



# UNHCR

United Nations High Commissioner for Refugees

Haut Commissariat des Nations Unies pour les réfugiés

## **Senate Foreign Affairs, Defence and Trade References Committee**

### **Inquiry into asylum and protection visas for consular officials and the deportation, search and discovery of Vivian Solon**

#### **Submission by United Nations High Commission for Refugees**

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to comment on certain of the matters referred to the Committee for inquiry, insofar as they impact on Australia's international obligations as they relate to asylum seekers, refugees and stateless persons.
2. UNHCR will be addressing its comments only to the question of the maintenance of confidentiality under the terms of reference of the inquiry, paragraph (b):

*“The application of the Migration Act 1958, its regulations and guidelines concerning the maintenance of confidentiality for any consular officials or staff (including Mr Chen Yonglin, and any other former consular officials or staff) who were applicants for territorial asylum and/or protection visas by Department of Immigration Multicultural and Indigenous Affairs, Department of Foreign Affairs and Trade and their respective Ministers”.*

#### **UNHCR Standing to Comment**

3. Australia has assumed responsibility to extend protection to asylum seekers and refugees through accession to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (the Refugee Convention).<sup>1</sup> UNHCR is regularly requested to comment on national legislation regarding refugees and related issues by States, pursuant to the Preamble and Article 35 of the Refugee Convention as well as the Statute of the Office of the United Nations High Commissioner for Refugees (the Statute).

#### **Right to Privacy of the Individual**

4. International human rights law guarantees everyone the right to privacy and protects individuals from arbitrary or unlawful interference.<sup>2</sup> It also requires that effective

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<sup>1</sup> The term ‘Refugee Convention’ is used to refer to the *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, [1954] ATS 5, (entered into force for Australia 22 April 1954) as applied in accordance with the *Protocol Relating to the Status of Refugees*, opened for signature on 31 January 1967, [1973] ATS 37, (entered into force for Australia 13 December 1973).

<sup>2</sup> See Article 12 of the Universal Declaration of Human Rights of 10 December 1948 and Article 17 (1) of the International Covenant on Civil and Political Rights of 16 December 1966 (ICCPR).

measures be taken to ensure that information concerning a person's private life does not reach the hands of third parties that might use such information for purposes incompatible with human rights law.<sup>3</sup>

5. The right to privacy and confidentiality enshrined in these instruments clearly applies to asylum seekers and refugees. Respect for that right assists in creating the climate of trust and confidence that needs to exist between an asylum-seeker and the country of asylum. This is of particular legal significance in circumstance where the latter is a State-Party to the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol, under which concomitant international obligations arise. The primary consideration should be the physical safety and protection of asylum-seekers and refugees, as well as that of their family members or persons with whom they are associated.

### **Confidentiality in the Context of Refugee Status Determination**

6. The consent of the asylum seeker should be sought before individual case information<sup>4</sup> about his or her claim for refugee status is shared with other parties.
7. In addition, individual case information about asylum seekers should be kept strictly confidential because of the potential risk to the asylum seeker and others.
8. Confidentiality in asylum procedures is particularly important because of the vulnerable situation in which refugees and asylum-seekers find themselves. As discussed during the

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<sup>3</sup> See Human Rights Committee, General Comment No. 16 on Article 17 of the ICCPR (32nd session, 1988), paragraph 10, HRI/GEN/1/Rev.1 at p. 23.

<sup>4</sup> “Individual case information” includes:

#### *Information provided by the asylum seeker or refugee*

- Name and address (or last place of residence) of the asylum seeker or refugee, family and close associates, date and place of birth, country of origin, ethnic origin, religion, educational qualifications, profession or vocation, medical or health status, identity or travel documents held;
- Information on the substance of refugee claims obtained through status determination interviews, letters or documents of the asylum seeker or refugee, including the reasons for departure from the country of origin, reasons for fearing persecution upon return to the country of origin, political opinions, affiliations and activities, membership of social groups, arrests or detentions, convictions for crimes, experience of violations of human rights, military service;
- Transit details, including routes taken, countries traversed, and duration of stay *en route* to the country of asylum, types of transportation used, date and point of entry into the country of asylum, whether entry into the country of asylum was clandestine or authorised, experience of human rights violations in transit, details of travel from the point of entry into the asylum country to the place where asylum is requested; and

#### *Information generated or obtained by the authorities in the country of asylum*

- Information relating to examination and assessment of the refugee claim, including opinions and instructions, internal correspondence and correspondence with external parties, assessments of the merits of the asylum claim, decisions on recognition of refugee status and processing of durable solutions;
- Information obtained in the course of providing protection, social and community services to the asylum seeker or refugee, medical and counseling records, records on the treatment and behaviour of the asylum seeker or refugee.

Global Consultations on International Protection,<sup>5</sup> “the asylum procedure should at all stages respect the confidentiality of all aspects of an asylum claim, including the fact that the asylum-seeker has made such a request” and highlighted that “no information on the asylum application should be shared with the country of origin”. This principle is also reflected at the European level in the draft “EC Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status”, on which political agreement was reached by the Council of Ministers in April 2004.<sup>6</sup> State practice also shows that the principle of confidentiality is paramount in asylum procedures.

9. The decision-making authority in the country of asylum should not share any individual case information about an asylum seeker with the authorities of the country of origin. The potential risk to the safety of asylum seekers and their families or associates is greatest where information relating to their identity or asylum claims is made available to the authorities in the country of origin. Even the mere fact that an asylum seeker has sought asylum elsewhere may have adverse consequences for the asylum seeker and/or his or her family and associates in the country of origin. Thus, a decision-making authority should not confirm to the authorities or other entities in the country of origin whether or not a particular individual is or has been in contact with the decision-making authority, regardless of whether the person concerned is an asylum-seeker, a refugee, a resettled refugee, or whether she or he has been denied refugee status or excluded. The general rule of non-disclosure should in principle continue to be observed *vis-à-vis* the country of origin even if the situation in the country of origin has changed.
10. The decision-making authority in the country of asylum should not communicate with entities within the country of origin, whether they are governmental or non-governmental, in order to verify or authenticate declarations or documents provided by an asylum seeker. The risk of potential interception of mail, phone, fax or email messages may be high. Exceptionally, communication with such entities may be necessary for other reasons. In such cases the communication should always be couched in the most general and anonymous terms, and should never include names or data by which an asylum seeker or her or his family could be identified in the country of origin.
11. There may also be exceptional situations where an asylum seeker or refugee consents to sharing certain data with the authorities of the country of origin, for instance in order to facilitate transfer of assets or to enable family reunification. In such instances, it must be established clearly by the decision-making authority that the sharing of information does

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<sup>5</sup> The Global Consultations on International Protection is a process during which governments, intergovernmental and non-governmental organizations, refugee experts and UNHCR held discussions on various issues. Although not legally binding, the documents produced during this process reflect a broad consensus on protection issues. The Global Consultations documents have not been formally adopted by the Executive Committee in the form of EXCOM Conclusions but were incorporated into the Agenda for Protection, which has been endorsed by the Executive Committee and welcomed by the General Assembly.

<sup>6</sup> See Article 37(1) on procedural rules:

*“In addition, Member States shall ensure that within the framework of such a procedure: (d) where information is collected on the individual case for the purpose of reconsidering the refugee status, it is not obtained from the actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that the person concerned is a refugee, whose status is under reconsideration, nor jeopardize the physical integrity of the person and his/her dependants, or the liberty and security of his/her family members still living in the country of origin.”*

not put at risk the asylum seeker or refugee, his or her family members, or other individuals concerned.

12. A person who, because of his or her experiences, is in fear of the authorities in his or her own country may feel apprehensive *vis-à-vis* any authority. He or she may therefore be afraid to speak freely and give a full and accurate account of his or her case. It will therefore be necessary for the person considering the case to gain the confidence of the asylum seeker in order to assist the latter in putting forward his or her case, and in fully explaining his or her opinions and feelings. In creating such a climate of confidence it is, of course, of the utmost importance that the asylum seeker's statements will be treated as confidential and that he or she be so informed. Breaches of confidentiality may undermine the credibility of the process.

### **Refugees “*sur place*”**

13. The requirement that a person must be outside his or her country to be a refugee does not mean that he or she must necessarily have left that country illegally, or even that he or she must have left it on account of well-founded fear. He or she may have decided to ask for recognition of refugee status after having already been abroad for some time. A person who was not a refugee at the time of leaving his or her country, but who becomes a refugee at a later date, is called a refugee “*sur place*”.
14. A person may become a refugee “*sur place*” due to circumstances arising in his or her country of origin during his or her absence. Diplomats and other officials serving abroad, prisoners of war, students, migrant workers and others have applied for refugee status during their residence abroad and have been recognized as refugees.
15. A person may also become a refugee “*sur place*” as a result of his or her own actions, such as associating with refugees already recognized, or expressing his or her political views in the country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities.
16. In some circumstances a breach of confidentiality may result in a person becoming a refugee “*sur place*”. Again, whether or not this has occurred in relation to any individual case must be determined by a thorough and careful examination of the circumstances.

### **Conclusion**

17. The principles noted above should inform the application of the Migration Act 1958, its regulations and guidelines concerning the maintenance of confidentiality, for any consular officials or staff who apply to the Department of Immigration Multicultural and Indigenous Affairs, the Department of Foreign Affairs and Trade, or their respective Ministers, for territorial asylum and/or protection visas.