SUBMISSION

Inquiry Into the Administration and Operation of the Migration Act 1958

Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Australia

by

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Committee Secretary

Senate Legal and Constitutional Committee

Department of the Senate

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Dear Senate Legal and Constitutional Committee and Secretary,

Thankyou for the extension of time, providing me with an opportunity to make a submission to this inquiry.

Due to the volume of documents in my possession relating to this submission I offer to make further information available to the committee at their request.

I am an Australian citizen who holds deep concerns about the probity of conduct of the Australian Government and it's departments in relation to the general administration and operation of the Migration Act 1958 (Cth).

My submission is primarily focused on the events and circumstances of the 53 Vietnamese Nationals, in particular Mr Van Tol Tran, who arrived seeking asylum in Australia at Port Headland on 1 July 2003, aboard the vessel *Hao Kiet*[1].

I submit that charges made against Mr Van Tol Tran of the offence, commonly referred to as 'people smuggling', provided for under section 232A of the Migration Act 1958;

- Undermines the integrity of the Australian Legislature
- Is a malicious prosecution
- Renders Australia in breach of Article 31 of the Convention relating to the Status of Refugees

[1] Immigration designation *Emira*; Defence description SIEV 13

I believe that Australia's treatment of the *Hao Kiet* Refugees may have involved a serious breach of the doctrine of the 'separation of powers' that is embodied in the Australian Constitution.

The Hoa Kiet
The boat was wooden and considered in good repair and clean by Navy officers. It was approximately 20 metres in length 3 metres breadth, freeboard of 80cms and a draught of approximately 1.8m.

Background MR Tol Van Tran
Mr Tran was a fisherman, formerly of southern Vietnam who owned and skippered the *Hoa Kiet* when it arrived in Port Headland on 1 July 2003.

The boat was at times 200 meters offshore and well inside the Australian Migration zone.[2].

Mr Tran was with 52 other asylum seekers, including his wife, and two teenage children plus Mr Hao Van Nguyen who is an Australian citizen.

Boarding and Detention
At about 1900 hours on 1 July the *Hoa Kiet* located 3 nautical miles east of Port Headland, was boarded by Australian Department of Defence Naval Officers and Mr Hoa Van Nguyen was formally served with a Migration Act vessel detention notice which was part of Operation Relex orders.

At approximately 2300 a transmission was received by the boarding officers stating that Hoa Nguyen remaining on the boat was illegal detention and that he had to be handed over to the federal police.

Christmas Island Detention
All asylum seekers were transferred to the HMAS Canberra and transported to the Christmas Island detention facility on the 5 July 2003.

Given that there was an adequate operational facility at Port Headland at the time there appears to have been an decision on the remote location of detention for this group for political rather than practical purposes.

Improper public comments by Politicians
Immigration Minister Ruddock said in his press release dated 2 July 2005,'I see this as more as an opportunistic attempt."[3]

Given that there was no interpreter other than Mr Hoa Nguyen who speaks very little English, available to enable communication between boarding officers and Hao Kiet, passengers the Minister could not have reasonably

[2] Personal comm. Sister Mary Keeley about her observations of the boat from the Port Headland Detention facility.
[3]

http://parlinfoweb.aph.gov.au/piweb/Repository1/Media/pressrel/AHU960.pdf

been able to assess the circumstances or veracity of asylum claims of the passengers.

Blanket Rejection by DIMIA
DIMIA gave a blanket reject at the first stage of processing asylum applications for the *Hao Kiet* refugees

Charges and Conviction s232A Migration Act
Mr Nguyen was charged with people smuggling in a complaint sworn on the 3 July 2003.

On the 25th August 2003 charges were bought against Mr Tran and his relative, Mr Lai and they were transferred from Christmas Island to Hakea prison in Western Australia as a remand prisoner.

Mr Lai was separated from his young son and Mr Tran from his wife and children.

On the 17 March 2004, Tol Van Tran was convicted of one count of 'facilitating' the bringing to Australia of a group of persons pursuant to Section 232A of the Migration Act 1958 ('the Act'). Mr Tran was subsequently sentenced to the minimum mandatory term of 5 years imprisonment, eligible for parole after 3 years, pursuant to section 233C(2) and (3) of the Act.

Sentencing comments by Judge

> *"This group are now caught in the mandatory sentencing regime put in place to protect Australia from organised gangs involved in people smuggling for base motives of greed. I raise these matters because of my belief that this case may be one where the Commonwealth Executive will need to intervene, relying on the prerogative of mercy, to alleviate the harshness of the mandatory sentencing regime that I am required to apply"*
>
> *"I would have considered imposing a sentence of three years with the possibility of a suspended sentence because of the time already spent in custody. I now have to sentence you to five years with a minimum of three years. (It may be) the mandatory sentence is too severe in all the circumstances in this case."*

Crown Prosecutor at original Trial: Mr Hilton Dembo[4]

> *"The venture was not for profit ie contrary to the spirit of the second reading speech which indicated that the section was enacted inter alia to stop those involved in people smuggling for profit"*

[4] AACP Annual Conference July 2004, '*Surviving the difficult Prosecution - " A People Smuggling Trail" The Queen v Nguyen, Tran and another Perth District Court 2004*

After serving part of that sentence at Acacia prison in Western Australia, Mr Tran's conviction was quashed on appeal in the Perth Supreme Court of Appeals on the 22 March 2005 and a retrial ordered for October 2005 in the Perth District Court.

Mr Tran had a successful bail hearing on the 17 June 2005 and was released into the detention supervision of the Immigration Department on the 18 June 2005 and reunited with his family.

Tol Van Tran: Refugee Review Tribunal
Mr Tran's application was subject to a favourable decision at the Refugee Review Tribunal in June 2005 and was considered a person to whom Australia has protection obligations under the Refugees Convention.

Mr Tran and his family have been released from detention on Temporary Protection Visas along with all of t

Section 232A Migration Act

Background to the creation of the offence at law

The passing in1999 of the Migration Legislation Bill (No.1) created the penalty for the offence, commonly known as 'people smuggling', provided for in s 232A of the Migration Act.

Intent and purpose of the Legislature
I refer to 'Annexure 1' of this submission where the Australian Legislative intent to target 'profiteers' and purpose of ensuring Australia's compliance with obligations as a signatory, under the 1951 Refugee Convention, were established.

- Mr Slipper said on the 30 June 1999[5], in the 2nd reading speech of the abovementioned Bill;

  "I want to stress that Refugees are not at risk from these provisions. This is because the refugees Convention to which Australia is a party, provides that refugees are not to be subjected to penalties on account of their illegal entry of presence in the country of first refuge."

  " I want to make it clear that this legislation is primarily aimed at the profiteers from people trafficking who organise individuals or groups to enter Australia illegally or for a fee"

- Mr Sciacca also said;

[5] (see Hansard at 7992 – 7994)
http://www.aph.gov.au/hansard/reps/dailys/dr300699.pdf

"The opposition will monitor these provisions to ensure that genuine Refugees, escaping their country of origin, often illegally, and in fear of their lives, will not be prosecuted for doing so under these new penalties. We have made it clear that we will not tolerate any breaches to any of the international conventions on refugees."

Convention Relating to the Status of Refugees

I submit 'Annexure 2'[6] in regard to Australia's obligations under Article 31 and issues in relation to the criminalisation of Refugees as a direct result s 232A of the Migration Act.

Smuggling Protocol – Australian National Interest Analysis[7]

Item 28 of the Australian National Interest Implementation Analysis recommended the adoption of the principles of the protocols into the Migration Act. If this recommendation were in place, the profit element of the offence would not allow a conviction for a non-profit making journey for asylum seekers to Australia.

To date the recommendations have not been implemented as recommended.

International Convention and People Smuggling Protocol

Article 12 of the International People Smuggling Protocol (which Australia is a signatory) provides a defined meaning of people smuggling.

> The Protocol requires States Parties to criminalise certain forms of conduct that is transnational in nature when committed intentionally and in order to obtain a financial or other material benefit:

It is clear Tol Tran's conduct does not satisfy the protocols requirements for criminalisation nor does the current wording of the offence provided for in 2232A of the Migration Act.

Other Similar Cases

There are a number of other cases[8] I am aware of, where Refugee men who arrived on boats seeking asylum and were convicted of people smuggling for fixing motors at sea (rather than perishing) and were deemed to be refugees by Australia.

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[6] RILC submission concerning Article 31 of the Refugee Convention –"Non-Penalisation, Detention and Protection."

[7] http://www.austlii.edu.au/au/other/dfat/nia/2003/35.html

[8] "SRBBBB" and Minister for Immigration and Multicultural and Indig enous Affairs [2003] AATA 1066 (24 October 2003)

Note: Item 53; is wrong in that the offence provided for in s 232A of the Migration Act has not been 'replaced' ;

SRCCCC and Minister for Immigration and Multicultural and Indigenous Affairs [2004] AATA 315 (26 March 2004)

As part of refusing the granting of visa's to these Refugees, DIMIA put up the people smuggling convictions as 'character barriers' as an obstacle for the men being issued with visas.

Appeals to the AAT (Administrative Appeals Tribunal) by the refugee men were successful and DIMIA's decisions overturned.

DPP threshold for prosecution of charges[9]

- there must be sufficient evidence to prosecute the case (which requires not just that there be a prima facie case but that there also be reasonable prospects of conviction); and
- it must be clear from the facts of the case, and all the surrounding circumstances, that prosecution would be in the public interest.

It could not be reasonably argued that continuance of these charges against refugees is in the public interest given the apparent conflict with the intent and purpose of the Legislature at the time of making the offence.

[9] http://www.cdpp.gov.au/Prosecutions/Policy/

Kaye Bernard Submission recommendations:

1) Section 232 A of the Migration Act be amended to;

   - To facilitate the recommendations of the National Interest Analysis **tabled on 3 December 2003**
   - to improve and reflect the intent and purpose of the Australian Legislature;
   - avoid breaching Article 31 of the Convention Relating the Status of Refugees and ensure;

-Prosecutions should not take place until a final negative decision on an asylum application has been reached,

"good reason for illegal entry" should focus more broadly on the reason for flight,

"As soon as reasonably practicable" should be interpreted in a flexible manner and should take into account factors that relate to the special circumstances of asylum seekers,

"Coming directly" should include persons who transit an intermediate country for a short time, without having received or applied for asylum.

Prosecutions should be conducted only "where the offence itself appears manifestly unrelated to a genuine quest for asylum".

2) The Legal and constitutional committee recommend to the Government that a Royal Commission be conducted into the probity of conduct of the Government and departments.

3) The policy of mandatory detention be abolished under statute and an orderly process of processing asylum claims whereby those applicants who pass health and security checks in a reasonable period are permitted to live in the community pending the outcome of their applications.