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SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE ON THE MIGRATION LITIGATION REFORM BILL (23005)

March 2005

Introduction

The Refugee Council of Australia (RCOA) welcomes the opportunity to provide input into the inquiry being conducted by the Senate Legal and Constitutional Legislation Committee into certain provisions of Migration Litigation Reform Bill (2005). In so doing the Council notes the Government's stated intention to curb the number of migration cases proceeding to judicial review, targeting in particular unmeritorious cases.

The Refugee Council of Australia is the peak non-governmental agency in Australia concerned with issues relating to refugees and asylum seekers and represents over 90 organisational members and a similar number of individual members. The Council works to promote humane, flexible and legally defensible policy towards refugees, asylum seekers and displaced peoples by the Australian Government and the Australian community.

It thus follows that the Council's particular interest in the current inquiry relates specifically to the impact it will have on those seeking to obtain refugee status or some other form of protection.

The Refugee Council is aware that the Refugee and Immigration legal Centre (RILC), a body with which we are closely associated, is making a detailed submissions to the current inquiry which addresses each of the terms of reference in depth. RCOA defers to their expertise on such matters and therefore will confine itself in this instance to stressing some important underlying issues that it hopes the Committee will be mindful of in their deliberations.

Australia's Obligations under International Law

The cornerstone of refugee protection is the **Principle of *Non-refoulement*** or not returning a person to a country where he or she faces persecution.[1] This is an obligation accepted by signatories to the 1951 Convention relating to the Status of Refugees (the Refugee Convention), as is Australia, and imposed on all States under International Customary Law.

It must also be recognised that signatories to the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (the Torture Convention), such as Australia, are also bound (by Article 3) not to return (*refouler)* or extradite a person to another State where

[1] Contained in Article 33 of the 1951 Convention relating to the Status of Refugees.

there are substantial grounds for believing that the person would be in danger of being subjected to torture.

It therefore follows that any decision to limit judicial review of migration decisions must in no way prevent a person from obtaining a thorough examination of all matters pertinent to his or her claim from protection, thus preventing any breach of Australia's obligations under the Refugee or Torture Conventions. The Council is deeply concerned that a number of the proposed provisions in the Bill are clearly designed to seriously restrict or in certain circumstances, such as with non-extendable time limits for judicial review, completely bar someone from seeking judicial review.

Some might argue that the administrative refugee status determination procedures currently employed in Australia provide such protection. In reply, RCOA argues:

- while it is true that only a minority of matters are remitted by courts to the Refugee Review Tribunal, each one that is, is significant in its own right and such remittal could not only prevent Australia from breaching its Convention obligations, it could well save the life of the person concerned;

- refugee law is complex and constantly evolving. The courts have, over time, played an essential role in developing the jurisprudence that guides decision-making;

- the current administrative refugee status determination procedures in Australia are legislatively limited to considering only whether a person is a refugee under the terms of the Refugee Convention. It is not possible for decision-makers to give consideration to whether a person has legitimate fears of torture or other substantial human rights abuse if returned. While the courts are similarly constrained as a result of the absence of incorporation of other human rights treaties into domestic legislation, it must be recognised that some of those who are seeking redress through the courts have meritorious claims for protection and are people to whom Australia has non-derogable obligations.

It is also important to be mindful of the fact Australia has other non-derogable obligations under international law that are not reflected in administrative determination procedures. As a signatory to the Convention on the Reduction of Statelessness, Australia is bound, under Article 1, to grant its nationality to a person born in its territory who would otherwise be stateless. It is further bound by the 1954 Convention Relating to the Status of Stateless Persons (Article 16), to ensure that:

> *A stateless person shall have free access to the Courts of Law on the territory of all contracting states.*
>
> *A stateless person shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from* judictum solvi*.*
>
> *A stateless person shall be accorded in the matters referred to in paragraph 2 in the countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.*

As is the case with people fearing return to torture, stateless people fearing expulsion turn to the courts in an effort to secure the protection they need and this will continue until such time as the administrative determination procedures are amended to enable decision makers to consider the full spectrum of Australia's protection obligations to non-citizens. [2]

Limiting Vexatious Claims

[2] For a more expansive discussion on this issue, see a paper entitled "The Complementary Protection Model" on RCOA's website: www.refugeecouncil.org.au.

RCOA concedes the legitimacy of the Government's desire to limit unmeritorious migration matters going before the courts. In this regard, however, it believes that there are certain issues specific to asylum seekers that the Committee should be mindful of when considering how to achieve this objective:

- Many asylum seekers (and more often than not those with meritorious claims) have limited financial resources. Since access to welfare benefits were substantially reduced and work rights limited, more and more are without any form of income. They are thus unable to pay for application advice.

- The amount of free application advice available to applicants has been substantially reduced over the years, first with the introduction of the migration agent registration scheme, then the significant curtailment of Legal Aid access from July 1998 when federal funding was cut and most recently with the ongoing funding shortfalls faced by community based advisers. Many asylum seekers with strong claims and few skills to represent themselves unaided (eg someone with no English and who is unfamiliar with bureaucratic processes eg a Somali woman) are not able to get access to competent advice. Reliable estimates are that approximately only one in five applicants who require full representation but cannot afford to pay for it, are able to access such assistance *pro bono*. This has meant that cases are not necessarily examined as carefully as they should be at the administrative determination stages because the applicant is unprepared for the complexities of the determination process.

- Access to competent advice about whether or not an applicant has grounds to seek judicial review is even more scarce. The DIMIA-funded IAAAS providers receive no funding to provide this advice. In the past the Legal Aid Commissions could provide assistance but this too was cut substantially in July 1998.

- Despite reforms to both the primary and review stages of refugee determination, serious concerns remain about the quality of decision making, in particular in cases where applicants are unrepresented.

As a result of the above, some refugees and asylum seekers:

- present ill-prepared applications that do not allow a proper examination of the claims - thus flow on to appeal;

- fall victim to unscrupulous lawyers and migration agents who promise the world, abuse the determination system and fail to represent the interests of their clients;

- receive decisions that they strongly believe do not give appropriate weight or an accurate and balanced analysis in relation to the issues they raised and to their fears of returning and thus are genuinely aggrieved and thus desirous of challenging these decisions;

- submit applications to the courts without having had the benefit of competent and impartial legal advice as to whether the application has merit and without any legal support.

The Refugee Council has long argued that if there is increased access to free, competent and impartial legal advice on a means and merits tested basis to asylum seekers at both the administrative and judicial review stages, the number of unmeritorious applications for judicial review from asylum seekers would be significantly reduced.

Conclusion

While reiterating our acknowledgement that the issues raised are somewhat tangential to the terms of reference, the Council hopes that they will provide useful background material to the Committee Members in their deliberation.

In closing, we submit a quote from Chief Justice James Spigelman's 1998 Ethnic Affairs Oration:

The right to participate in legal decisions, on the basis of equality before the law, must be real right, not merely a theoretical one. That requires that all people have access to legal advice and to the courts and tribunals that make decisions.