

## **Senate Legal and Constitutional References Committee**

### **Inquiry into the Administration and Operation of the Migration Act 1958**

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

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to comment on the issue of the administration and operation of the Migration Act 1958 insofar as it impacts on Australia's international obligations as they relate to asylum seekers and refugees.
2. UNHCR will be addressing its comments only to paragraph a. of the terms of reference:

*the administration and operation of the Migration Act 1958, its regulations and guidelines by the Minister for Immigration and Multicultural and Indigenous Affairs and the Department of Immigration and Multicultural and Indigenous Affairs, with particular reference to the processing and assessment of visa applications, migration detention and the deportation of people from Australia.*

Particular attention will be paid to the processing and assessment of visa applications and migration detention.

#### **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).
4. UNHCR actively co-operates with States and regional organisations in order to ensure that international protection is afforded to refugees through optimal implementation and harmonised application of all provisions of the Refugee Convention. In recent times, principally through its work on the Agenda for Protection and the “Convention Plus” initiative, UNHCR has paid particular attention to encouraging dialogue and concrete action to revitalize the existing protection regime, while ensuring its flexibility to address new protection challenges as well as the contemporary concerns of States, including

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<sup>1</sup> The term ‘Refugees’ 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).

national security, people smuggling and trafficking, and irregular or secondary movements. Through its engagement on these issues, both multilaterally and directly with various individual states, UNHCR has acquired considerable experience and expertise that it draws upon in commenting upon States' domestic arrangements in relation to asylum seekers and refugees, and the consistency of those arrangements with State obligations under the Refugees Convention.

5. The supervisory role of UNHCR relating to the protection of refugees worldwide is complemented by the Conclusions developed annually by the Executive Committee of the High Commissioner's Programme (EXCOM), comprised of State Parties to the Refugee Convention and its Protocol. The EXCOM Conclusions are developed through a consensual process requiring the agreement of States, and set international protection standards. Australia has traditionally taken an active role in the work of EXCOM.

### **Australia's Refugee Protection Arrangements**

6. Australia has traditionally had a well-developed and sophisticated asylum system. Indeed, from UNHCR's perspective aspects of the Australian system are important for their export value in the region and beyond — particularly for countries that may not have an equivalent level of safeguards in their systems, the same tradition of respect for human rights, or a comparable level of support for refugees among civil society.
7. While Australia's arrangements for the protection of refugees have many strengths, it is UNHCR's opinion that some aspects of Australia's protection arrangements fall short of international standards and best practices. UNHCR has previously taken these up with the Australian Government and, where appropriate, commented publicly on them.<sup>2</sup>
8. Public attention to these aspects of Australia's protection arrangements has often overshadowed Australia's positive contributions to the international protection of refugees. Australia has a generous refugee resettlement quota, and has been actively engaged in implementation of the Agenda for Protection, focusing on strategic issues in the international protection framework.<sup>3</sup>
9. This submission will not comprehensively restate UNHCR's position in relation to issues previously raised with the Australian authorities. Rather, it will address those aspects of the Migration Act 1958 ('the Migration Act') and the Migration Regulations 1994 ('the Migration Regulations') that, while not currently meeting international standards and best practices, have the potential to be administered in such a way as to mitigate adverse impacts upon refugees and asylum seekers. Adjustments to this end may also encourage payment of greater public attention to the many ways in which Australia is positively contributing to the international protection of refugees.

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<sup>2</sup> See e.g. UNHCR Position Papers on Detention of Asylum Seekers (No.1/ 2002), Temporary Protection (No. 2/ 2002), Cessation of Refugee Status and the Principle of Effective Protection (No.1/ 2003), as well as UNHCR's submissions to the Human Rights and Equal Opportunity Commission National Inquiry into Children in Immigration Detention (May 2002) and the Senate Select Committee on Ministerial Discretion in Migration Matters Inquiry into Ministerial Discretion in Migration Matters (August 2003). Copies of these and other UNHCR Position Papers and submissions may be found at <http://www.unhcr.org/submitq.shtml>.

<sup>3</sup> See e.g. Australia's Second Progress Report on the Implementation of the Agenda for Protection tabled at the 33<sup>rd</sup> meeting of the UNHCR Standing Committee of EXCOM held 28-30 June 2005.

## Detention<sup>4</sup>

10. UNHCR views the detention of asylum-seekers as inherently undesirable. The 1999 Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers ("UNHCR Detention Guidelines")<sup>5</sup> set out under which exceptional circumstances the detention of asylum-seekers may be resorted to by States. The guidelines also spell out specific recommendations on the conditions of detention. They are not binding, but represent UNHCR's reference point, drawing upon the 1951 Convention relating to the Status of Refugees, relevant EXCOM conclusions,<sup>6</sup> and human rights law and standards such as, *inter alia*, the 1989 Convention on the Rights of the Child ('CRC') and the 1966 International Covenant on Civil and Political Rights (ICCPR).
11. Australia's policy of mandatory detention of all asylum-seekers arriving undocumented is not consistent with applicable international standards, including those contained in the EXCOM Conclusions already referred to. While UNHCR recognises that mandatory detention was introduced as a mechanism seeking to address Australia's particular concerns related to illegal entry, using detention in this way requires the exercise of great caution to ensure that it does not serve to undermine the fundamental principles upon which the regime of international protection is based. Legitimate State security concerns must be addressed in a way that balances them with the rights of individuals, consistent with human rights instruments, including the Refugee Convention. In the particular case of refugees, their human suffering in fleeing persecution should not be exacerbated by their treatment upon arrival in the country of asylum.
12. The recent changes to detention arrangements introduced by the Migration Amendment (Detention Arrangements) Act 2005 ('the Detention Arrangements Act') were a welcome step towards improving the treatment of refugees and asylum seekers. Of particular import was the affirmation by Parliament that as a matter of principle, minors shall only be detained as a measure of last resort.
13. The Prime Minister's announcement of the changes, as well as then Minister McGauran's second reading speech in relation to the relevant Bill, emphasise that the Detention Arrangements Act was introduced to enable the detention of families with children to take place in the community, where conditions will be set to meet their individual circumstances.
14. However, the powers granted under the Detention Arrangements Act are not limited in their application to families with minor children. Indeed, the Detention Arrangements Act gives the Minister new and extremely broad powers to grant a visa to any person who is in

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<sup>4</sup> For a more detailed statement of UNHCR's position in relation to detention in Australia, with particular emphasis on detention of children, see UNHCR's submission to the Human Rights and Equal Opportunity Commission National Inquiry into Children in Immigration Detention, a copy of which may be found at <http://www.unhcr.org.au/pdfs/subinqchildimmi.pdf>.

<sup>5</sup> A full copy of the UNHCR Detention Guidelines may be found at <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf>.

<sup>6</sup> See, for example, EXCOM Conclusions Nos. 44 (XXXVII) – 1986, 46 (XXXVIII)- 1987 para f), 47 (XXXVIII) – 1987 para e), 50 (XXXIX) - 1988 para i), 65 (XLII) - 1991 para c) and j), 71 (XLIV) - 1993 para f), 85 (XLIX) - 1998 para cc) and ee), and 89 (LI) - 2000.

immigration detention, or to allow any such person to reside at a specified place rather than being held in a detention centre.<sup>7</sup>

15. These powers could be exercised in such a way as to ensure that asylum seekers are detained only for so long as is necessary:

- To verify identity;
- To conduct a preliminary interview to determine the elements on which their claim for refugee status or asylum is based;
- In cases where asylum-seekers have destroyed their travel and /or identity documents or have used fraudulent documents in order to mislead the authorities; or
- To protect national security and public order.<sup>8</sup>

They could also be exercised so as to allow vulnerable individuals to reside outside of detention centres.<sup>9</sup>

16. Exercised in this way, the powers could make a significant contribution towards bringing Australia's detention regime into line with international standards, and facilitate further consideration of more fundamental changes to, for example, introduce a system under which there is an assumption against detention of asylum seekers.<sup>10</sup> Clear guidelines would need to be put in place to ensure that all relevant cases were referred by the Department of Immigration and Multicultural and Indigenous Affairs ('DIMIA') to the Minister, for exercise of his or her powers. UNHCR stands ready to advise on the development of any such guidelines.

### **The Temporary Protection Visa and Temporary Humanitarian Visa Regime**

17. UNHCR has a number of concerns in relation to Australia's Temporary Protection visa (TPV)<sup>11</sup> and Temporary Humanitarian visa (THV)<sup>12</sup> regime.<sup>13</sup> Foremost among these are that TPV and THV holders are not entitled to family reunion, have no right to re-enter Australia if they leave, and are not eligible to receive Convention Travel Documents. In some cases the lack of access to these entitlements may be indefinite.<sup>14</sup>

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<sup>7</sup> See new sections 195A and 197AA- 197AG of the Migration Act.

<sup>8</sup> See UNHCR Detention Guidelines, Guideline 3, Exceptional Grounds for Detention.

<sup>9</sup> See UNHCR Detention Guidelines, Guideline 7, Detention of Vulnerable Persons.

<sup>10</sup> See UNHCR Detention Guidelines, Guideline 2, General Principles, and Guideline 3, Exceptional Grounds for Detention.

<sup>11</sup> Subclass 785 (Temporary Protection) visa.

<sup>12</sup> Subclass 447 (Secondary Movement Offshore Entry (Temporary)) and Subclass 451 (Secondary Movement Relocation (Temporary)) visas.

<sup>13</sup> The relevant issues are canvassed more fully in the UNHCR Discussion Papers on temporary protection and cessation, which may be found at <http://www.unhcr.org.au/pdfs/dpaper022002.pdf> and <http://www.unhcr.org.au/pdfs/dpaper012003.pdf> respectively. UNHCR has also commented on the issue of TPVs in other parliamentary submissions, notably its submission to the Senate Select Committee on Ministerial Discretion in Migration Matters Inquiry into Ministerial Discretion in Migration Matters, which may be found at <http://www.unhcr.org.au/pdfs/subinqmigmatters.pdf>.

<sup>14</sup> Holders of Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visas are ineligible for a permanent Protection visa unless a waiver power is exercised. See Migration Regulations 1994 – Schedule 2, 866.214.

18. While, for the reasons noted above, the TPV and THV regime falls short of international standards and best practices,<sup>15</sup> there is scope for the relevant regulations to be administered in such a way as to mitigate adverse impacts upon refugees and asylum seekers. In relation to both TPV and THV holders there exists discretions which, if exercised, would render TPV and THV holders eligible to be granted a permanent Protection visa without protracted delay, provided they meet other relevant criteria.<sup>16</sup> Those granted permanent Protection visas would then be eligible to access family reunion and obtain a Refugee Convention document to enable them to travel.
19. Again, new guidelines would need to be put in place or existing guidelines revised, to ensure either that all relevant cases were referred by DIMIA to the Minister, or to ensure the proper exercise of the discretions by the Ministers' delegates. UNHCR stands ready to advise on the development of any such guidelines.

### **The "Seven Day Rule"**

20. The so-called "seven day rule"<sup>17</sup> is of concern to UNHCR because of its potential to subject refugees to a series of "rolling" temporary visas only, thereby rendering them permanently ineligible for family reunion and a Convention Travel Document. Also of concern to UNHCR is that an overly broad interpretation of the concept of "effective protection"<sup>18</sup> may lead to the seven day rule being applied in circumstances where refugees have in reality not had any opportunity to access protection before arriving in Australia.
21. DIMIA has issued guidelines to decision-makers as to how the seven day rule should be interpreted and applied.<sup>19</sup> In UNHCR's view, the guidelines are not sufficiently explicit in spelling out the minimum criteria which must be satisfied before a country could be said to offer effective protection to refugees. These criteria are that:
- there is no likelihood of persecution, of *refoulement* or of torture or other cruel and degrading treatment;
  - there is no other real risk to the life of the person[s] concerned;
  - there is a genuine prospect of an accessible durable solution in or from the asylum country, within a reasonable timeframe;

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<sup>15</sup> In relation to family reunion, see for example EXCOM Conclusions 9(XXVII)-1977; 24 (XXXII) – 1981 and 88(L)-1999. In relation to travel documents see Refugee Convention Art. 28.

<sup>16</sup> Migration Regulations 1994 – Schedule 2, 866.214 (2), 866.228 (b) and 866.228A (b).

<sup>17</sup> Migration Regulations 1994 – Schedule 2, 866.215 provides:

'(1) If the applicant has held a Subclass 785 (Temporary Protection) visa since last entering Australia, the applicant, since leaving his or her home country, has not ever resided, for a continuous period of at least 7 days, in a country in which the applicant could have sought and obtained effective protection:

(a) of the country; or

(b) through the offices of the United Nations High Commissioner for Refugees located in that country.

(2) The Minister may waive the requirement under subclause (1) if the Minister is satisfied that it is in the public interest to do so.'

<sup>18</sup> For a discussion of the concept of "effective protection", see the UNHCR Discussion Paper on the topic at <http://www.unhcr.org.au/pdfs/dpaper012004.pdf>.

<sup>19</sup> See "The '7 Day Rule', Interpreting and applying criterion 866.215".

- pending a durable solution, stay is permitted under conditions which protect against arbitrary expulsion and deprivation of liberty and which provide for adequate and dignified means of subsistence;
  - the unity and integrity of the family is ensured; and
  - the specific protection needs of the affected persons, including those deriving from age and gender, are able to be identified and respected.<sup>20</sup>
22. UNHCR considers that amendment of the guidelines to reflect these criteria would go a long way to ensuring that the seven day rule is not applied in respect of countries that do not in fact offer effective protection to refugees.<sup>21</sup>
23. UNHCR is also concerned that the seven day rule<sup>22</sup> may be read as equating the presence of UNHCR in a country with effective protection, even through it is States, rather than international organisations, which afford international protection. This concern has to some extent been addressed by the guidelines, which clarify that UNHCR itself is not a provider of protection.
24. The broader issue, however, is the denial of a permanent visa, and associated entitlements, to people found to fall within the seven day rule. There is a power to waive the seven day rule where it is in the public interest to do so,<sup>23</sup> and UNHCR acknowledges that exercise of this waiver power pursuant to the existing guidelines is in many cases facilitating access to a permanent visa. However, it remains the case that exercise of the waiver power in line with the existing guidelines can produce harsh outcomes. These could be reduced or eliminated by more expansive application of the waiver.
25. The section of the guidelines dealing with waiver of the seven day rule provides for some limited recognition of the importance of family reunion. It indicates that where one family member is eligible for a permanent visa, the seven day rule should be waived for other family members who may be caught by it, so that all may be granted permanent visas. It also indicates that the application of the seven day rule should be waived in respect of certain vulnerable individuals. However, in UNHCR's view the guidelines should go further.
26. The family is acknowledged in human rights instruments as the natural and fundamental group unit of society. As already noted, the importance of putting in place measures that ensure respect for the unity of the refugee family has been highlighted by EXCOM on a number of occasions. Maintaining or reinstating family unity is one of the most important ways in which persons in need of international protection can enjoy the stability and certainty they require to continue their lives.

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<sup>20</sup> See Statement by Ms. Erika Feller Director, Department of International Protection, UNHCR, at the Fifty-fifth Session of EXCOM, Geneva, 7 October 2004. See also Lisbon Expert Roundtable Summary Conclusions on the Concept of 'Effective Protection' in the Context of Secondary Movements of Refugees and Asylum-Seekers, February 2003.

<sup>21</sup> There has, for example, been at least one finding in Australia that effective protection is available in Indonesia. For UNHCR's assessment of the availability of effective protection in Indonesia, see the Position Paper on that topic at <http://www.unhcr.org.au/pdfs/EFFECT.pdf>. See also UNHCR's position in relation to effective protection in Malaysia at <http://www.unhcr.org.au/pdfs/Malaysia.pdf>.

<sup>22</sup> Migration Regulations 1994 – Schedule 2, 866.215 (1) (b).

<sup>23</sup> Migration Regulations 1994 – Schedule 2, 866.215 (2).

27. Given the importance of family unity, including that attached to it under international law, it is difficult to conceive of a case in which the public interest would be served by a decision that would lead to the separation of a refugee family for years on end. That is particularly so in cases where the family may already have suffered an enforced separation of three or more years more, as a result of the family member/s in Australia having been granted a TPV only upon arrival. While there is of course a need to prevent abuse of the availability of family reunion, this should not be done at the expense of the rights of people in genuine need of international protection.
28. Ensuring that the seven day rule is not applied so as to maintain the separation of families would go a considerable way towards mitigating some of its adverse impacts upon refugees and asylum seekers. This could be achieved by an appropriate amendment to the existing guidelines so as to promote a more expansive application of the waiver in cases involving families. UNHCR stands ready to advise on the development of any such amendments to the guidelines.

## **Conclusion**

29. UNHCR's concerns in relation to certain aspects of Australia's otherwise strong arrangements for the protection of refugees are a matter of record. While these aspects of the Australian system remain in place, their adverse impacts upon refugees and asylum seekers may nonetheless be mitigated by sensible and humanitarian focussed administration of certain existing discretionary powers. If those powers are administered in this way, Australia's protection arrangements are capable of operating in a manner more consistent with international standards and best practices. This could be achieved without undermining Australia's national security or its legitimate interests in preventing abuse of its protection arrangements.
30. To implement administration of the relevant powers in this way, appropriate guidelines would need to be developed, or existing guidelines amended, to provide the necessary guidance to DIMIA officers. UNHCR stands ready to advise the Australian authorities in the formulation of any such guidelines, and in developing progressive and innovative measures to meet the protection challenges posed by the current international environment. Progress towards this end would more closely align Australia's domestic arrangements for asylum seekers and refugees with its efforts to strengthen the international protection framework, and may also lead to more public attention being paid to Australia's positive contributions to the international protection of refugees.

UNHCR Regional Office Canberra  
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