



Australian Government

Department of Immigration and Multicultural and Indigenous Affairs

Secretary

Mr John Lynch
Registrar
Refugee Review Tribunal
Locked Bag A3
SYDNEY SOUTH NSW 1235

Dear Mr Lynch

I am writing to you under section 423(2) of the *Migration Act 1958* (the Act) in relation to the application of the principle of effective protection for the purposes of applying the 7 day rule during the review of protection visa refusal decisions made by DIMIA in relation to persons who were previously granted temporary protection visas (TPV).

Specifically, I wish to raise concerns about a letter of 24 November 2004 from UNHCR Regional Representative in Australia to the First Assistant Secretary, Refugee, Humanitarian and International Division. The letter concerns the application of the 7 day rule, and whether Indonesia offers effective protection. The UNHCR has written concurrently to the RRT on this issue and has published the substance of its views regarding Indonesia, as set out in the letter, on its Regional website and in its recent newsletter.

The letter reiterates UNHCR's views on the interpretation of the principle of effective protection, and refers to the statement made by Ms Erika Feller, Director of the Department of International Protection at the 55th Session of the Executive Committee on the minimum requirements of effective protection. Having regard to that statement, UNHCR concludes that the protection situation in Indonesia cannot be characterised as affording effective protection.

The views expressed by Ms Feller on effective protection do not represent internationally agreed minimum standards by States and, in our view, go beyond the Refugees Convention obligations.

The concept of effective protection has been a matter of discussion between UNHCR and States for a considerable period and no consensus has been reached on the matter. Australia has made its position clear on how the concept of effective protection should be applied over a number of years, in particular the need to consider the availability of protection on a caseload specific basis and taking into account the local context.

In our view, it is important to closely examine a State's practice in dealing with asylum seekers and refugees in determining whether a country provides effective protection. Whether a country is a party to the Refugees Convention is not conclusive as to whether effective protection is available in that country.

International literature, including UNHCR's own publications, reflects positively on Indonesia's treatment of asylum seekers and persons under UNHCR's mandate. Australia's experience with Indonesia is that it has acted very responsibly in allowing thousands of Australia bound asylum seekers to remain in Indonesia with full access to refugee determination procedures and resettlement outcomes if found to be refugees. Many countries in the Asia-Pacific region, including Indonesia, are not Refugee Convention signatories, yet have made a major contribution to the protection needs of hundreds of thousands of asylum seekers and refugees.

The practice in Indonesia is that any person who signals a potential protection need is referred to UNHCR, which is then able to assess any protection claims and seek durable solutions for those determined to be refugees, including referral internationally for resettlement. Australia's experience is that such persons are not subject to removal by the Indonesian authorities, and that thousands of asylum seekers en route to Australia have been successfully handled under these practical and effective arrangements.

Further, IOM, with funding from the Australian Government, provides practical support such as accommodation, food and emergency medical assistance to such persons, and advises them of their options, including voluntary return, thus allowing for an adequate and dignified means of existence during their refugee determination.

In the period 2000 to 31 January 2005, 80-90% of those Australia-bound persons who had protection claims assessed by UNHCR in Indonesia and were found to be in need of protection and resettlement, have been internationally resettled, and others are likely to achieve a resolution in due course. These persons have been allowed to remain in Indonesia by the authorities, whilst their claims are assessed and a durable solution found.

By international standards, this is a very high rate of access to durable solutions and the waiting period has been relatively short by comparison to refugees in other parts of the world seeking solutions.

On balance, these arrangements have provided both effective protection in Indonesia and, in particular, protected refugees from the perceived need to use people smugglers, and risk their lives, to get a durable solution.

On our examination of the RRT decision referred to in the UNHCR's letter (N04/48768), the approach of the RRT in finding that Indonesia could offer effective protection was consistent with the available independent country information, and an appropriate assessment.

As a general principle, the concept of effective protection as it appears in the 7 day rule (clause 866.215), involves the person not only being permitted to remain in the third country without risk of persecution for a Convention reason, but also not being at risk of being refouled to their country of origin where they have a well-founded fear of persecution for a Convention reason.

It should be noted that the recent High Court decision in *NAGV v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA6 does not affect the meaning of the expression "effective protection" in the *Migration Regulations 1994*. Further, statutory effective protection, which is reflected in sections 36(3) to (7) of the Act, is still a relevant consideration in the making of a protection visa decision.

I would be grateful if the Tribunal would consider and give weight to the material contained in this submission.

Should you have any queries on this matter, please contact Robert Illingworth, Assistant Secretary, Onshore Protection Branch on (02) 6264 4677.

Yours sincerely

W J Farmer

23 May 2005