



Darwin Asylum Seeker Support and Advocacy Network

Submission to Senate Standing Committee on Legal and Constitutional Affairs inquiry into Australia's Agreement with Malaysia in relation to Asylum Seekers

The Darwin Asylum Seekers Support and Advocacy Network (DASSAN) is a group of concerned community members and organisations in Darwin who support and advocate on behalf of the women, children and single men who have been detained by the Australian government in Darwin since April 2010.

Members are from various backgrounds and skill-sets and focus on local and national lobbying and advocacy, support to people in detention through visiting and letter writing, as well as creative public awareness and education efforts.

DASSAN does not support Australia's Agreement with Malaysia in relation to Asylum Seekers ('Malaysia Agreement'). Set out below is a discussion of:

- DASSAN's concerns about the inconsistency of the Malaysia Agreement with Australia's international human rights obligations;
- DASSAN's concerns about the impact of the Malaysia Agreement on unaccompanied minors; and
- anecdotal material provided by one asylum seeker with whom DASSAN has worked which provides insights into the conditions of detention in Malaysia and the broader migration system in Malaysia.

Inconsistency of the Malaysia Agreement with Australia's international human rights obligations

DASSAN is concerned that the Australian Government's pursuit of offshore processing of asylum seekers and, in particular, the Malaysia Agreement are inconsistent with its obligations under the *Convention in relation to the Status of Refugees* ('*Refugee Convention*') and the *Convention on the Rights of the Child*.

DASSAN draws attention to the following provisions of the *Refugee Convention*:

- Article 31 – Refugees unlawfully in the country –

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the



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country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

- Article 32 – Expulsion –

The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

- Article 33 – Prohibition of Expulsion or Return ('refoulement')

No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Additionally, there are provisions in the *Refugee Convention* which grant rights to refugees in the territory of Contracting States, including the right to access the courts of law. There is no guarantee that these rights would be provided to refugees transferred to Malaysia.

DASSAN is concerned about the incompatibility of the proposed Malaysia Agreement and its objectives with Australia's obligations under the *Refugee Convention*.

In its recent decision in *M70 and 106 of 2011 v Minister for Immigration and Citizenship*, the High Court discussed the absence of any appropriate protections in the Malaysia Agreement for a person transferred under the agreement from refoulement to their country of origin. Under the *Migration Act* in its current



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form, the High Court found that the Minister for Immigration and Citizenship could not declare Malaysia to be an appropriate country for offshore processing, and stated as follows:¹

Where, as in the present case, it is agreed that Malaysia: first, does not recognise the status of refugees in its domestic law and does not undertake any activities related to the reception, registration, documentation and status determination of asylum seekers and refugees; second, is not party to the Refugees Convention or the Refugees Protocol; and, third, has made no legally binding arrangement with Australia obliging it to accord the protections required by those instruments; it was not open to the Minister to conclude that Malaysia provides the access or protections referred to in s 198A(3)(a)(i) to (iii) [of the *Migration Act*].

This High Court's decision clearly identifies that there is no legally binding obligations on Malaysia under the Malaysia Agreement to have regard to basic human rights of persons who are transferred to Malaysia. On this basis, DASSAN is firmly of the view that offshore processing of asylum seekers under the Malaysia Agreement should not be pursued.

In relation to the *Convention on the Rights of the Child*, DASSAN notes the following provision:

- Article 22

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason , as set forth in the present Convention.

In DASSAN's view there are serious questions to be asked about the consistency of the Malaysia Agreement with article 22 of the *Convention on the Rights of the Child*.

¹ *M70 and 106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011) [135] (Gummow, Hayne, Crennan and Bell JJ); see also [66]-[67] per French CJ.



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Impact of the Malaysia Agreement on unaccompanied minors

Clause 8 of the Malaysia Agreement provides that:

“Special procedures will be developed and agreed to by the Participants to deal with the special needs of vulnerable cases including unaccompanied minors.”

The written submissions by counsel for the plaintiff in case of *M70 and 106 of 2011 v Minister for Immigration and Citizenship*, outlined the concerns associated with transferring Plaintiff M106 to Malaysia. These concerns included:²

- Malaysian law does not require that a guardian must be appointed in favour of persons seeking asylum who are unaccompanied minors;
- There are no arrangements in place for the appointment of a guardian for Plaintiff 106 upon his arrival in Malaysia;
- Plaintiff M106 is liable to a legally sanctioned whipping of up to six strokes in Malaysia because, when he entered Malaysia as an asylum seeker on his way to Australia without an entry permit or pass, he committed a crime punishable in this way; and
- Plaintiff M106 claims that he has a well founded fear of persecution in Malaysia because of his religion as a Shi'a Muslim, and also claims that he fears he will be subjected to other harms and abuse in Malaysia.

The submission also identifies the conflict between the obligations and responsibilities of the Minister for Immigration and Citizenship under the *Immigration (Guardianship of Children) Act 1946* (Cth) as the guardian for unaccompanied minors who enter Australia, and the Minister's role under the *Migration Act* and in relation to the Malaysia Agreement.³

Ultimately, the High Court, in *M70 and 106 of 2011 v Minister for Immigration and Citizenship*, were not required to make findings in relation to the submissions that were made on this issue. Although, in their joint judgment, Gummow, Hayne, Crennan and Bell JJ did note that the Minister would be required to provide his consent to an unaccompanied minor being transferred to Malaysia under the Malaysia Agreement, and that reasons for this decision could be sought under the *Administrative Decisions Judicial Review Act 1977* (Cth).⁴

DASSAN has concerns about the conflict between the role of the Minister as guardian of unaccompanied minors and the proposal to transfer unaccompanied minors to Malaysia, where they will have no legal guardian. In DASSAN's view, unaccompanied minors who arrive in Australia should be provided with

² *M70 and 106 of 2011 v Minister for Immigration and Citizenship*, Plaintiff's Outline of Submissions (17 August 2011) [125].

³ See also Julie Taylor, 'Guardianship of Child Asylum Seekers' (2006) 34(1) *Federal Law Review* 185.

⁴ *M70 and 106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011) [137]-[147] (Gummow, Hayne, Crennan and Bell JJ); and [257] (Kiefel J).



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appropriate protection and guardianship. Australia has a responsibility to do this, both under the *Immigration (Guardianship of Children) Act 1946* as well as having regard to its international commitment to the *Convention on the Rights of the Child* (see discussion above). It is critical that the Government takes steps to fully discharge these responsibilities.

A refugee's experience in Malaysia

Unfortunately, the short timeframe since becoming aware that this inquiry was again accepting submissions has not allowed DASSAN to collect the stories from the asylum seekers with whom it has worked or is working who have had experiences in Malaysian detention centres. However, it has received an account from one refugee living in Darwin, who is referred to as R. The following is a summary of his experiences as provided to DASSAN:

- While in a Malaysian detention camp, R experienced raids by Malaysian authorities during which he was physically abused, with excessive punching and kicking, and was arrested.
- In some cases, refugees were handed by Malaysian authorities to people smugglers to illegally deport them into Thailand.
- This practice was not welcomed by the Thai authorities, and often resulted in exchange of fire along the border when such activity was noted. R stated:

“Sometimes, they were shot by both side of border security guards that resulted a few dead. One ... deportee was shot dead and another one was injuries in the end of Dec 2007. But it was not cleared shot by smuggler or border security.”

- Once in Thailand, many deportees were sold into slavery to various businesses such as fishing boats and plantations to work without pay. Some women were sold into the sex slave trade and others sold as house maids. Some deportees with money were able to pay the same smuggler who had taken them to Thailand to smuggle them back to Malaysia. But, this involved the risks associated with going back across the border.
- In relation to conditions in the detention camps in Malaysia, R reports that there was overcrowding, physical abuse by the authorities directed toward the refugees, sexual harassment and insufficient food and drinking water. These conditions lead to malnutrition, mental damage and some detainees contracting tuberculosis. R described the conditions as follows:

“Overall condition is dehumanized and systematic tortures against vulnerable migrants.”

Conclusion

Having regard to the issues identified above, in particular Australia's international human rights obligations, the need to protect unaccompanied minors and the concerns about the conditions of detention in Malaysia, DASSAN is opposed to the implementation of the Malaysia Agreement by the Australian Government.