Inquiry into the detention of Indonesian minors in Australia

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About the Human Rights Law Centre

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We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

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Contents

1. Introduction

1.1 Background

On 10 May 2012, the Senate referred several questions concerning the detention of Indonesian minors in Australia to the Legal and Constitutional Affairs References Committee for inquiry and report.

1.2 Scope of this submission

This submission examines the human rights implications of the pre-charge detention of individuals suspected of people smuggling. It focuses, in particular, on circumstances where the detention is authorised by the operation of a Criminal Justice Stay Certificate (CJSC).

We note that the operation of CJSC's is not explicitly dealt with in the Committee's terms of reference, but a consideration of this regime – pursuant to which a person may be 'temporarily' detained for the purposes of the 'administration of criminal justice' – is relevant to the Committee's inquiry into the appropriateness of detention of Indonesian minors in Australia.

1.3 Summary and recommendations

The Human Rights Law Centre (HLRC) has identified the following concerns in relation to pre-charge detention of suspected people smugglers, including children:

(a) under the *Migration Act 1958* (Cth) (Migration Act)[1] the Commonwealth has open-ended powers to detain persons suspected of people smuggling offences and, consequently, individuals may be arbitrarily detained for prolonged and indefinite periods of time;

(b) the Australian Federal Police have given evidence before the Senate Estimates Committee that the average time spent in detention prior to charge for alleged crew of people smuggling ventures is 161 days;[2]

(c) judicial review in these circumstances is restricted and suspects are not guaranteed legal assistance or representation for the purposes of challenging the lawfulness of their detention; and

(d) the detention of children, including in adult immigration facilities, gives rise to particularly grave concerns.

The HLRC considers that, in these circumstances, detention may violate Australia's international legal obligations under the *International Covenant on Civil Political Rights* (ICCPR) and, in the case of minors, the *UN Convention on the Rights of the Child* (UNCRC).

[1] Sections 189, 147 and 250. See discussion below.

[2] Michael Gordon, 'Boat Crew Facing Legal 'Black Hole', *The Age*, 21 February 2012.

This submission makes the following recommendations:

Recommendation 1:

Pre-charge detention of suspected people smugglers must be reasonable, necessary and proportionate in all the circumstances.

Recommendation 2:

In all people smuggling cases, Commonwealth authorities should be required to make a decision whether to lay a criminal charge within 14 days after a CJSC has been issued or such longer period as authorised by a court.

Recommendation 3:

A court must be capable of revoking, or declining to extend, a CJSC, including on the basis that pre-charge detention has become prolonged or arbitrary.

Recommendation 4:

The Commonwealth must provide free Legal Aid to persons suspected of people smuggling offences who are being held in immigration detention pursuant to CJSCs.

Recommendation 5:

Where a person suspected of people smuggling claims to be a minor, he or she should not be held in an Immigration Detention Centre.

1.4 Further information

On 30 January 2012 the HRLC made a submission to the Committee on the *Crimes Amendment (Fairness for Minors Bill) 2011*. A copy of that submission, which sets out Australia's human rights obligations in relation to the circumstances, length, conditions and review of detention, is annexed.

Information regarding the use and number of Criminal Justice Stay Certificates (CJSCs) issued was publicly available until 2003 and was reported in the Appendix of the Australian Government's Annual Report. This information is no longer publicly available. In the interests of transparency this information should be made publicly available again, provided that it does not disclose names or other particulars that would identify individuals subject to CJSCs. In December 2011, the HRLC made an application under the *Freedom of Information Act 1982* (Cth) for further information in relation to the use and number of CJSCs. We have still not received a response to that request. We intend to provide a supplementary submission to the Committee if we are successful in obtaining this information before the reporting date.

2. Legislative and judicial framework

2.1 Issue of Criminal Justice Stay Certificates

Under section 147 of the Migration Act, the Attorney-General may issue a CJSC if he or she is satisfied that a non-citizen should remain in Australia 'temporarily' for the purposes of the 'administration of criminal justice in relation to an offence against the law of the Commonwealth'.

The 'administration of criminal justice' is defined under section 142 of the Migration Act to include circumstances where an investigation is undertaken to determine whether an offence has been committed, as well as the prosecution of an offence.

The consequences of the issue of a CJSC are stated in section 150 of the Migration Act. Where such a certificate is in force, the non-citizen is not to be removed or deported from Australia.

Section 250(3) of the Migration Act provides that a non-citizen who is suspected of committing an offence may be kept in detention for such period as is required to make a decision whether to prosecute the person in connection with the offence concerned, and to carry out any such prosecution. However, once that period comes to an end, the person must be 'expeditiously' removed from Australia, pursuant to section 250(5) of the Migration Act, unless a CJSC has been issued in respect of the individual in question.

2.2 Basis of detention

Under section 189 of the Migration Act, where a migration officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person. Section 196(1) of the Migration Act further provides that that person must be kept in detention until he or she is either removed from Australia, deported, or granted a visa. Unless granted a visa, a person cannot be released, even by a court.[3]

As a result, individuals suspected of people smuggling, including individuals who maintain that they were minors when the alleged offence occurred, may be held under section 189 of the Migration Act for prolonged periods in adult immigration detention facilities before being charged with an offence.

The circumstances considered in *Supriadin v Minister for Immigration & Citizenship*[4], summarised below, indicate that it is current practice for Commonwealth officials to rely on powers under section 147 of the Migration Act, namely the issuing of CJSCs, to hold persons suspected of people smuggling in immigration detention for prolonged and indefinite periods.

2.3 Supriadin v Minister for Immigration & Citizenship [2011] NTSC 45

Supriadin[5] was a case brought on behalf of a number of plaintiffs who were being held in detention facilities in the Northern Territory pending the completion of investigations into their involvement in people-smuggling offences. The plaintiffs were all minors aged between 12 and 17 years.

Each plaintiff was subject to a CJSC issued by a delegate of the Attorney General. However, none were actually charged with an offence at any time during their detention.

By the time the case was heard before a Northern Territory Supreme Court, at least one of the plaintiffs had been detained for well over a year, without charge.

The plaintiffs sought to challenge their detention by applying for writs of habeas corpus, although no direct challenge was made to the validity of the CJSCs.

In summary, counsel for the plaintiffs argued that the powers contained in sections 189, 147 and 250 of the Migration Act are open ended and, as the plaintiffs were all minors, decisions must be made promptly as to whether to prosecute them or not. If the decision was made not to prosecute, the child

[3] Section 196(3) of the *Migration Act 1958* (Cth).

[4] *Supriadin v Minister for Immigration & Citizenship* [2011] NTSC 45.

[5] *Ibid*.

in question must be 'expeditiously' removed from Australia in accordance with section 250(5) of the Migration Act.

The court confirmed the Commonwealth's power to detain the plaintiffs while the CJSCs remained in force. Justice Mildren noted that at least one plaintiff had been detained for 'rather an extraordinarily long time for a decision to prosecute to be made'[6]. His Honour said, however, 'while the Attorney-General's certificate [CJSC] is in force, the provisions of s 250(5) cannot operate'. Therefore, the court was unable to compel the Minister for Immigration to end the detention by removing the plaintiffs from Australia.[7]

No challenge was made to the constitutionality of the provision of the Migration Act, nor to the validity of the CJSCs. The plaintiffs' application to be released was refused and they remained in immigration detention.

The HLRC submits that because the powers contained in sections 189, 147 and 250 of the Migration Act are open ended, minors are being subjected to prolonged periods of detention before being deported or charged with an offence. This constitutes a violation of a number of human rights.

3. Relevant human rights

3.1 Arbitrary detention

Article 9(1) of the ICCPR provides that 'no one shall be subjected to arbitrary detention'. Under international law, detention may be considered 'arbitrary' even when it is permitted by a domestic law.[8] Likewise, Article 37 of the UNCRC prohibits the 'arbitrary' detention of children.

The United Nations Human Rights Committee has stated that:

> The notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as *appropriateness* and *injustice*.[9]

To avoid being arbitrary, detention must also be reasonable, necessary and proportionate in all circumstances.[10]

As discussed above, the Migration Act presently enables the Commonwealth to detain suspects, including children and suspects who claim to be children, for indefinite and extended periods of time. In *Supriadin*, the court confirmed that these powers were used to detain at least one child for well over a year without criminal charge.[11]

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[6] *Ibid,* see paragraph 17.

[7] In any event, Mildren J said there was insufficient evidence before the court, in this case, to find that a 'reasonable period' for making a decision whether to prosecute had passed. *Ibid,* paragraph 22.

[8] See, for example, Human Rights Committee, *A v Australia* (560/93) para. 9.2.

[9] *A* v *Australia*, HRC, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) [9.2] (italics added). See also *Van Alphen v The Netherlands*, HRC, Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988 (15 August 1990) [5.8].

[10] Nowak, *CCPR Commentary (2nd revised edition)* (2005), p. 224.

[11] *Supriadin,* above n 4, at [18].

The pre-charge detention of people smuggling suspects for long periods of time is manifestly inappropriate, unreasonable and unjust. In our submission, the operation of the Migration Act has, in this respect, caused Australia to breach its obligations under article 9(1) of the ICCPR.

A person should only be detained pursuant to a CJSC where such detention is reasonable, necessary and proportionate in the circumstances. Once a reasonable time has elapsed, the CJSC must be capable of being revoked.

Recommendation 1:

Pre-charge detention of suspected people smugglers must be reasonable, necessary and proportionate in all the circumstances.

Recommendation 2:

In all people smuggling cases, Commonwealth authorities should be required to make a decision whether to lay a criminal charge within 14 days after a CJSC has been issued or such longer period as authorised by a court.

3.2 Prompt judicial review

Article 9(3) of the ICCPR provides as follows:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other office authorised by law to exercise judicial power and shall be entitled to trial within **a reasonable time** or to release. **It shall not be the general rule that persons awaiting trial shall be detained in custody**, but release may be subjected to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment. (Emphasis added.)

Article 9(3) provides special protections for persons who are arrested or detained for the purpose of criminal justice, including circumstances where the arrest and detention is authorised directly by executive authorities, such as police and government officials.[12] It requires state parties to ensure that persons who are detained for criminal justice reasons are tried for their alleged crimes 'within a reasonable time', or released. It also requires state parties to restrict the use of pre-trial detention 'to essential reasons, such as danger of suppression of evidence, repetition of the offence and absconding.'[13] Where special circumstances exist which justify pre-trial detention, the period of pre-trial detention 'should be as short as possible'[14].

Further Article 9(4) of the ICCPR states that 'anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide *without delay* on the lawfulness his detention and order his release if the detention is not lawful.' (Emphasis added.) This article protects people's rights to challenge, without delay, the lawfulness of detention, regardless of the reasons for that detention.

[12] Nowak, above n 10, p 230.

[13] *Ibid*, p 233.

[14] *Ibid.*

Similarly, Article 37(d) of the UNCRC also provides that 'every child deprived of his or her liberty shall have the right to … challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a *prompt decision* on any such action'. (Emphasis added.)

The *Supriadin* case demonstrates that there is no real and effective opportunity to challenge a person's detention on the basis of a CJSC in Australia. Judicial review is also restricted by section 474 of the Migration Act, which provides that decisions made under the Migration Act are final and conclusive. Such a decision cannot therefore be challenged, appealed against, reviewed, quashed or called into question in any court.[15]

The HLRC submits that it is inappropriate for individuals, in particular children, to be held subject to sections 189, 147 or 250 of the Migration Act without charge and with such a limited scope of judicial review of decisions made under those sections. In this respect, Australia is failing to meet its international human rights obligations under Article 9(3) and 9(4) of the ICCPR and Article 37(d) of the UNCRC.

In order to comply with Australia's international human rights obligations, the Migration Act must contain a mechanism for prompt and effective judicial review of detention (i.e. within a reasonable time), including cases where detention flows from the issue of a CJSC.

To avoid inappropriately long periods of detention Commonwealth authorities, namely the Commonwealth Director of Public Prosecutions, must be required to make a decision whether to lay criminal charge and, if charges are to be laid, do so within a reasonable timeframe. The HRLC supports the time limit of 14 days for the laying of charges as proposed by the *Crimes Amendment (Fairness for Minors) Bill 2011* (Cth), with the proviso that a court should be permitted to authorise an extension of that time in certain circumstances.[16]

Recommendation 3:

A court must be capable of revoking, or declining to extend, a CJSC, including on the basis that pre-charge detention has become prolonged or arbitrary.

3.3 Access to a lawyer

Without access to a lawyer, the right to judicial review is illusory and ineffective. Hence, it is a procedural requirement that a suspect deprived of liberty must be given access to legal advice and representation to enable them to challenge the lawfulness of the detention. Comparative jurisprudence from Europe confirms that legal advice/representation must be free[17] and the guarantee extends to

[15] *Plaintiff S157 / 2002 v Commonwealth of Australia* [2003] HCA 2; 211 CLR 476; 195 ALR 24; 77 ALJR 454.

[16] For example, we acknowledge that the need for expediency must be balanced against fairness in the age determination process for suspects who claim to be minors. Extensions of time may sometimes be necessary to enable the investigating authorities to obtain appropriate evidence of the suspect's age (e.g. birth certificates, affidavits from family members, school reports and medical reports from the suspect's home country).

[17] *Zamir v United Kingdom* (1983) 40 DR 42, EComm HR.

minors[18]. Article 37(d) of the UNCRC also states that 'Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance'.

Non-citizens suspected of people smuggling offences in Australia are not presently guaranteed legal advice or representation. Suspects are ineligible for Legal Aid until charges are laid and, unlike asylum seekers, they do not have access to providers under the Immigration advice and Application Assistance Scheme (IAAAS) as they are not visa holders. In the *Supriadin* case, the plaintiffs relied on pro-bono legal assistance.

The HRLC submits that it is inappropriate for individuals, particularly children, to be subject to such processes without access to prompt and free legal assistance.

Recommendation 4:

The Commonwealth must provide free Legal Aid to persons suspected of people smuggling offences who are being held in immigration detention pursuant to CJSCs.

3.4 Additional rights that pertain to children

Under international human rights law, Australia must only arrest, detain and imprison a child 'as a measure of last resort and for the shortest appropriate time.'[19] There are also strict limitations and conditions on the detention of minors, such as Article 37(c) of the UNCRC which requires the proper treatment of children deprived of liberty, including that children deprived of liberty should be separated from adults.[20]

The AHRC has stated that it is aware of 'a number of cases where individuals suspected of people smuggling offences were acknowledged to be children after they had spent long periods of time in detention, including in adult immigration detention facilities.'[21] The *Supriadin* case provides a further example of the Commonwealth detaining substantial numbers of children under CJSCs, or suspects claiming to be children for prolonged and indefinite periods of time.

As outlined in the annexed submission, the arbitrary and prolonged pre-charge detention of children suspected of people-smuggling offences, including detention with adults, has lead to very serious breaches of children's rights protected under the UNCRC. We refer to and repeat the HRLC's submission about compliance within the UNCRC as set out in that submission. In particular, we reiterate that 'the benefit of the doubt' principle must be applied to persons suspected of people smuggling who claim to be children, meaning that those persons must be presumed to be children unless proven otherwise and must be treated accordingly.

[18] *Bouamar v Belgium* (1988) 11 EHRR 1. See also *Woukam Moudefo v France* (1988) 13 EHRR 549.

[19] Article 37(b) of the UNCRC.

[20] UNICEF, *Protecting and realizing children's rights*, 2 June 2011. At http://www.unicef.org/crc/index_protecting.html (viewed 20 January 2012).

[21] Ibid.

Recommendation 5:

Where a person suspected of people smuggling claims to be a minor, he or she should not be held in an Immigration Detention Centre.