



## AUSTRALIA'S LEGAL OBLIGATIONS TO REFUGEES

### **In International Law**

As a signatory to the *Refugees Convention* Australia promised to offer protection to refugees and not return them to danger. The *Refugees Convention* defined refugees as people who had "a well founded fear of persecution" for reason of their race, religion, nationality, political opinion or social group. The Convention definition of "refugee" is narrow and does not include refugees fleeing climate change, or natural or even man made disasters, including wars.

However even those international treaties and conventions of which Australia is a signatory are not part of Australian law until they have been adopted in domestic law by statute.

### **In Australian Domestic Law**

Australia's international obligations to protect Convention refugees became part of Australia's domestic law when the Refugee Convention was adopted in the Migration Act. With this adoption refugees were given legal rights to protection visas if they could prove themselves to be refugees.

### **Mandatory Detention**

The *Migration Act* also provides that any person who does not have a visa must be detained. This mandatory detention means that refugees without visas (including those who arrive by boat) must be detained while their claims for protection are being processed and until they are either granted protection visas or removed (ie deported).

### **Assessment of Refugee Claims for mainland arrivals**

The process of assessment for refugees who arrive on the Australian mainland consists in an initial merits assessment of the refugees' claims by a departmental officer who is an authorised delegate of the Minister for Immigration.

The asylum seeker can apply to the Refugee Review Tribunal (RRT) for a *merits review* of an unfavourable decision by a delegate. Powers and responsibilities of the RRT in the conduct of the review are set out in the *Migration Act*. Following an unfavourable RRT decision the asylum seeker can apply to the courts for *judicial review* of the

RRT process. The reviewing court can return the person's case to the RRT for reconsideration if the asylum seeker establishes that the RRT exceeded its powers in the way it reviewed the delegate's decision.

### **Excision and the Denial of Legal Entitlement to Protection**

The legally enforceable protection obligations owed to all refugees have since been taken from refugees who arrive in Australia by landing on certain Australian islands.

In 2001 as part of the Pacific Solution the Howard government amended the *Migration Act* to "excise" certain islands (including Christmas Island and Ashmore Reef) from the "migration zone". These new excision provisions of the *Migration Act* meant that refugees who had arrived at those excised places (typically by boat) were barred from even applying for protection visas without the express permission of the Minister for Immigration.

An assessment process was established by which the Minister would be advised which of the "offshore entrant" asylum seekers he should consider allowing to apply for protection visas.

### **Two Assessment Regimes**

Therefore there were now two procedures for the assessment of refugee claims depending on whether a person had arrived on the mainland or on an excised island.

The defining difference between the assessment processes for "offshore entrants" and those arriving on the mainland is that "offshore entrants" have no right under domestic law to protection visas, even if they are assessed to be refugees. At law, the Courts do not have the power to force the Minister to lift the bar, even if there is good reason to do so.

### **Detention**

Persons who arrive on the mainland, typically by air, pass through immigration clearance on other visas, eg tourist visas, and are not therefore subject to detention during the currency of these visas. If they apply for protection visas during the currency

of their other visas they are usually granted bridging visas unless they are assessed as flight risks.

Those arriving by boat (dubbed "offshore entrants") are immediately placed in detention and held there until they are assessed as refugees and security cleared, or removed.

### **The process for "offshore entrants" until late 2010**

It was intended that the assessment process which informed the Minister's decision to maintain or lift the bar against "offshore entrants" applying for protection visas would not be subject to judicial review by the Courts.

This assessment process which informed the Minister's decision originally consisted of a comprehensive initial assessment of a person's claims for protection, called the Refugee Status Assessment (RSA). If a person's claims were rejected the person was entitled to a merits review called an Independent Merits Review (IMR). This was carried out by former members of the Refugee Review Tribunal.

### **The High Court Decision in the Christmas Island Case**

In late 2010 the High Court found that, while it could not order the Minister to exercise his discretion one way or another, the whole assessment process which informed the exercise of the Minister's discretion was subject to the requirements of procedural fairness, and on this basis was reviewable by the courts.

The High Court's decision otherwise affirmed the validity of the scheme by which "offshore entrant" asylum seekers were barred from making applications for protection visas until the Minister allowed them to do so. It remains that there is no obligation under Australian law that "offshore entrants" be afforded protection even when they are assessed to be refugees. The High Court found it could not order the Minister to exercise his discretion in favour of the refugee.

### **Changes to Processing of "offshore entrants"**

In March 2011 the government will establish a new assessment regime which effectively removes the merits review component of the merits assessment process for "offshore entrants". This is said to be in response to the High court case, however there is nothing in the Court's decision which warrants or requires such a move. The government claims that the courts will be flooded and that this justifies the "streamlining" of the procedure.

In fact what is happening is that the government is using the High Court decision as

an excuse to take away a level of merits review, as if that type of review could be substituted by the more narrow judicial review that courts are limited to.

In reality the government will be simply using the court system to white wash a degraded merits assessment while blaming long term detention on the courts.

### **Judicial review and merits review**

Judicial review by the courts is not a substitute for merits review. Judicial review is narrow and cannot cure mistakes of fact made in the merits assessment process. The limits of judicial review are discussed in another RAC factsheet.

There is no reason why persons need be detained while their cases are being considered by the courts.

The practical consequences of the limits of judicial review are illustrated in the experiences of a young Afghan man, Mohammad K, who arrived as an unaccompanied minor by boat in early 2001.

His claims for protection from the Taliban were rejected as he was not believed to be from Afghanistan but Pakistan. This assessment was made on the basis of a faulty analysis of his accent. He applied for judicial review and the court noted that he may well be from Afghanistan but the court did not have the power to review this possible error of fact.

Mohammad K. then applied to return to Afghanistan but the Afghan ambassador refused to issue him with a passport. He was detained for almost five years until the Minister intervened to release him on the recommendation of the Commonwealth Ombudsman. The Ombudsman found Mohammad had been truthful about his origins. Had Mohammad K. been recognised as an Afghan when he first applied for protection he would have obtained a protection visa<sup>1</sup>. Years of his life were wasted in detention.

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<sup>1</sup> Report for Tabling in Parliament by the Commonwealth Ombudsman, Personal Identifier 08/05, 21 November 2005.