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JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE HUMAN RIGHTS SUBCOMMITTEE

Reference: Human rights conditions in migration detention centres

THURSDAY, 5 APRIL 2001

CANBERRA

BY AUTHORITY OF THE PARLIAMENT

JOINT COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

Human Rights Subcommittee

Thursday, 5 April 2001

Members: Senator Ferguson *(Chair)*, Senators Bourne, Calvert, Chapman, Cook, Gibbs, Harradine, Hutchins, Sandy Macdonald, O'Brien, Payne and Schacht and Fran Bailey, Mr Baird, Mr Brereton, Mrs Crosio, Mr Laurie Ferguson, Mr Hawker, Mr Hollis, Mr Jull, Mrs De-Anne Kelly, Mr Lieberman, Dr Martin, Mrs Moylan, Mr Nugent, Mr O'Keefe, Mr Price, Mr Prosser, Mr Pyne, Mr Snowdon, Dr Southcott and Mr Andrew Thomson

Subcommittee members: Mr Nugent *(Chair)*, Mr Hollis *(Deputy Chair)*, Senators Bourne, Ferguson, Gibbs, Harradine Payne and Schacht and Mr Baird, Mr Brereton, Mrs Moylan, Mr Price and Mr Pyne

Senators and members in attendance: Senators Bourne, Gibbs, Harradine and Payne and Mr Baird, Mr Hollis, Mr Nugent and Mr Price

Terms of reference for the inquiry: Human rights conditions in migration detention centres

WITNESSES

Subcommittee met at 11.56 a.m.

GODFREY, Mr John Fitzsimons, Acting Principal Member, Refugee Review Tribunal

CHAIR—Welcome. As you know, we have been having a look at the whole area of detention centres. We actually do not have a formal reference—it started off as a bit of a look-see and has grown like Topsy. Clearly, the committee has a number of concerns about various aspects of what it has seen and heard. This is a private meeting; there will be a *Hansard* record purely as an aide-memoire, but it is not a formal inquiry. We will be tabling a report in the parliament and we hope to do that within the next couple of months or so.

There are a whole range of issues, but one that has particularly come before us has been the problem of processing times. We are trying to look at the various steps in the process and what the processing times might be in those steps that seem to aggregate in some cases to very long periods of time indeed. Frankly, whether people are illegal or not illegal, are good guys or bad guys, it would be fair to say that, in our view, the length of time is sometimes totally exorbitant, just as a basic treatment of human beings. You obviously have a fundamental slot in that process, so we thought it would be appropriate to ask you to come and talk to us about how you go about it and about some of the issues from your point of view. We have had a copy of your brief, which I hope all members of the committee will have read. I found it quite interesting because I had not realised just what a big empire you have.

Mr Godfrey—It is continuing to grow, unfortunately, Mr Chair.

CHAIR—Perhaps you would like to talk to us for a bit and then we will ask some questions.

Mr Godfrey—Thank you. The summary that I prepared is just that—it is only four pages. The brief from the secretary was to try to provide you with an overview of what we do, but with a particular look at what we do in terms of detention cases. The first point to make is that, traditionally, 90 to 95 per cent of our workload has been non-detention related. This is the first year we have gone over 10 per cent. In fact, as of 27 March, as a cut-off date when I was preparing this, we are now up to 15 per cent of the caseload for this year as detention cases.

Last year, when the boat caseload increased fairly dramatically at primary level, the flow-on rate to us was relatively low and primarily cases from Iraq and Afghanistan. As the caseload of primary cases seems to have diminished a little, it has increased to us because the mix coming in now includes cases from countries such as Iran that have a significantly lower set aside rate, or approval rate, both at primary and at tribunal levels. So we are seeing an increase in the number of cases coming to us. I should explain, though, that detention cases are given priority processing by the tribunal. Although it has got to the stage where, effectively, one case in three that we are giving to members at the moment is a detention case, we still have some capacity to increase that should more detention cases arrive. The consequences for the rest of our caseload, of course, are quite significant.

With regard to the processing, I tried to briefly set out in the paper the sorts of issues that a member has to consider to give the committee some idea of the amount of detail that a member has to look at in assessing any individual case. We are finding that, in the normal caseload, about a quarter of the cases we do are taking longer than we would consider a case should take.

There are two main reasons for that: firstly, because the case raises issues where the member has had to go overseas to attempt to get additional country information—by that I do not mean the member personally; I mean sending overseas for the information—or, secondly, because the issues being raised by the applicant's adviser are such that submissions continue to flow after the hearing has been held. So there will be additional exchanges of submissions from the adviser, comments back from the member and further submissions from the adviser. That is also happening with the detention caseload. As of last Monday, about one in three of our cases have gone past the 70 days. On average, we are still doing cases in 58 days but, by the same token, some of them are taking a considerable length of time. Perhaps I should stop there and give people an opportunity to ask questions, because I would be happy to expand on anything in the paper.

CHAIR—What, in an ideal world, could you do to speed up your processing?

Mr Godfrey—Not a lot without a lot of new members, to be very honest. We have had a difficulty in the last 12 months with the Administrative Review Tribunal's proposal that you may be aware of that was recently defeated in the Senate. That proposal had the impact on us that we were not able to recruit additional members to replace people who had left. We are now down to probably the lowest number of members we have had for three or four years. I have about 48 effective full-time members.

CHAIR—How many should you have?

Mr Godfrey—There is no set figure, but we would have expected to be able to recruit when we saw these sorts of problems starting to arise. There were advertisements in last weekend's press.

CHAIR—Yes, I noticed that.

Mr Godfrey—I had hoped that we would increase the numbers by about 20 per cent to be able to deal with that. In an ideal world, firstly, we would like more members. With regard to the processing, it is hard to speak authoritatively about all 708 cases, but there are a number of instances where we have had difficulties caused because of changes of adviser. As you would probably know from speaking to the department, they provide legal representation for the asylum seeker. What we are now seeing quite often is that people are changing advisers and hiring their own advisers. Obviously it is their entitlement to do that, but that can mean that the new adviser will want to completely familiarise themselves with the case.

We have had instances where that has occurred and then there has been a dispute been the applicant and the adviser, and a third adviser has come on board. All of that eats into the time. That is something we cannot legislate against. It is going to happen, and it is the applicant's right to do that.

In terms of other processing difficulties, getting information from overseas, particularly if we have to go to third countries, can sometimes be quite an issue for us. There is not the same degree of urgency felt necessary in the third country in responding to the requests for information that we might have.

CHAIR—Do you go through our post in that country?

Mr Godfrey—Not always. Quite often—in fact, in the majority of cases—we would go to independent experts if we can. But if we have to go through the posts we have to go through the Department of Foreign Affairs and Trade, and that means the Department of Foreign Affairs and Trade would then ask the host government for the information.

CHAIR—Is it all done by mail when you go overseas?

Mr Godfrey—No, it is all done electronically.

CHAIR—So that speeds it up a bit.

Mr Godfrey—It is done electronically when we do it ourselves. We would have to go through the Department of Foreign Affairs and Trade in Canberra if we had requests. Some of those requests can take some time, but that is primarily because of a lack of response from the host government. If want to find out from the Canadians whether somebody has actually applied for refugee status in that country or the reasons why they did not or whether they have effective protection in Canada—and the Canadians are usually reasonably prompt—it can still take us some considerable time to get that information back from the Canadians.

CHAIR—Do you have a profile of countries that are generally good and those that are recalcitrant?

Mr Godfrey—In terms of responses?

CHAIR—Yes.

Mr Godfrey—No, not really. It is just the fact that you are dealing with countries which themselves have a very heavy onshore asylum rate of applications. If we are asking the Belgians to go and look at their records, they may not necessarily give it a high priority. I would not want to overstate it; it is an issue for us in a percentage of cases. Of the cases that are outstanding at the moment over the 70-day period as of last Monday, we had 54 cases that were over 70 days. Of those, 24 were attributable to difficulties with getting information through advisers. Thirty dealt with the need to get additional country research done—that would include going to third country governments.

Mr BAIRD—What did you say was the total number that you were processing over this year?

Mr Godfrey—The total number of detention applications we have received so far this financial year is 708.

Mr BAIRD—How many of those exceeded 70 days?

Mr Godfrey—I have only got the number as of last Monday, I have to tell you.

Mr BAIRD—Just give it to us approximately.

Mr Godfrey—We have 213 cases on hand, with 55 cases over the 70 days—that is, of the cases on hand. The average processing time, even building that in, is still 58 days.

Mr BAIRD—What does that go out to?

Mr PRICE—Working days or days?

Mr Godfrey—Calendar days.

Mr BAIRD—How long does that go out to?

Mr Godfrey—What is the worst? Well, the worst on hand at the tribunal at the moment is about 220 days. That is a case that involves an issue about the identity of the person.

Mr BAIRD—In speeding up the processes, you talked about getting more resources, which is one thing. There is no ability to stop this handing over of cases, is there?

Mr Godfrey—No, there is not.

Mr BAIRD—Is it people leaving? Why do they swap around? Are they going to the Ombudsman?

Mr Godfrey—I am hesitant to put too much weight on one particular case to try to explain it, but there is one I will look at, which was a matter that you may have raised in another forum quite recently. There was a case of a lady who had come to Australia in December 1999. She received a rejection from the department in November 2000 and applied to us in December 2000.

At that stage, she had an adviser who was not an adviser provided by the department—in other words, a second adviser. She had a hearing. At the hearing the tribunal member noted the fact that the legislation had changed in early December 1999 and, as a consequence of that change of legislation, the member was going to have to take into account whether that person had had effective protection in a third country beforehand. That issue was put to the applicant at the hearing, and the adviser was present. The adviser had been unaware of the change in legislation and had not made any submission about this. The member adjourned the hearing and gave the adviser an opportunity to respond to the issues being raised about the effective protection. After a month the member had received no information, got in touch again and was told that, yes, something would be coming. Two weeks later the member got in touch again, to be told that there was a commercial dispute between the applicant and the adviser. The member then got in touch with the applicant and said, 'This is still an issue. I need to get your authority to go to a third country to get the information.' The member got that authority to go to the third country, got the information back after about six weeks and went to the applicant again and said, 'I have this adverse information.' The applicant said, 'I now have a new adviser, and the new adviser has put in a FOI request.' Further submissions were received last week, and the member is expecting to be able to arrive at a decision before Easter.

As I say, I do not want to generalise too much but that is an example of the sorts of things that can happen. In one sense you could say that the member quite rightly and appropriately pointed out the part of the case that was going to cause the applicant some difficulty if it was not addressed by the adviser. The member had actually raised this and identified this issue for them to follow up. I do not think we would want to see a case where the member did not do that.

Mr PRICE—Hear! Hear!

Mr Godfrey—I am not sure that that is a good case in identifying shortcomings, but it is a good case to identify the sorts of complexities that can come into the caseload—and that was for somebody who had been in detention for 16 or 17 months and, of that time, about four months with us.

Mr BAIRD—How do you feel the offshore advice could be speeded up—or perhaps it cannot?

Mr Godfrey—It is difficult. I would have thought one way to do it might have been to have either us or the department of immigration as a repository for this information, to have someone with a thorough knowledge of what effective protection was available to asylum seekers in 120 or 130 countries around the world. The difficulty with that, however, is that this is a continually changing environment. There was a court case only 10 or 12 days ago where a judge has handed down a decision in which he has very tightly defined—or redefined, if you like—what 'effective protection' means and what the tribunal has to take into account when looking at the issue of whether somebody has effective protection in a third country. Even if I had had all those 130 case studies in case, I would be going offshore now to actually try to get that additional information to deal with what the court has now redefined for us.

The other issue causing people to be in detention for quite long periods—and this is not in any way suggesting it should not happen—is that if people get a negative decision from us then they do have a right of appeal to the Federal Court. More than 50 per cent of the people who get a negative decision from us who are in detention go on to appeal. At the moment, out of those 213-odd cases there are four cases where we have had the case back for the second or, indeed, in one case, for the third time, because there has been an error of law in the first decision. It is not because the court does not look at the merits of the case; it is just the legality. It comes back to a member who has to start again and do the case again. That is certainly an issue in terms of length of time. The applicant there, I am sure, would prefer not to be in detention but would prefer to have that case looked at according to law.

Mr PRICE—Firstly, you seem to have a very high set-aside rate. In other words, the tribunal is overturning the department's decision. That is not a criticism—

Mr Godfrey—With some countries, yes.

Mr PRICE—Would it be an advantage to the tribunal if there were an internal review mechanism within the department that was more rigorous with that original decision maker? Would that provide scope to provide you with better information when it comes across to the tribunal?

Mr Godfrey—It is an issue in the sense that one of the functions of review should always be to highlight the areas where, if there is an error in the original decision making, it should be highlighting that. I think it is fair to say that we are seeing many fewer cases from Iraq now than we were a year ago. That is because we were overturning a large number—almost 95 per cent—of the departmental decisions on Iraq. They were then looking at the information that we had had available to our decision makers which they may not necessarily have had available to their own. That certainly does happen.

The other point that I should make—and it also goes to the delay question—is that very often when applicants come to a hearing, although they have been through an arrival interview, and although they have been through a departmental interview, and although they have provided detailed claims and submissions about what has happened to them and what they fear might happen to them, they quite often raise matters which have not been raised at an earlier stage. In the detention case load there have been those various steps. In the overall case load, where the department is not obliged to interview everybody, it is more of an issue for us, but in the detention case load it is still an issue. Again, I do not think you can legislate for that either. I think that is something that is going to happen and somebody is going to come along and—

Mr PRICE—I am passionate about external review, which is the function that you have, but it seems to me that there is a problem in terms of consistency of decision making and, as you point out, legality of decision making. If we can strengthen the decisions in the first instance from the department without removing people's right to external review it seems to me that that would be a positive thing.

Mr Godfrey—Definitely.

Mr PRICE—For myself, I would like to see all decisions internally reviewed. That may be impractical but maybe we should give them a right to a second departmental review if they wanted it. Are you comfortable with that? I am trying to get an indication of where the applicant might be most advantaged, from your perspective—or is that entrapment?

Mr Godfrey—No, I do not think it is. I am just conscious of the fact that in our sister tribunal, if you like, in the Migration Review Tribunal, they have just done away with internal review in that area. I am not sure that it would necessarily advance the situation. If you were going to put 20 or 30 review officers in to do that it might be better to give us 20 new members, to be frank.

Mr BAIRD—Our focus is on the human rights aspect of it. One of the things that concerns us as a committee is the despair that comes to those people who wait in a situation of limbo. Is there something you believe we should be addressing our minds to to assist in this whole process?

Mr Godfrey—I would say that the length of time that people have waited before getting into the process is probably the area that could be best addressed—speaking as someone at this end of the process, if you like. For example, there is that particular case I mentioned where it took 11 months before the person got a negative primary decision. I am well aware that when you get sudden influxes you will get delays, but it is unusual these days to have something that is quite

that long. I know that a lot of resources have been devoted to putting in processing at an earlier stage than perhaps was done a year or so ago. I think it is fair to say that with the more recent cases some of those concerns I think you are expressing are being overcome, but only some of them.

The other advantage, I suppose, in terms of quick decision making is that the less time there is between the various stages of the decision making the more likelihood there is of getting a very quick decision from us. But if we have to go off, because somebody has been here for 12, 14, 15 months, and look again at the situation in the country of origin and at all the new information, we are just adding layers onto the time. Anything that could be done to shorten the processes would be fine. I understand that at the primary stage they are looking at about a 12-week turnaround and we are looking at about a 10-week turnaround. Those sorts of issues and iniatives should be encouraged because it makes our job far easier if we are dealing with current recent advice.

Mr PRICE—You have to make your decisions on very strict legal grounds—that is, you and your fellow tribunal members—and you have no discretion about that whatsoever, as I understand it. Have you come across cases where, in having exercised those responsibilities, at the end of the day you felt that if you had the discretion you would say through compassion or humanitarian reasons that we should make an exception of this case, and would you welcome such a power?

Mr Godfrey—At the moment what happens—and what I have done personally and what I know other members of the tribunal have done—is that I would include references to the humanitarian concerns in the decision that I was writing. We have a procedure in the tribunal whereby those cases are specifically drawn to the attention of the department. So even though we are affirming a case, if there are in the view of the member concerned humanitarian issues, then there is a mechanism there that we can put in so that it gets fast-tracked through for any consideration that might be being made under section 417 by the minister. We cannot recommend or cannot make any judgment on that issue but we can flag, and we do flag, those issues.

CHAIR—If the department get that sort of flagging from you, they understand they are being given a message?

Mr Godfrey—Yes.

Mr PRICE—You have explained the current situation. Would you prefer a greater discretion—for instance, to be able to recommend that the minister consider exercising his discretion rather than having the present informality or, indeed, that if the legislation were changed, to be able to say, 'This is an exceptional case?'

Mr Godfrey—I am aware of the recent inquiry that was conducted into the way in which the whole refugee system works and that this was an issue that the Senate made recommendations on. If you are asking me about my personal view of this as someone who, 15-odd years ago, used to sit on what used to be known as the old Dawes committee when I was with the Department of Foreign Affairs and Trade, we did have that power in those days—under the old

6A(1)(e), I think—to be able to make those decisions. Of course, that power was removed in about 1989. I certainly think there needs to be a safety valve of the sort that you are discussing. From our perspective, section 417 seems to be working at the moment. I am quite happy with the fact that we make those recommendations and that we do eventually get feedback about whether those cases we have flagged have actually been successful. I can certainly say that in the most recent case that I would have done that actually happened.

CHAIR—Thank you very much for coming, Mr Godfrey. Your contribution has been very helpful. I think we have learnt a lot and that has been very valuable.

Mr Godfrey—Thank you. If there is anything else that the tribunal can do, please get in touch.

CHAIR—Thank you very much.

Subcommittee adjourned at 12.27 p.m.