity is conceded by the applicant, the cases instead turn on questions such as whether the applicant was given sufficient notice of the Department's adverse inferences about a document in order to respond, or whether an applicant's explanation for providing a bogus document was 'reasonable' under the Act.

The first Full Federal Court decision in relation to the Act's proscription against bogus documents addresses whether the section is limited to the provision of bogus documents only as part of, or in connection with, protection visa applications or extends to the provision of bogus documents as proof of identity in any circumstance, including those unrelated to a protection visa application (*BGM16 v Minister for Immigration and Border Protection* 2017). The Department's submissions would have it that a false drivers' license presented at a state registry or fake identification used to enter a bar should act as a barrier to accessing refugee protection from the Federal Government. Although the Court rejected the Department's submissions as an incorrect interpretation of the section, they demonstrate the expansion of the 'internal border' for non-citizens, which involves the policing of

migration status by internal government agencies and private actors (Weber 2013). Policing at these sites, and the regulation of the border itself is enabled by 'administrative and bureaucratic techniques', which operate around a range of documents including 'passports, visas, identification cards and their application procedures' (Browne 2010, 138).

In the cases addressing whether a document is bogus, the inaccessible and opaque nature of document examination "expertise" relied on by the Department (and relevant review bodies) is a common theme. Like the assessment of the refugee claim itself, interpretation and evaluation of the document occurs across jurisdictions, languages, translations and cultures, based on limited and incomplete insights about identity documents in the applicant's home state available from the Department's own 'country of origin information' databases (Gibb and Good 2013). Moreover, based on the text of available judgments, it is extremely difficult to ascertain what gives rise to a suspicion that a document may be bogus in the first instance.

The statutory definition sets out that the Minister must hold a 'reasonable suspicion' that a document is bogus on the basis of one or more of the three grounds outlined in Part Two (*Migration Act 1958* s 5). A number of the cases provide a glimpse as to what kinds of non-expert things raise such a suspicion. In *ASF17 v Minister for Immigration and Border Protection,* the applicant's claim was made on the basis that he was a stateless Faili Kurd. His 'Identity Card for Foreign Nationals' was deemed to be bogus on the basis that he also held an Iranian Driver's Licence, which country information 'suggested' only citizens may acquire (*ASF17 v Minister for Immigration and Border Protection* 2018). On appeal, the question of whether the decision-maker's suspicion was reasonable was raised. Although the assessment under s91WA appears to turn on the authenticity of *documents*, the decision also recorded that the applicant, in his first oral interview, had stated that he was an Iranian national but later explained he had mistakenly said this on account of bad advice to pretend he was a citizen of Iran. The decision-maker's overall assessment of the applicant's case was based on this original inconsistency in his testimony, and on an assumption that he was an Iranian citizen falsely presenting himself as a stateless Kurd.

The applicant was invited to provide an explanation for what the delegate suspected was a false Foreign Nationals Identity Card. The applicant provided a written response through a migration agent, claiming:

> his father had obtained the document in 1998 or 1999 and handed over his family's 'green cards' in exchange for the [foreign] National ID card(s). [He] claimed he was provided with the [Foreign] National ID card by his father and always believed it to be a genuine document (*ASF17 v Minister for Immigration and Border Protection 2018* [12]).

The documents in this case formed both the legal basis rejecting the claim for refugee status as well as the basis for doubting the applicant's oral evidence and credibility. The delegate's ultimate rejection of the authenticity of the document, which was upheld on appeal, was not primarily based on the document but rather on the finding that the applicant was not a 'credible, truthful or reliable witness' and that he was not a Faili Kurd as claimed but an Iranian citizen. The slippage here between disbelieving the applicant and doubting the authenticity of the document resulted in a finding that the document itself breached the relevant provision.

In another case, an Afghan identify document, commonly known as a *taskera*, was considered to be bogus on the basis of country information that such a document could only be issued in Afghanistan, and not in the Afghan Consulate in Pakistan (*AYZ18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* 2020). The finding was overturned on appeal. The delegate had overlooked clear evidence provided by the Department of Foreign Affairs and Trade that Afghan Consulates can and frequently do provide identity documents outside of Afghanistan. In that case, a further basis for finding that the document was bogus was discrepancies between the form of the applicant's *taskera* and the applicant's father's identity document, provided as further proof of the applicant's identity. On appeal, it became clear that the delegate had compared two entirely different forms of identity document, namely a birth certificate with a general identity document (*taskera*). As such, it was not open to the delegate to make a finding based upon the inconsistencies identified. The ability to clarify the ostensibly obvious error was complicated by the fact that the applicant himself was illiterate.

Surprisingly, in the above case, the document held to be bogus was in fact a photocopied version of the original document. Moreover, uncertified *copies* of original documents were assessed as bogus documents in a number of cases. Items forensically assessed for their authenticity included photocopies of identity documents (*AYZ18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* 2020); a photograph of a government identity document (*FLD18 v Minister for Home Affairs* 2020); and scanned photographs of an applicant wearing a military uniform (as evidence of national identity) (*DSM16 v Minister for Immigration* 2018). Copies of documents were nonetheless found to be bogus and to meet the definition of a bogus document under the Act. The fact that assessment of the copied documents took place as if they were assessments of the original documents – that were never in possession of the Department or accessed by forensic document experts – raises the extremely difficult question of what precisely is being assessed for imitation or authenticity?

In addressing identification verification processes and biometrics, Simone Browne draws on Frantz Fanon's notion of epidermalization, explained as the racialised body experiencing 'its being through others' whereby the 'dissociation between the self and the world' is experienced through the skin (Browne 2010, 133). That is, it is through skin or epidermalization that one is marked as other and as a 'contact moment of fracture of the body from its humaneness' (Browne 2010; citing Fanon 1967). This takes place, amongst other things, via an interpellating gaze, which might exclaim '"Look, a Negro!" or an "illegal alien", or some other negatively racialized subject position'(Browne 2010, 134).

Browne describes biometrics as a 'technology of measuring the living body' put to use in identification practices 'that enable the body to function as evidence'. However, she insists that identities 'in these digitizing discourses, must also be thought through their construction within discourse'(Browne 2010, 134). What is so useful in Browne's work for analysis of the bogus document cases and reforms is the way in which she casts both the object of identification (biometrics, passport and identity documents) and the practices of interpretation (the 'science' of interpreting biometric data, or the 'scientific' practices to determine if a document is bogus) as already informed and structured both by whiteness and an othering of the racialized body.

Pugliese puts this in another way in his argument that biometrics, as a technology of authentication, only achieves its signifying status by 'being situated within relations of power and disciplinary techniques', which identify, classify and distribute 'templates of biometrically enrolled subjects across complex political, social and legal networks' (2012, 1). He demonstrates the ways in which biometric technologies are inscribed with normative categories such as race, gender, disability and sexuality at the same time as these infrastructural aspects are 'invisibilised' to enable 'ongoing pronouncements about the technology's neutral and non-discriminatory capability' (Pugliese 2012, 2). Precisely because such technologies are 'infrastructurally calibrated to whiteness' and designed with whiteness as a template, non-white subjects are often 'precluded from biometric enrolment due to the fact the technologies fail to "read" their biometric characteristics' (Pugliese 2012, 57). For the purposes of identification, the 'failure to enrol' or be recognised by a particular form of biotechnology confirms a non-white subject's failure to fit into predetermined 'white standards' or universal whiteness. Although the identity document is not necessarily also a biometric record, it is similarly represented as an 'ideologically neutral "conduit" of data, rather than ideologically inflected' and interpreted through networks of knowledge and power (Pugliese 2012, 58).

Similarly, Browne considers biometrics as involving moments of observation, calibration and application, and argues that the ideas of a body made other and out of place, and of epidermalization, are:

> useful when thinking through the moments of contact enacted at the 'institutional sites' of international border crossings and spaces of the internal borders of the state, … where identification, and increasingly biometric identification, is required to speak the 'truth' of and for muted bodies (Browne 2010, 134–135)

Biometric technologies and methods of identification verification are not 'neutral, objective systems' but rather 'their seemingly pure geometry, their transcendental algorithms and apparently unmotivated digital formulae are all inflected with the dense sociocultural and historical significations of their designers' (Pugliese 2012, 78). The (bogus) identity document at the centre of the reforms is read alongside, and together with, the raced body

already out of place, just as refugee testimony is heard – and disbelieved – in the same manner (Bohmer and Shuman 2018; Vogl 2018).

The Document Examination Unit

A number of the cases make reference to the Department's DEU or to reports provided to decision-makers by the DEU. Most references to DEU reports are perfunctory and remarkably short on detail. In all of the cases I read, there was no reference to scientific evidence or to the forensic methods the DEU adopts to reach its conclusions.[2] As with the following example, findings are generally declaratory, applied by the delegate and material factors in the final decision.

In *BYE17 v Minister for Immigration and Anor*, the applicant was an unaccompanied minor whose national identity card and birth certificate were referred to and assessed by the DEU in the first instance. The DEU findings were set out and applied by the delegate and referred to in the appeal judgment as follows:

> [The DEU] found that the birth certificate was fraudulently altered with entries for birth date, location and issue date removed and replacement entries added. The national identity card was found to be entirely counterfeit. Following forensic examination by the Department, I find that the birth certificate and national identity card are bogus documents in accordance with s5(1)(b) (*BYE17 v Minister for Immigration and Anor* 2018 [19]).

The appeal, which did not turn on the DEU report or its findings, provides a sense of the opaque nature of references to the DEU, its methods and findings. It sets out that on review of the delegate's decision, the Tribunal also accepted the DEU report:

> The Tribunal said that it accepted that the DEU had expertise in document examination and that it had placed significant weight on the findings of the DEU as reported in the delegate's decision record…. **The Tribunal said that whilst the information provided in the delegate's decision record did not include the nature of the forensic examination undertaken by the DEU**, the delegate's decision record does report that the DEU found the birth certificate provided by the appellant was fraudulently altered (*BYE17 v Minister for Immigration and Anor* 2018 [28] (my emphasis)).[3]

[2] For an excellent examination of the extent to which experts in the criminal courts are required, or rather not required, to explain their methods or demonstrate their expertise under the relevant rules see (Edmond, Martire and San Roque 2017, 624).

[3] Note in this case the applicant did not concede that he had provided bogus documents.

The case of *DVH16 v Minister for Immigration*, referred to in the Introduction, similarly deals directly with the content, methods and findings of a DEU report. In that case the applicant argued that while the delegate referenced the conclusion reached in a DEU report and gave the applicant an opportunity to respond to this, the delegate 'did not give any detail as to how the conclusion was reached … so as to make the giving of information to the applicant relevantly meaningful' (*DVH16 v Minister for Immigration* 2020). The applicant argued that the delegate 'failed to give the applicant particulars, or relevant details, of the DEU report which the delegate otherwise considered to be the reason or a part of the reason for his decision.' The alleged bogus documents were an Iraqi National Identity Card and an Iraqi Nationality Certificate. The applicant's argument was not accepted by the Federal Circuit Court. The case again confirms the minimal detail provided to the applicant about how his documents were found to be bogus, and highlights how this absence of information affects the 'opportunity' to provide a reasonable explanation for a bogus document, particularly where an applicant asserts a document's authenticity, as he did in this case.

It is worth noting that in cases where the DEU report is not directly contested, it is difficult to ascertain if further details about the DEU's methods were included in the original or review decision, given the limited number of cases that are on the public record. Judicial review decisions often include direct excerpts from Departmental or AAT decisions, but these are only fragments of the original decision. However, references to the DEU generally conform with the above insofar as its finding are declared (rather than explained) and then applied.

Reading the decisions raises rather than resolves questions as to what the DEU's precise expertise is, the methods it employs and its mandate within the Department. There is no direct mention of the DEU on the Department of Home Affairs website. A general internet search reveals a number of public references to the DEU to be in current and former employees LinkedIn profiles or other online biographies. In terms of the Department's own reporting, the existence of the DEU is mentioned in some but not all annual reports. The Department's most recent annual report (2018-9) makes no mention of the unit itself, and only references "document examination" in relation to training provided by the Department to 'Australia's international partners' in order 'to enhance [their] border management and

security capacity' (Department of Home Affairs 2019, 33, 66).[4] One of the more colourful references to the DEU is made in a case study in the 2010-11 Annual Report. The case study begins:

> Torn, soaked and seemingly illegible; this was the state of a bundle of passports and other documents provided to the department's Document Examination Unit in late 2010. The discarded papers were found in a plastic bag hidden in the wheelhouse of SIEV [Suspected Illegal Entry Vessel] 201, a boat intercepted north-east of Christmas Island … Two weeks later, the Document Examination Unit in Canberra was given the arduous task of putting the scraps of paper back together (Department of Immigration and Citizenship 2011, 148).

The case study then quotes a 'forensic document examiner' who said that the initial step was to separate the 'damp and smelly' documents without destroying them further: '[i]t was like a puzzle,' Roslind said. 'We then had to dry the pieces, flatten them, and then start the time-consuming process of document reconstruction.' The case study gives little detail of the methods used by the DEU (beyond 'drying' and 'flattening') but does note that the documents helped confirm the identities of six 'irregular maritime arrivals', including three people who 'falsely claimed' to be minors during entry interviews.

A slightly clearer sense of what the DEU is, and what it does is provided in the National Audit Office's report on the Department's identity verification arrangements for citizenship applications. The report does not address the specific challenges faced by refugee applicants in either accessing or verifying their documents, though it does list the 'resources' available within the Department to verify identity, of which the DEU is just one part (Australian National Audit Office 2015 [2.31]). The DEU is also referenced in an Ombudsman report on enhanced identity checking for applicants for citizenship by conferral. Again, though, no mention is made of the DEU's actual work, methods or the nature of its expertise. It is discussed as part of the Department's various 'strategic plans' for improving identity verification (Commonwealth Ombudsman 2017).

These reports make clear that the DEU sits within a network of identity verification strategies and databases. The mandate, scope and methods of the Departmental identity verification 'resources' listed in the National Audit Office report warrant further investigation. The DEU's

[4] Similar mention of 'document examination' training is made in previous reports, though with no reference to the unit itself, see eg (Department of Immigration and Border Protection 2017, 106)

expertise and methodologies in particular are certainly not clear in the decisions addressing the bogus document provisions, or in other information available from the Department. At a bare minimum, details about how this unit operates, and the forms of forensic expertise and methods it relies upon, should be made available so that those subject to its findings, including refugee applicants whose matters are *not* appealed, are able to test and respond to conclusions that their documents are bogus.

Conclusion

In 2015, the UNHCR completed the development of its Biometric Identity Management System (BIMS). Noting that 'biometrics provides an accurate way to verify identities using unique physiological characteristics, such as fingerprints, iris and facial features', the promotional brochure explains the UNHCR's Policy on Biometrics in Refugee Registration. It states that biometrics 'should be used as a routine part of identity management to ensure that refugees' personal identities cannot be lost, registered multiple times or subject to fraud or identity theft' (UNHCR n.d.). The BIMS promotional material also presents the system as complete and problem-solving:

> Identifying a person using BIMS is quick and simple. After enrolment, refugees and others of concern need only to present two or more biometric elements (e.g., two fingers, two eyes, or a combination thereof) for BIMS to be able to ascertain their identity within seconds. The matching time for identity checks during the roll out … was on average five seconds (UNHCR n.d.).

The odd aspect of the material on BIMS is that it so assuredly bypasses the prior problem that the Australian reforms and identity document provisions attempt to address, namely refugee applicants' frequent lack of identity documents to begin with. While the BIMS may be able to register 'two eyes' or 'two fingers' it cannot in fact determine that refugees 'are who they say they are', nor to whom the biometric data belongs. These questions are not the focus of the BIMS, which instead aims to achieve the goal of future identification once it has captured and stored as much biometric data as possible. This is confirmed by one of the promotional grab quotes from 43 year-old Congolese refugee Oliver, who states 'I can be someone now. I am registered globally with the UN and you'll always know who I am' (UNHCR n.d.).

In an understated formulation, the Explanatory Memorandum addressing the bogus document reforms explained that 'the purpose of the new section 91WA is to encourage an applicant to comply and assist with authenticating their identity by providing a reasonable explanation for providing a bogus document' (Parliament of Australia 2014a [55]). The section does not merely encourage applicants to assist. It functions via the threat of the outright refusal of a protection visa where a bogus document is provided without reasonable explanation. The Memorandum also states '[i]t would not be acceptable for the applicant to produce any document as documentary evidence of their identity… that is a bogus document' and that 'the purpose of the amendment is to ensure a protection visa applicant provides documentary evidence of their identity, nationality or citizenship wherever possible to do so' (Parliament of Australia 2014a [57]).

In the frequent absence of stable documentary or biometric data to establish refugee applicants' identities, the Australian legislative reforms transfer the discretionary judgment of who is a bogus refugee – and the attendant racialised fear of duplicitous brown bodies at the border – onto a new question, of what is a bogus document. The relocation of the question of who is a fake refugee onto a document (or documents) is accompanied in the cases by an opaque scientific discourse about document examination and verification. Just as refugee oral testimony is generally assessed against the deeply subjective criteria of coherence, consistency and plausibility, 'document examination' techniques and biometrics function as another proxy for subjective judgments directed to the simultaneous and entwined questions of what is a bogus document and who is a bogus refugee.

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