



THE ASYLUM SEEKER RESOURCE CENTRE

A CASE FOR JUSTICE

Position Paper on the Legal Process of Seeking Asylum in Australia



Everyone has the right to seek and to enjoy in other countries asylum from persecution.

Universal Declaration of Human Rights, 1948



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EXECUTIVE SUMMARY

The purpose of this paper is to advocate, educate and work constructively towards better practices and processes in the refugee determination system. The numerous case examples are based on the real-life experiences of clients of the Asylum Seeker Resource Centre (ASRC) Legal Program, and reflect the experiences of many asylum seekers.

The paper is structured chronologically; the reader is therefore taken through every step of the decision-making process as experienced by an asylum seeker pursuing his or her claim, from the primary stage to possible 'removal'.

A recurring theme throughout this paper is the need for education and training of decision-makers at the Department of Immigration and Citizenship ('DIAC') and the Refugee Review Tribunal ('RRT'). This will ensure good and consistent decisions that take into account the impact of the refugee experience on individuals, as well as the role and responsibility that decision-makers and government have in upholding and developing the rights of asylum seekers seeking Australia's protection.

The Rudd Government, and more specifically the Minister for Immigration and Citizenship Chris Evans, have shown their willingness to establish a fairer system, with the abolition of the TPV regime in 2008. More recently, changes to the 45-day rule have been proposed. This is welcome news for the asylum seeker sector, which has been campaigning on these issues for twelve years. It is disappointing however that while the policies are slowly improving, the process of applying for protection is still one that is arbitrary and dependant upon the inclinations of DIAC case officers and RRT members, some of whom do not have the requisite skills or knowledge-base to guide their decision-making.

It is hoped that this paper contributes to a more humane system for those seeking asylum on our shores.

DEPARTMENT OF IMMIGRATION AND CITIZENSHIP

Assessing asylum claims is without question a difficult task. It requires DIAC officers to assess both individuals as well as the political, social, economic and cultural information about a country of origin.

Lack of legal training of DIAC officers, inadequate timeframes and poor decision-making combine to produce an inconsistent and unjust legal system.

This inconsistent treatment of asylum seekers' claims starts at the primary stage. The right to an interview is not guaranteed, despite the fact that without an interview it is impossible for an asylum seeker to give their account in detail or address any concerns that may arise for DIAC. Asylum seekers are at times refused without an interview and adverse credibility findings are made 'on the papers'.

Another issue at the primary stage is that of statutory time limits. The ASRC welcomes the Government's proposal to remove the '45-day rule', which required asylum seekers to lodge a protection visa application within 45 days of arrival in order to be granted work rights and access to Medicare.

A statutory time limit remains, however, which applies to decision-makers. The 90-day rule requires decision-makers at DIAC to make a decision on a Protection Visa application within 90 days from the date of lodgement. While prompt decision-making is a desirable outcome, it can have an adverse effect in that it creates unnecessary pressure on DIAC officers to make a decision, often without interviewing an asylum seeker, which fails a model of best practice.

One of the most contentious issues in the refugee process is that of adverse credibility findings leading to refusal of applications. Asylum seekers have been found to 'lack' credibility and not be believed for (amongst other factors) not being able to remember dates or for remembering information that they had not included in a written statement.

In making such findings DIAC often disregards medical evidence about an asylum seeker's psychological condition.

Other issues of concern at the DIAC stage include:

- The disregard of expert reports;
- An inconsistent approach to asylum seekers with gender-based claims;
- An inconsistent approach to asylum seekers with sexuality-based claims.

REFUGEE REVIEW TRIBUNAL

The RRT has a specialist role in dealing with the assessment of asylum claims. Section 420 of the *Migration Act 1958* requires the RRT to carry out its functions of review in a way that is fair, just, economical, informal and quick. It is not bound by technicalities, legal forms or rules of evidence and must act according to substantial justice and the merits of the case.

Some notable concerns about DIAC are relevant when discussing the RRT. There is inconsistency in decision-making at the RRT, leading to a loss of confidence in the integrity of the process. Not all RRT Members are legally qualified, skilled in inquisitorial processes or immune from political influence.

As a result asylum seekers' experiences before the RRT vary widely.

COURTS AND JUDICIAL REVIEW

Judicial review of asylum seekers' cases is limited to whether the RRT made an error of law not an error of fact. The current process does not permit judicial review of a case on its facts. This means that a Court will not re-hear the evidence and arrive at its own decision about whether a person is a refugee or not.

As most decisions of the RRT turn on issues of fact and credibility, asylum seekers face a real challenge in demonstrating that the RRT's fact-finding process amounted to an error of law.

MINISTERIAL STAGE

When an asylum seeker has been rejected by DIAC and the RRT, he or she has the option of making a request to the Minister for Immigration and Citizenship seeking ministerial intervention under s.417 of the Migration Act. The 's.417 process' has highlighted the enduring inequities of the current refugee determination system and the ongoing cost to asylum seekers and the community.

Many asylum seekers reach the s.417 process not having had a fair hearing or having had questionable decisions made in their case. However these are often the cases where ministerial intervention is least likely, given the assumption that is made that these asylum seekers have exhausted their legal appeals and have been found not to be 'genuine' refugees.

The process is also inefficient – asylum seekers are required to pursue unmeritorious refugee claims

through the review system in order to make a request for ministerial intervention. This means that relevant humanitarian issues are raised at the end of the process, rather than at the beginning.

COMPLEMENTARY PROTECTION

The time for a system of complementary protection in Australia is long overdue.

The Australian Government is presently considering the introduction of such a system. Under such a system, DIAC will assess an asylum seeker's claims under the 1951 *Refugee Convention* and if refugee criteria are not met, go on to assess particular protection needs arising under other relevant human rights treaties such as the *Convention Against Torture* and *International Covenant on Civil and Political Rights*.

While such a reform would be welcome, the dangers regarding the quality and consistency of decision-making remain.

SECTION 48B

Once an application for a Protection Visa has been refused, an asylum seeker is barred by s.48A of the Migration Act from making a new application. Only ministerial intervention pursuant to s.48B of the Migration Act can permit an asylum seeker to make a new application.

The concerns with s.48B mirror those with s.417 – the Ministerial process is discretionary, non-reviewable, non-transparent and often lengthy. Furthermore, the most vulnerable asylum seekers seeking to make use of s.48B are often faced by credibility issues surrounding the late disclosure of information.

In its current form, this section of the Migration Act puts Australia at risk of breaching its international obligations towards asylum seekers, particularly its *non-refoulement* obligations.

REMOVAL

Two seminal reports have been prepared regarding the return and removal of asylum seekers: *Returning Failed Asylum Seekers from Australia* (Corlett 2007) and *Removing Seriously Ill Asylum Seekers from Australia* (Sampson, Correa-Velez & Mitchell 2007). The recommendations in these two reports are comprehensive and commendable.



Critical issues that remain unaddressed include ‘fitness to travel’ assessments, in the absence of judicial or independent oversight and the process itself. These are concerns which affect both asylum seekers in detention or in the community.

RECOMMENDATIONS

The recommendations below are a starting point to ensure Australia’s international obligations to asylum seekers are upheld both substantively and procedurally in law and practice.

General

1. Continue to develop a culture of compassion and respect for asylum seekers throughout the refugee determination process.
2. Adopt the principle: ‘If in doubt, approve’.
3. If DIAC or RRT members are going to refuse on the basis that an asylum seeker is not credible, clear findings must be given including why expert evidence is ignored.
4. If reliable and supportive information sources regarding the situation in countries of origin are going to be ignored by DIAC or the RRT in favour of other sources, clear reasons must be given.
5. Incorporate the *Guidelines on Gender Issues for Decision-Makers* and the RRT’s *Credibility Guidelines* into legislation as either part of the Code of Procedure or as a relevant consideration that must be taken into account by decision-makers at DIAC and the RRT.

DIAC stage

1. If a DIAC case officer cannot make a favourable decision in an application, an asylum seeker must be called to an interview.
2. Amend the Migration Act to provide for minimum standards of procedural fairness at the DIAC stage.
3. Abolish the currently statutory time limit of 90 days.
4. Consider extending the Immigration Advice and Assistance Scheme (IAAAS) funding to all asylum seekers in the community.
5. Provide adequate and ongoing education and training to DIAC officers about the impact of

the refugee experience on asylum seekers’ ability to fully participate in the legal process; and on assessing credibility and arriving at findings of adverse credibility.

The Refugee Review Tribunal

1. Amend the Migration Act to enable the Refugee Review Tribunal to grant leave and hear applications lodged out of time.
2. All Members of the RRT to be legally trained; to receive training about the impact of the refugee experience on asylum seekers; on assessing credibility and arriving at findings of adverse credibility; in inquisitorial questioning and assessment of evidence.
3. All Members of the RRT to disclose any political roles or affiliations.
4. Repeal s.91R and apply the wording of Article 1A(2) of the *Refugee Convention*.

The Courts and judicial review

1. Amend the *Migration Act 1958* to empower courts to review a case for errors of law due to material errors of fact based on the evidence before the RRT; failure to make findings on independent corroborative evidence, misapplication of the law to the facts and incorrect interpretation of the law.
2. In relation to ‘illogical’ and ‘irrational’ decisions, amend the Migration Act to define these concepts as ‘a decision that is contrary to the facts or evidence before the Tribunal and contrary to the facts or evidence as found by the Tribunal’.

Requests for ministerial intervention

1. Introduce a pro-forma for DIAC officers to use that summarises an applicant’s case against the criteria set out by the Minister’s Guidelines to ensure that there is no dilution of claims and that all relevant factors are included in a clear and concise manner.
2. Provide reasons for decisions where a request is refused.
3. Provide legal advice to asylum seekers to ensure requests contain all relevant information.

4. Develop a faster decision-making process for the Minister.
5. Grant humanitarian discretion to DIAC officers to remove the need to approach the Minister. This is predicated on DIAC officers having received appropriate education and training.

Complementary protection

1. Prioritise the introduction of a system of complementary protection.
2. Provide ongoing and adequate education and training for DIAC and appropriate systems of review before the RRT.
3. The s.417 process to remain in place for humanitarian cases falling outside the refugee or complementary protection criteria.

Section 48B of the Migration Act

1. Where women need to make their own application or a new application raising sensitive issues not previously put such as family violence, they should not have to seek ministerial intervention under s.48B to do this. An alternative and more direct process with safeguards should be introduced.

2. Incorporate the principle of *non-refoulement* into domestic law.
3. Develop a faster decision-making process for the Minister under s.48B.

Removal

1. Fitness to travel should be assessed against clear guidelines and should cover both physical and mental health.
2. Seriously ill individuals should only be returned if their condition can be treated or managed in their country of return.
3. There should be judicial or independent oversight of fitness to travel assessments.
4. Minimum standards of care must be developed for the return or removal process.
5. Asylum seekers should not be returned to civil war, natural disaster or where basic needs such as food and shelter cannot be met.
6. The Government should increase aid and development programs in countries of return.



INTRODUCTION – SCOPE AND PURPOSE OF THIS PAPER

The purpose of this paper is to advocate, educate and work constructively towards better practices and processes regarding the refugee determination system. This paper is not intended to cover the issue of mandatory detention – the ASRC’s position on this issue is well-documented.¹ There is no scope to discuss better practice when it comes to the policy of mandatory detention. The issues raised in this paper concerning processes and decision-making apply equally to asylum seekers in the community and in detention.

The cases referred to are based on fact and reflect the experience of many asylum seekers. It is beyond the scope of this paper to document every experience but where possible negative examples of cases have been complemented by positive experiences. The difference has often been one of following basic principles of

fairness and good decision-making – the difference between an asylum seeker being heard and having their claims properly assessed, or not.

We have also made a decision to document some cases as they progress throughout the Department of Immigration and Citizenship (‘DIAC’) and the Refugee Review Tribunal (‘the RRT’) stage given the problems that continue in the handling of asylum claims throughout the appeals process.

As a result, a recurring theme appears throughout this paper – that of the need for education and training of decision-makers at DIAC and the RRT to ensure good and consistent decision-making, taking into account the refugee experience on individuals as well as the role and responsibility decision-makers and government have in upholding and developing the rights of asylum seekers seeking Australia’s protection.

¹ See Immigration Detention Australia, *Submission to the Joint Standing Committee on Migration*, 24 Oct 2008.

ISSUES AND RECOMMENDATIONS

I THE DIAC STAGE

1. The right to an interview

At present the right to an interview for asylum seekers who have lodged an application for a Protection Visa at DIAC is not guaranteed.

While this is not contentious where an asylum seeker can provide sufficiently strong documentary or other evidence to establish their need for protection 'on the papers', in several cases applications have been refused without an interview. More recently, the ASRC Legal Program has seen applications refused without an interview for applicants claiming asylum from known refugee-producing countries such as Sudan and Zimbabwe.

Given what is at stake for an asylum seeker and why protection is sought, the critical nature of the primary interview and minimum standards of fairness, an interview should be guaranteed.

No asylum seeker case is 'typical' and each case can give rise to complex issues that can only be discussed or explained further at interview. In our experience very few accounts of why a person fled their home follows a simple narrative. Without an interview it is impossible

for an asylum seeker to give their account in detail or address any concerns that may arise for decisions makers at DIAC.

What is more difficult to reconcile is where an asylum seeker's application is refused without an interview and adverse credibility findings are made 'on the papers'.

Some asylum seekers prepare applications on their own or with a friend, others turn to private migration agents of varying skills and ethics. Given this, the denial of an interview is particularly unacceptable. The right to an interview is the safety net that ensures the basic integrity of the protection application system.

Good legal practice requires that if there are issues that could be the basis for refusing an application, an asylum seeker must be called to an interview.

This is the current practice for applications before the RRT. Section 425 of the *Migration Act 1958* (C'th) ('the Migration Act') requires the Tribunal to call a hearing if it cannot decide in favour of an asylum seeker.

Parallel requirements should exist at the DIAC stage.

CASE STUDY #1

An asylum seeker from an African country fleeing religious persecution applied for a Protection Visa five months after arriving in Australia. When he sought assistance at the ASRC he was homeless and the 45-day limit for him to apply for protection had passed, leaving him without work rights, with no income and destitute.

The asylum seeker had a *sur place* claim – events arose in his home country after he had arrived in Australia making it impossible for him to safely return.

His asylum application was refused without an interview, partly on the basis that the DIAC Case Officer did not find his claims credible. Many of the issues regarding adverse credibility could have been addressed at an interview, including what further evidence was required and clarification of the information provided in the entry visa application. None of these matters were put to the asylum seeker and in the absence of an interview led the decision-maker to refuse the application.

An appeal was made to the RRT. The case is discussed below in the RRT section.

At the time of preparing this paper, the asylum seeker has been without work rights and Medicare for over two years.

CASE STUDY #2

An asylum seeker from an African country applied for a Protection Visa three and a half years after arriving in Australia.

The asylum seeker had a *sur place* claim - her circumstances changed while in Australia making it impossible for her to safely return to her country of origin.

Often such 'delay' in applying for a Protection Visa is seen as inconsistent with a genuine fear of persecution - however, a prompt application is seldom viewed as boosting the applicant's credibility; more often than not, it is viewed simply as a ploy to gain work rights in Australia.

In this case however, the asylum seeker was appropriately called to an interview and her claims properly assessed.

At the time she lodged her application the asylum seeker did not have work rights, had a six month-old baby and was about to become homeless.

Following the interview and a police clearance, the application was approved within four months of lodgement, leading to permanent residence.

RECOMMENDATIONS

- ★ **If a DIAC Case Officer cannot make a favourable decision in an application, an asylum seeker must be called to an interview.**
- ★ **Amend the Migration Act to provide for minimum standards of procedural fairness at the DIAC stage including both:**
 - ★ the right to an interview;
 - ★ the requirement that any adverse information be put to an asylum seeker in writing before a decision is made.

2. Statutory time limits

Current statutory time limits exist for asylum seekers and decision-makers respectively. These are:

- The 45-day rule which requires that asylum seekers lodge a protection visa application within 45 days of arrival in order to be granted a Bridging Visa A when their entry visa expires;
- The 90-day rule which requires decision-makers at DIAC to make a decision on a Protection Visa application within 90 days from the date of lodgement.

There are problems with both these time limits.

2.1. The 45-day rule

At the time of writing this paper the Australian Government has just announced the abolition of the 45-day rule.

This is extremely commendable and puts an end to a twelve-year long campaign by asylum seeker agencies to have this unfair rule abolished. While the process of implementing this change is still being considered, it is worthwhile to remind the reader of the reasons why this rule needed to change.

In practice, few asylum seekers in the community access proper legal assistance shortly after their arrival. Asylum seekers in immigration detention are informed

of the Immigration Advice and Application Assistance Scheme ('IAAAS') and assisted accordingly. However, asylum seekers in the community often present with little time remaining before the 45-days will expire. The first priority for advocates, after determining that they meet the criteria for a protection visa, is to lodge a valid application to preserve their rights to a Bridging Visa A. Due to the 45-day limit, it is often impossible to lodge a Protection Visa application complete with a detailed Statement of Claims or other supporting documents such as medical reports.

Other issues affect the possibility of making a complete application within 45-days: language

barriers, social isolation and lack of knowledge as to where to get help. More complex issues such as an asylum seeker's ability and willingness to disclose their experiences and mental health issues may affect this, as well as delays in obtaining any other evidence from external sources that is required.

The 45-day rule creates unnecessary pressure on asylum seekers and advocates in lodging a claim and leads to poor process affecting DIAC decision-makers given that they will often receive information in a fragmented manner, and will not be in a position to make a speedy decision. The 45-day rule has no bearing on the merits of an applicant's claim for protection.

RECOMMENDATION

- ★ **As has long been advocated, all asylum seekers should be eligible for work rights and Medicare upon their entry visa expiring and/or upon lodgement of a Protection Visa application and while they are pursuing their legal avenues if unsuccessful at the primary stage.**

2.2. The 90-day time limit

While no asylum seeker should wait years to receive a decision, the 90-day limit imposes unnecessary pressures on decision-makers and advocates alike. Efficiency is only secondary to adequately preparing and presenting an asylum seeker's case. This often requires:

- Obtaining an asylum seeker's immigration file through the *Freedom of Information Act (FOI)* including from an overseas post. These files are rarely provided before the 90-day time limit has expired;
- Expert evidence such as medical reports to corroborate claims of torture and trauma. Most skilled clinicians will be able to establish a therapeutic relationship and treatment within a short amount of time, however preparing a report often takes weeks and months;
- Expert evidence concerning specific country information which may require weeks to research and complete;

- Research and written legal submissions setting out an asylum seeker's claims and why they fall within the *Refugee Convention*;
- Health, security and overseas police clearances, the latter of which may not be possible to obtain.

The above often proves the 90-day time limit is unrealistic and unworkable. This is particularly the case when working with interpreters and seeking to ensure an asylum seeker is well supported and kept fully advised throughout the process.

In most cases, advocates have sought and DIAC has granted extensions of time to prepare cases, provide further documents or to attend an interview.

Recent experience has shown that any increase in volume of applications renders the 90-day time limit unrealistic, particularly if there is no corresponding increase in DIAC resources. This is despite cases being relatively straightforward given the country of origin and the claims made against refugee criteria.

CASE STUDY #3

In December 2008 Protection Visa applications were lodged for asylum seekers from countries including Zimbabwe, Afghanistan, Rwanda, Liberia and Uganda.

Despite the volume of cases, these applications were prepared as quickly as possible to entitle applicants to a Bridging Visa A with other documents such as a detailed Statement of Claim following within a fortnight of most applications being lodged.

At the time of writing this paper (more than three months after applications were lodged) the majority of asylum seekers have not attended an interview nor has a decision been made.

Further time to provide documentation such as medical reports and to attend interviews has been sought and granted.

The 90-day time limit has passed for all applications.

RECOMMENDATIONS

- ★ **Abolish the current statutory time limit of 90 days. This is to be a guideline only. The current provisions relating to decision that are not made within that time limit are too cumbersome. While the 90-day time limit is a desirable objective, there should be more flexibility allowed for exceptions.**
- ★ **Consider extending IAAAS funding to all asylum seekers in the community with a panel of migration lawyers and agents to provide advice and assistance.**

3. Assessment of asylum claims

Assessing asylum claims is without question a difficult task. It requires DIAC officers, who may not be legally trained, to assess individuals as well as the political, social, economic and cultural information about the country of origin. It requires good questioning skills and the ability to assess evidence properly to arrive at a decision.

In making the above assessment it is critical to take into account an asylum seeker's:

- experiences of persecution
- mental health
- cultural diversity, gender, non-English speaking background and reliance on interpreters to provide an accurate account of claims
- unfamiliarity with legal processes

amongst other factors and as they can impact on an asylum seeker's ability to relate their claims.

There is inconsistent consideration and application of the above factors by DIAC, particularly when making credibility findings.

3.1 Adverse credibility findings

Adverse credibility findings against asylum seekers leading to refusal of applications remain without question one of the most contentious issues in the refugee process.

Asylum seekers have been found to 'lack' credibility and not be believed in part because they have not been able to remember dates at an interview, because they gave information at an interview that was not in a written statement or because they gave evidence in the application to travel to Australia that they later readily admitted was not true. In other cases DIAC has equated 'vagueness' on the part of an asylum seeker as lacking credibility.

In making such findings DIAC often disregards medical evidence about an asylum seeker's psychological condition.

It is well-known that asylum seekers with poor psychological health may be more prone to relate claims in a way that some decision-makers might find unconvincing. There may be issues of inconsistencies and vagueness that may adversely affect the way their evidence is assessed.

James Hathaway (*The Law of Refugees Status*, 1991) states,

'It is critical that a reasonable margin of appreciation be applied to any perceived flaws in the claimant's testimony. A claimant's credibility should not be impugned simply because of vagueness or inconsistencies in recounting peripheral details; since memory failures are experienced by people who have been the subject of persecution.'

In other cases DIAC officers have considered an asylum seeker's claims as 'implausible' leading to adverse credibility findings. This is despite their having little insight about the situation in asylum seekers' countries of origin. It is not uncommon for a decision-maker to assess claims through the prism of an ordered and functioning society, rational behaviour and choice.

This is contrary to virtually all asylum seekers' experiences in the countries from which they have fled.

Although the RRT has published *Credibility Guidelines* which are relevant to DIAC, there continues to be an inconsistent approach regarding assessment of credibility and an over-reliance on adverse credibility findings to refuse an application.

This is also contrary to well-established principles including:

- Taking into account all the legal, factual and evidentiary matters in an application;
- The low threshold test for a finding that there is a real chance of persecution. Australian courts have decided that the onus on an asylum seeker is one of establishing a possibility rather than a probability; very little in the way of objective support is required to establish refugee status for a person genuinely in fear of relevant persecution if returned to his or her own country;
- Considering an asylum seeker's fears of persecution separately and cumulatively when assessing the chance of persecution.

In other areas of law very few decisions are made on a finding of *'I don't believe you'* by relying on one piece of evidence, such as an oral response which differs from a written response, or an inability to recall dates. Individuals being questioned are given the benefit of the doubt that in such an environment, details may be forgotten.

In other areas of law very few decision-makers come to a finding of *'I don't believe you'* in the face of expert evidence about a person's experiences of harm and its impact on their mental health. An analogous situation would be to reject exonerating evidence against a person charged with a crime, because they were a poor witness in their own defence.

In other areas of law very few decision-makers come to a finding of *'I don't believe you'* by having the power to take into account one piece of evidence over another, such as a country information report which may overstate the improving situation in a country while they also have an equally reliable report that supports an asylum seeker's claims. Australian courts have cautioned against this approach.

CASE STUDY #4

An asylum seeker from an African country who had fled political persecution was refused by DIAC partly on the grounds of adverse credibility.

In assisting him it was quickly established that he was not an articulate speaker. What was without doubt however were his experiences of torture, corroborated by a medical report.

In refusing his application the DIAC officer repeatedly referred to his vagueness and the implausibility of the events he described, particularly the circumstances of his flight.



The medical report was rejected on the basis that it merely recorded what the asylum seeker told the expert, despite the expert offering a medical opinion about the cause of scars and other injuries.

The decision was overturned by the RRT.

3.2 Treatment of expert reports

The disregard of expert reports (including medical reports) provided in support of asylum seekers' claims is of ongoing concern.

Too often decision-makers disregard expert reports and their findings on the basis that they merely record (and by implication, adopt) what an asylum seeker has told them about their experiences of persecution. This is particularly so in the context of a therapeutic relationship.

This is not an appropriate basis upon which to reject an expert's report.

Nor is it acceptable for an expert report to be disregarded on the basis that a decision-maker does not 'believe' an asylum seeker.

Experts are not required to provide reports – in the case of medical reports, they do so because in their expertise they are able, firstly, to establish trust and, secondly, to offer an opinion about the cause of an asylum seeker's physical or psychological condition.

In *The Global Challenges of Asylum* (2004), Professor Derrick Silove states,

'Immigration officers regularly challenge the histories of persecution presented by asylum seekers, and the secrecy with which torture and related abuses are perpetrated make verification of individual

trauma stories difficult. Nevertheless, clinicians working in the field rarely have cause to doubt the trauma stories recounted by refugees, with their accounts being consistent with historical conditions known to pertain in their countries of origin. A recent study has confirmed that, although details are often forgotten, recall of major abuses recorded of refugees remains consistent over time (Herlihy, Scragg, & Turner, 2002).

*Hence, the problem of credibility relates less to the genuine experiences of persecution experienced by refugees than to the politically motivated attitudes of immigration officials assessing their claims. The process of assessing asylum claims is often adversarial, with asylum seekers becoming distressed and at times incoherent during the proceedings. The consequence can be that their fragmented or contradictory testimony is attributed erroneously to fabrication rather than to underlying memory disturbances caused by traumatic stress reactions.'*²

Australian courts have also stated that where medical science offers an answer to a medical issue, it is simply not rational for a lay person to brush that answer aside in favour of some theory of their own.³

CASE STUDY #5

An asylum seeker from an African country fleeing persecution on account of his political activities was assisted by the ASRC to lodge a Protection Visa application. However it took approximately two months from the date of lodgement to provide a detailed Statement of Claims. This was due in part to his previous immigration files being requested under FOI from

² At the time of publication the author was Professor of Psychiatry at the University of NSW; Director of the Psychiatry Research and Teaching Unit, South Western Sydney Area Health Service and Centre for Population Mental Health Research; Psychiatrist at the Service for the Treatment and Rehabilitation of Torture Survivors, NSW and Project Director of the East Timor National Mental Health Project.

³ See for example *Fuduche* (1993)

overseas but more importantly, to the asylum seeker's mental health condition. He initially presented as distrustful, fearful and it was impossible to gain a complete account of his history including that of detention and torture.

This information was revealed slowly over time and as trust was gained. His history of torture also impacted on his ability to recall events and dates in sequence. His claims were complex and like most asylum seekers' experiences, did not follow a simple narrative.

Following his interview with DIAC, medical, counselling and psychiatric reports were provided in support of the asylum seeker's claims as were legal submissions regarding the law on the proper handling of this evidence.

The application was refused. Although the expert reports and evidence were not in question, the decision-maker did not accept as 'plausible' the events as the asylum seeker described and found that he was not 'credible'.

The expert reports were dismissed because the overriding consideration was the asylum seeker's credibility. The DIAC Officer did not accept that the torture and psychological condition were due to the claims made by the asylum seeker, but by some other cause which was not stated.

The decision is currently being appealed.

3.3 Gender-based claims

As with the above issues, DIAC officers have taken an inconsistent approach to asylum seekers with gender-based claims.

In our recent experience, DIAC Officers, on the whole, have handled gender-based claims laudably. Female case officers have been assigned to interview asylum seekers who have experienced violence and trauma; decision-makers have displayed knowledge of the case so as to limit questioning to the most relevant points and decisions have followed quickly where all evidence has been provided.

However, in some cases adverse credibility findings continue to override asylum seekers' claims of gender-based persecution. This is despite expert evidence being provided in support. For women who have firstly, experienced persecution and secondly disclosed it, not being believed is akin to being re-traumatised.

DIAC has published *Guidelines on Gender Issues for Decision-Makers* which are presently in the process

of being revised. The ASRC through the position of its Women's Legal Worker is providing a detailed submission in relation to the Guidelines.

The Guidelines call for women's claims of persecution, including gender-based persecution to be 'properly heard and assessed'. The Guidelines acknowledge the barriers that lead to women being able to access protection and aim at promoting a consistent and sensitive approach to women's claims, in line with international law and practice.

In relation to persecution such as sexual assault disclosed at a later date the Guidelines call for decision-makers to handle this issue with great care including making assessments about the late disclosure and a woman's demeanour.

However, despite the existence of the Guidelines, there continues to be an inconsistent approach taken by decision-makers to gender-based claims.

CASE STUDY #6 – NEGATIVE EXPERIENCE

An asylum seeker from the Middle-East fled persecution on account of her minority ethnic group status and imputed political opinion.



She applied for a Protection Visa together with her husband. During the DIAC stage and before a decision was made she disclosed to her lawyer that she was sexually assaulted while in detention in her country.

A psychological and psychiatric report stated that her symptoms were consistent with trauma of a sexual nature.

Although she was interviewed separately and by a female case officer, her application was refused on the grounds of adverse credibility and because of an absence of country information referring specifically to the events as described by the asylum seeker. This was despite the existence of reliable information of the incidence of sexual assault against women (particularly those from ethnic minorities) while in custody.

The decision was appealed to the RRT. This case is further discussed in the RRT section of this paper.

CASE STUDY #7 – POSITIVE EXPERIENCE

An asylum seeker from Africa fled political and gender-based persecution. She had been detained on account of her family's political activities and during her detention was sexually assaulted.

She applied for a Protection Visa and disclosed her experiences of harm in her statement.

A psychological report supported her claims.

She was not interviewed and her application was approved 'on the papers' within four months of lodgement.

3.4 Sexuality-based claims

As with gender-based claims, there is an inconsistent approach by decision-makers to accepting or refusing sexuality-based claims.

In refusing asylum seekers' claims of persecution on the grounds of their sexuality there is often an over-reliance on adverse credibility findings or applying principles of refugee law such as relocation that are inappropriate.

CASE STUDY #8 – NEGATIVE EXPERIENCE

An asylum seeker from Asia who fled persecution on account of his sexuality was refused by DIAC, without an interview. The asylum seeker was 17 years old and had never lived away from his family. His family had sent him to Australia in 2007 to study after he and his father were attacked. They hoped he would remain here after he finished his studies. He did not seek any legal assistance following his arrival in Australia. Within a year he had deteriorated as a result of his past experiences, being separated from his family and the stress of his studies.

He was unrepresented at the time he lodged his Protection Visa application in 2008.

In refusing the application the decision-maker referred to the delay in applying for protection as being inconsistent with someone who genuinely feared persecution.

His personal circumstances were not taken into account. The decision-maker also found that that the asylum seeker could relocate to another city in his country where some progress had been made in advancing the rights of homosexuals. This was despite the fact that homosexuality was still a crime in that country and that he could not openly express his sexuality without serious risk of harm.

The issue of his sexuality was not doubted by the DIAC officer who rejected his application. He appealed the decision. The decision of the RRT is discussed further in this paper.

CASE STUDY #9 – POSITIVE EXPERIENCE

An asylum seeker from an African country applied for a Protection Visa on the grounds of fearing persecution as a homosexual if he returned.

He was interviewed by DIAC and during the interview the decision-maker indicated that no-one could question or test a person's sexuality.

Applying appropriate legal principles there was a real chance he would be persecuted if returned to his country on account of his sexuality.

His application was approved.

RECOMMENDATIONS

★ **Incorporate:**

- ★ *the Guidelines on Gender Issues for Decision-Makers*
- ★ *the Tribunal's Credibility Guidelines*

into legislation as either part of the Code of Procedure or as a relevant consideration that must be taken into account by decision-makers at DIAC.

- ★ Continue to develop a staff culture of compassion and respect for clients.
- ★ **Provide adequate and ongoing education and training to DIAC about the impact of the refugee experience on asylum seekers' ability to fully participate in the legal process.**
- ★ **Provide adequate and ongoing education and training to DIAC on assessing credibility and arriving at findings of adverse credibility.**
- ★ **If DIAC is going to refuse on the basis that an asylum seeker is not credible, clear findings must be given including why expert evidence is ignored.**
- ★ **If reliable and supportive information sources regarding the situation in countries of origin are going to be ignored in favour of other sources, clear reasons must be given.**
- ★ **Adopt the principle: 'If in doubt, approve'.**

II THE REFUGEE REVIEW TRIBUNAL

The RRT has a specialist role in dealing with the assessment of asylum claims. Section 420 of the Migration Act requires the RRT to carry out its functions of review in a way that is fair, just, economical, informal and quick. It is not bound by technicalities, legal forms or rules of evidence and must act according to substantial justice and the merits of the case.

Some notable concerns that have been discussed about DIAC remain relevant when discussing the RRT. There is inconsistency in decision-making at the RRT leading to a loss of confidence in the integrity of the process. Not all RRT Members are legally qualified, skilled in inquisitorial processes or immune from political influence.

As a result asylum seekers' experiences before the RRT vary widely.

1. No right to seek leave to apply

Section 412 of the Migration Act states that an

application to the RRT must be made within 28 days after notification of a decision.

This means that if an asylum seeker misses the deadline the RRT has no power to grant them leave to apply out of time.

This is not the case with other Tribunals, which have power to hear applications lodged out of time: see for example s.29(6) & (7) of the *Administrative Appeals Tribunal Migration Act 1975*; s.21 of the *Defence Force Discipline Appeals Act 1955*; s. 5T of the *Veterans' Entitlements Act 1986*; the *Social Security (Administration) Act 1999*.

Given that the RRT is considered the specialist tribunal in Australia and represents the final opportunity for merit reviews for asylum seekers, one has to question its lack of power to grant leave and hear an application lodged out of time.

RECOMMENDATION

- ★ Amend the Migration Act to enable the Refugee Review Tribunal to grant leave and hear applications lodged out of time.

2. Assessment of asylum claims

2.1 Adverse credibility findings

Where the RRT refuses an application on the grounds of credibility, such findings are beyond the scope of review by the courts. Findings of credibility are a matter for the RRT; courts cannot look at the facts of a case, or at how the RRT arrived at a finding of fact including adverse credibility.

In many cases however, how the RRT arrives at findings of adverse credibility is of serious concern.

The RRT's *Credibility Guidelines* make clear how the Tribunal should conduct reviews. The Guidelines call the Tribunal to:

- make clear and unambiguous findings as to the evidence it finds credible or not credible and provide reasons for such findings (paragraph 2.5);
- ensure that it conducts a hearing that respects the dignity of the Applicant in a fair and non-

intimidating manner (paragraph 3.2)

- have due regard to expert evidence (paragraph 8.4);
- take into account the factors that may affect an Applicant's ability to give evidence (paragraphs 4.1 and 4.3) and
- keep an open mind (paragraph 3.6).

The Guidelines are followed on an *ad hoc* basis at the discretion of individual Members and remain unenforceable.

In some cases individual Members will give the benefit of the doubt to an asylum seeker so that even if they are not believed about one aspect of their case this will not lead to refusing the entire application. This is in line with the guidelines above.

In other cases particularly those that have been remitted by the courts, it is imperative that Members keep an open mind when re-hearing the case.

In the absence of the Guidelines being legislated however, it will come down to individual Members as to whether they are followed or not.

Although Members frequently state in their decisions that they have had regard to the Guidelines the lack of consistency would indicate otherwise.

CASE STUDY #10 – NEGATIVE EXPERIENCE

An asylum seeker from Asia who fled persecution on account of his political activities and occupation was refused by the RRT at his first hearing because it made adverse credibility findings. An interpreter was present at the hearing however the asylum seeker was unrepresented.

During the hearing, lengthy questions and propositions were put to him that were impossible to interpret accurately. Throughout these questions critical and adverse information was being raised but was not translated, leaving the asylum seeker unaware and unable to respond to the Tribunal's concerns.

He was unsuccessful in his appeal.

On appeal the Federal Magistrates' Court remitted the matter back to the Tribunal by consent for a new hearing. The Minister accepted the Tribunal had made an error of administrative law.⁴

At the second RRT hearing the Tribunal was provided with evidence that was not put to the asylum seeker and it was open to accepting the errors that occurred in the first hearing.

The asylum seeker's credibility was restored. However, his application was unsuccessful because the Tribunal considered he had not been seriously harmed.

This decision is currently being appealed.

CASE STUDY #11 – POSITIVE EXPERIENCE

An asylum seeker from the Middle-East fled persecution on account of his religious conversion. His application was refused by DIAC including on the grounds of lack of credibility and country information that would support such a claim.

This was despite having provided medical evidence of torture and there being evidence of abuses by religious extremists.

On appeal to the RRT the Tribunal questioned the asylum seeker about his faith, took into account the supportive country information and while the Tribunal found that some aspects of the asylum seeker's evidence had been 'overstated' this did not disqualify his entire claims.

Applying appropriate legal principles, the Tribunal found there was a real chance that if returned to his country he would be persecuted.

His application was successful.

In other cases however, an adverse credibility finding about one matter has led the Tribunal to reject an asylum seeker's *entire* claim. Such findings are often excessive, illogical and unreasonable, particularly as they ignore other evidence provided in support of a case.

⁴ Principles of administrative law are distinct from refugee law. Australian courts cannot consider the facts of a refugee case. This is discussed below in the 'Courts and Judicial Review' section.



CASE STUDY #12

On appeal to the RRT the asylum seeker mentioned in Case Study #1 was questioned for approximately 37 minutes. On average an RRT hearing takes about three hours. He was not asked any questions about his religion.

He had provided letters of support from churches in his country and Australia and country information that supported his fears of persecution because of his religious conversion. The letters were not in question.

He had provided a report diagnosing two serious psychological conditions. The report was not in question.

The RRT focused solely on the way the asylum seeker obtained his entry visa to Australia and his financial resources. Few notes were taken during the hearing despite transcripts *not* being available following a hearing. The Member's conduct, including turning her back to the asylum seeker during the hearing, raised concerns about the integrity of the review.

The application was refused on adverse credibility grounds. This was despite the evidence of the asylum seeker's religious practices in his country and Australia. The RRT found that the religious activities in Australia were undertaken solely to strengthen the refugee claim, despite not asking the asylum seeker a single question about his faith.

Such a decision is difficult to reconcile with the *Credibility Guidelines* and good administrative decision-making.

The case is currently on appeal before the Federal Court of Australia and a decision is pending.

Adverse credibility findings against an asylum seeker are unequivocally damaging to their legal claims and to an asylum seeker personally. The inability to challenge these findings in court also has negative implications should an asylum seeker seek ministerial intervention on humanitarian grounds. This is discussed below.

2.2 Treatment of expert reports

The inconsistent and often erroneous handling of expert reports including medical reports, remains of concern at the RRT stage.

It is noted that at present draft *Guidelines on Expert Opinion Evidence* are being considered by the RRT and it has commenced the consultative process.

Legal principles have established that the RRT is able to give what weight it considers appropriate to the evidence presented before it.

However, this often means that medical or other expert reports are disregarded, despite the report and credentials of the expert not being in question. This evidence should take precedence in an application.

CASE STUDY #13 – NEGATIVE EXPERIENCE

An asylum seeker from the Middle-East fleeing persecution on account of his political activities and ethnicity was refused by DIAC on adverse credibility grounds - partly because a previous visa application was unsuccessful and there was delay in applying for Protection.

At the RRT stage he made significant disclosures for the first time, regarding his activities in Lebanon and his experiences of torture. A medical report corroborated the abnormalities to

a particular part of his body and a psychiatric report stated why he made the disclosures at such a late stage.

During the hearing the RRT chose to conduct a medical examination of its own of the asylum seeker and stated that there was no visible abnormality. The RRT also rejected the psychiatric report explaining the reason for the late disclosure.

An appeal to the Federal Magistrates' Court was unsuccessful.

CASE STUDY #14 – POSITIVE EXPERIENCE

An asylum seeker from Asia was studying in Australia when he converted to Christianity. He feared persecution from his family and religious extremists if he returned. He could not openly practice his faith in his home country without risk of harm. He was refused by DIAC despite there being reliable country information on restrictions to freedom of religion and the consequences of converting. It was found that the asylum seeker could relocate to another part of his home country where there were Christian communities.

On appeal to the RRT an expert report was provided by a leading academic on the relevant legal situation in that country and for individuals in the asylum seeker's situation.

The appeal was successful.

2.3 Gender-based claims

Similar issues arise at the RRT as with DIAC regarding the inconsistent approach taken to gender-based claims of persecution.

CASE STUDY #15 – NEGATIVE EXPERIENCE

On appeal to the RRT the asylum seeker mentioned in Case Study #6 was separately questioned by a female Member as was appropriate.

Despite this the RRT refused the application primarily on the grounds of adverse credibility. The asylum seeker was not believed including, in part, because she did not recall details in exactly the same way as her husband.

A RRT Member with an open mind could have seen this as an absence of collusion between the husband and wife and could have seen this in the context of the asylum seeker's traumatized state as was argued.

In refusing the application the RRT disregarded psychological and psychiatric reports referring to the asylum seeker's symptoms and trauma. The reliability of the reports was not in question.

An appeal was made to the Federal Magistrates' Court and the matter was remitted to the Tribunal by consent for a new hearing.

At the second Tribunal hearing the asylum seeker was similarly questioned by a female Member and not believed for similar reasons.



A second appeal was made to the Federal Magistrates' Court and the matter was remitted to the Tribunal by consent for a new hearing.⁵

A third Tribunal hearing was held in the matter to which a decision is pending.

CASE STUDY #16 – POSITIVE EXPERIENCE

An asylum seeker who fled an Asian country fearing political, ethnic, religious and gender-based persecution was refused by DIAC without an interview.

She had come to Australia on a student visa but two years later a family member informed her that the military had gone to her home looking for her, on the basis of her association with another family member who had recently deserted the army and fled the country.

In her country of origin the asylum seeker had been detained and questioned three times regarding her political and religious activities. She was released on condition and monitored by the authorities each time.

Upon learning of this information and fearing return the asylum seeker promptly sought advice and applied for a Protection Visa.

At the RRT she was refused, including on the grounds of adverse credibility, in part because of her delay.

The RRT was constituted by a male Member. The advocate present noticed that the RRT adopted an interrogatory approach of questioning and was completely insensitive to the gender issues (the asylum seeker had given evidence that she had witnessed abuse by the military of ethnic minority women and this had impacted on her own fears of return). The RRT was repeatedly dismissive of these fears, forcefully stating that no harm had happened to the asylum seeker.

Following the hearing the asylum seeker stated that the RRT's conduct in questioning her was similar to that of the military in her home country.

An appeal was made to the Federal Magistrates' Court and the matter was remitted by consent to the RRT for a new hearing. The Minister accepted the RRT had made an error of administrative law.⁶

At the second hearing the RRT was constituted by a female Member, the asylum seeker was sensitively questioned and taking into account all the evidence, the RRT decided the case in favour of the asylum seeker.

It is important to note that at the second hearing no new evidence was provided and the same facts were relied upon. However a different outcome followed.

It is difficult not to draw the conclusion that the only variable in the case was the RRT itself.

2.4 Sexuality-based claims

The Tribunal's handling of sexuality-based claims remains inconsistent with an over-reliance on adverse credibility to refuse applications.

⁵ Although the Minister consented to the wife's application he did not consent to the husband's case. The husband's case is currently on appeal in the Federal Court of Australia. This shows the disparate way in which claims that arise from the same set of facts can be treated.

CASE STUDY #17

On appeal to the RRT, the asylum seeker mentioned in Case Study #8 provided, amongst other evidence, a sworn Affidavit from his father about the persecution suffered because of his sexuality and his fears if he returned to his country of origin.

During the hearing the asylum seeker was asked about the laws against homosexuals in his country. He was asked to name homosexual activist groups, magazines or websites there. He was unable to do so satisfactorily. These questions did not take into account his young age and his naivety.

He was asked why he could not 'disappear' into one of the larger cities. This is not part of Australian law.

He was asked to name gay bays in Australia and was unable to do so satisfactorily.

His application was refused.

The RRT rejected the affidavit evidence provided by his father.

The RRT rejected that the asylum seeker was a homosexual because the asylum seeker had done 'very little to express his sexual orientation since he *arrived* in Australia'. He had not pursued '*a gay lifestyle*'. This was demonstrated by his lack of relationships in Australia, his inability to name more than two gay bars and his limited knowledge of the '*gay scene*'.

This ignored the asylum seeker's isolation and distress in Australia, lack of work and financial resources, his emotional distress at the forced break-up of a serious relationship and his fear of being exposed to drugs in gay bars.

The adverse credibility finding removed the case from the scope of review of the courts.

The asylum seeker's humanitarian request to the Minister was subsequently refused.

He now faces return.

RECOMMENDATIONS

- ★ **All Members of the RRT to be legally trained.**
- ★ **All Members of the RRT to disclose any political roles or affiliations.**
- ★ **Incorporate:**
 - ★ *the Guidelines on Gender Issues for Decision-Makers*
 - ★ *the Tribunal's Credibility Guidelines***into legislation as either part of the Code of Procedure or as a relevant consideration that must be taken into account by decision-makers at the RRT.**
- ★ **Provide adequate and ongoing education and training to RRT Members about the impact of the refugee experience on asylum seekers.**

6 In this case the RRT's conduct was not the basis for the appeal.

- ★ Provide adequate and ongoing education and training to RRT Members on assessing credibility and arriving at findings of adverse credibility.
- ★ Provide adequate and ongoing education and training to RRT Members in inquisitorial questioning and assessment of evidence.
- ★ If RRT Members are going to refuse on the basis that an asylum seeker is not credible, clear findings must be given including why expert evidence is ignored.
- ★ If reliable and supportive information sources regarding the situation in countries of origin are going to be ignored in favour of other sources, clear reasons must be given.
- ★ Continue to develop a staff culture of compassion and respect for clients.
- ★ Adopt the principle: 'If in doubt, approve'.

3. Assessing conduct in Australia

The Migration Act defines persecution broadly and non-exhaustively, but goes on to state in s.91R(3) that any conduct engaged by an asylum seeker in Australia is to be disregarded unless an asylum seeker can satisfy a decision-maker that the conduct was engaged in for a purpose other than strengthening their refugee claim.⁷

This provision is problematic for a number of reasons:

1] The political motivation behind the provision

The provision was introduced under the Howard Government in 2001 and some commentators have referred to it as 'highly suspect'. It carries with it the danger of separating asylum seekers into those that are 'genuine' or those that are to 'blame', particularly if they are seen to have brought harm upon themselves. The *Refugee Convention* makes no such distinction or qualification.

As Germov and Motta (2003) point out:

'The requirements of subsection 91R(3) are highly suspect in relation to the requirements of Article 1A(2), since the applicant's fear need only be 'well-founded' and directed at them for a Convention reason to substantiate a claim to refugee status: the Convention makes no qualification as to how that well-founded fear came into existence. Importantly, the Convention does not hold an individual 'to blame' for persecution – or the threat thereof – that may be visited upon them where that persecution is directed at them for a Convention reason....

The danger of subsection 91R(3) is that it has the potential to import the highly suspect notion of 'deserving' and 'undeserving' refugees into interpretation of the Convention – meaning that, despite the fact that a refugee has a well-founded fear of Convention-related persecution in their home country, they can still suffer refoulement to that country if they are perceived to be "undeserving" because they are the 'author of their own harm'.

2] The provision has also been instrumental in stifling asylum seekers' activities in Australia.

It has made it virtually impossible for asylum seekers to advocate or lobby for their own cause or for issues of concern without it being seen as bad faith conduct intended to boost their refugee claims.

It has also made it impossible in some cases for asylum seekers to continue their activities in Australia given their freedom to do so without risk, without it being seen as intended only to strengthen their refugee claim.

Some examples of this include pro-democracy or Falun Gong activists from China who participate in protests in Australia or demonstrate outside consular offices.

3] As with an over-reliance on adverse credibility, in some cases, there continues to be a tendency to disregard activities undertaken in Australia despite there being evidence of their genuineness.

Some examples of this include religious converts in Australia who are seen as having engaged in activities,

such as converting and going to church, for the sole purpose of strengthening their refugee claims. This is despite of there being evidence of the genuineness of their conduct.

- 4] The question is well asked – what if such conduct gives rise to a real chance of persecution? Each case must be assessed on its merits particularly if there are consequences in returning the asylum seeker to their county of origin, following their conduct in Australia.

CASE STUDY #18

An asylum seeker from the Middle-East who fled persecution following religious conversion applied for a Protection Visa one week after arriving in Australia. Because he arrived without valid documents he was detained. He spent two and a half years in immigration detention prior to being successful at the RRT on his third hearing.

His first review application was unsuccessful, in part because of adverse credibility findings. The RRT found that he had not been a genuine convert and that any religious activities undertaken while in detention in Australia were solely for the purpose of strengthening his refugee claims.

On appeal, although the Federal Magistrates' Court could not assess the adverse credibility findings it found a legal error in the way the RRT assessed the refugee claims including the fact that the RRT Member has referred to country information from *Wikipedia*.

His second RRT hearing was unsuccessful, in part, because of the Tribunal's similar assessment that the religious activities undertaken in detention were solely for the purpose of strengthening his refugee claims.

He appealed to the Federal Magistrates' Court and was successful.

At both the hearings before the RRT the asylum seeker had provided evidence from clergy in Australia regarding his faith. Yet this was disregarded and seen as conduct by him to strengthen his refugee claims.

At his third RRT hearing the asylum seeker provided further evidence of his faith. Although the RRT did not accept that the asylum seeker was a convert in his country of origin, it accepted his genuine conversion in Australia. The RRT accepted how difficult it was to ascertain the genuineness of any individual's faith but referred to the consistency in the asylum seeker's evidence regarding the practice of his faith in Australia.

The RRT found his religious activities in detention were not undertaken to strengthen his claim to refugee status.

After two and a half years in immigration detention he was found to be a refugee.

The asylum seeker continues to question 'how long' it took to arrive at this outcome and why he had to be detained.

RECOMMENDATION

- ★ **Repeal s.91R and apply the wording of Article 1A(2) of the *Refugee Convention***

7 See s.91R(1) – (3) of the Migration Act



4. A way forward

Given the ongoing discussion about the integrity of the RRT process and the consistency and quality of decisions being made, a way forward may be for a panel of decision-makers to decide cases that present difficult factual and evidentiary issues. There needs to be a more robust mechanism for arriving at findings of adverse credibility which lead to a refusal than an individual Member's perceptions.

Although a panel of Members has been consistently rejected by Government because of the cost involved, the cost of poor decision-making to asylum seekers cannot remain unaddressed. It is anomalous that the Migration Review Tribunal ('the MRT') can convene a multi-member panel but in fact seldom does so. The issues involved in assessing protection

visa claims are arguably much more complex and there should be a mechanism for convening a multi-member panel – especially for cases that have been remitted by the Courts. This option would be less costly than litigation that sees cases bouncing back and forward from the Tribunals.

Recently the Minister for Immigration announced the appointment of five senior Members to the RRT based on merit. This is certainly welcome but does not address the issues above. The powers of the RRT that have been augmented, through legislation, particularly regarding natural justice principles and through judicial decisions, have created an inequity between an asylum seeker's rights to a fair and impartial hearing and the Tribunal's powers to consider and dispose of cases in ways often beyond the scope of judicial review.

III THE COURTS AND JUDICIAL REVIEW

Judicial review of asylum seeker's cases is limited to whether the RRT made an error of law not an error of fact. Administrative law and refugee law are entirely distinct and the current process does not permit judicial review of a case on its facts.

This means that a Court will not re-hear the evidence and arrive at its own decision about whether a person is a refugee or not. In most cases judges have expressed sympathy for an asylum seeker but at the same time refused an application on the basis that it could not engage in review of the facts of the case.

As most decisions of the RRT turn on issues of fact and the credibility of an asylum seeker, asylum seekers face a real challenge in demonstrating that the RRT's fact finding process amounted to an error of law.

Errors of law include:

- Identifying the wrong issue;
- Ignoring relevant material in coming to a decision that could have altered the decision (although the RRT is not bound to refer to every item of material relied on by the applicant);
- Relying on irrelevant material in coming to a decision;
- Making a decision that breaches natural justice principles eg because of actual/apprehended bias;
- Denying procedural fairness, eg refusing to hear from a key witness in a case;

- Misconstruing the meaning of persecution, the meaning of Membership of a particular social group, the relocation principle or another Refugee Convention definition;

- Making a finding that is unsupported by evidence which is critical to the ultimate determination.

Errors of law do *not* include the following:

- A material error of fact leading to a wrong conclusion;
- Illogical and irrational decisions.

However, most asylum seekers appeal a RRT decision because they feel their case has not been properly assessed.

In the absence of fair processes and consistent decision-making by Members skilled in inquisitorial not accusatorial questioning and in assessing evidence, errors of fact leading to a critical adverse finding should be open to judicial review.

This approach has been advocated by administrative law academics such as Dr Chris Enright (2000), who argue that if an error is made in finding a material fact or in applying law to facts, the consequence is that the law will not operate as intended by the legislature.

Many would argue that there are policy reasons against this such as increased delay and cost in the court system, particularly by asylum seekers pursuing unmeritorious claims. Others argue that if there is too

much judicial scrutiny, the legitimacy of the RRT's decisions will be undermined as the RRT may take less care as the court will make the 'real' decision.

These arguments can be answered. Unmeritorious cases are pursued through courts throughout every jurisdiction and courts retain powers to dismiss these where appropriate.

At present the pendulum has swung too far - away from confidence in consistent and good decision-making by the RRT, so that judicial review of cases on their facts is merited.

Such a development combined with ongoing education, training and appointment of the best possible Members to the RRT may lead to better decision-making and remove the excesses and errors that currently remain and obviate the need for judicial review.

Author and barrister Roz Germov states,

'...the traditional grounds upon which judicial review can be sought should be

expanded to include material errors of fact, illogicality and irrationality as well as failure to make findings on independent corroborative evidence. These grounds would need to be further defined so that they do not create a free for all. Unmeritorious cases will always be pursued and there is nothing you can do to stop them - people will appeal even a good decision just to buy time. It is difficult to find any way around this in a jurisdiction in which there are many unrepresented applicants. Perhaps a way to minimise unmeritorious litigation is reinstate reasonable legal aid for people who cannot afford to pay for representation - legal aid did not support litigation in civil cases where there are no reasonable prospects of success.

*I still think that if you improve the quality of decision-making below, that will be a significant way to reduce the level of litigation.'*⁸

RECOMMENDATIONS

- ★ **Amend the Migration Act 1958 to empower courts to review a case for errors of law due to material errors of fact based on the evidence before the Tribunal; failure to make findings on independent corroborative evidence, misapplication of the law to the facts and incorrect interpretation of the law.**
- ★ **In relation to 'illogical' and 'irrational' decisions, amend the Migration Act to define these concepts as 'a decision that is contrary to the facts or evidence before the Tribunal and contrary to the facts or evidence as found by the Tribunal'.**

IV REQUESTS FOR MINISTERIAL INTERVENTION

1. The s.417 process

Where an asylum seeker has been unsuccessful before the RRT, they can seek ministerial intervention under s.417 of the Migration Act which provides that the Minister can substitute a more favourable decision than that of the RRT if it is in the public interest to do so.

The Minister's power is discretionary, non-reviewable and non-transparent.

DIAC and the RRT have the power to refer a case to the Minister however these referrals have been inconsistent. In most cases an asylum seeker has sought Ministerial intervention arguing the circumstances of their case are unique and exceptional and it is in the public interest for the Minister to intervene.

The Minister has guidelines regarding the matters that should be brought to his attention in consideration of exercising his powers to intervene, including:

⁸ Extract from an interview between Roz Germov and the writer on 12 March 2009.



- A risk to an asylum seeker's security, human rights or human dignity on return to their country of origin;
- Australia's obligations under the International Covenant on Civil and Political Rights, the Convention against Torture and the Convention on the Rights of the Child;
- Whether an asylum seeker is a member of an Australian family unit;
- Whether an asylum seeker has exceptional skills;
- The length of time an asylum seeker has lived in Australia;
- An asylum seeker's physical and mental health;
- Issues of statelessness and other considerations.

The s.417 process has highlighted the enduring inequities of the current refugee determination system and the ongoing cost to asylum seekers and the community.

Many asylum seekers reach the s.417 process not having had a fair hearing or having had questionable decisions made in their case. However these are often the cases where ministerial intervention is least likely given the assumption that is made that these asylum seekers have exhausted their legal appeals and have been found not to be 'genuine' refugees.

The process is also inefficient - asylum seekers are required to pursue unmeritorious refugee claims through the review system in order to make a request for ministerial intervention. This means that relevant humanitarian issues are raised at the end of the process, rather than at the beginning.

The process also means that the Minister is responsible for a considerable caseload and is the sole arbiter of decisions affecting people's lives. In his address to the 2008 *National Members' Conference of the Migration Review Tribunal and Refugee Review Tribunal* (2008) the current Minister has likened his role to 'playing God' and stated:

'...ministerial intervention offers no guarantee of fairness.

While tribunal Members and judicial officers make their decisions and judgments in accordance with appropriate guidelines – decisions and judgments that are, in turn, open to review – there are no strict guidelines for the exercise of ministerial discretion.

There is no way of really knowing what factors influence the minister's decision in individual cases.

And there is no avenue of appeal from a bad decision, and no way to prevent an abuse of power.

There is no consistency in the decision-making because different ministers have different personalities and different ways of thinking.'

When an asylum seeker makes a first request they are granted a Bridging Visa E without work or study rights or access to Medicare. In some circumstances an asylum seeker may have had work and study rights and access to Medicare up to that point; these rights are lost when they seek ministerial intervention.

From a decision-making process perspective, the concerns below have been identified, although they are by no means exhaustive.

2. Dilution of claims

Many requests made for humanitarian intervention have squarely met the Minister's guidelines for intervention; yet this information has often been diluted by DIAC officers. As a rule, the Minister does not receive a complete file, but a summary compiled by DIAC. Summaries are subjective, and in some cases, the summaries submitted to the Minister include unrelated considerations and a lack of detail of the humanitarian issues in a case.

CASE STUDY #19

An asylum seeker from Africa who arrived in Australia in 2000 was unsuccessful in his protection visa application and subsequent appeals. In 2007 he lodged his third request for Ministerial intervention including on the grounds that he was married to an Australian citizen, was a step

father to a young child, had lived in Australia for 7 years and had become stateless given his inability to obtain a travel document.

In the summary prepared by DIAC officers for a former Minister and obtained under FOI, the first issue raised was the court debt that the asylum seeker had incurred while challenging the RRT's decision to refuse his protection application. He had no means of repaying the court debt given that he did not have work rights, which he lost when he sought Ministerial intervention and was placed on a Bridging Visa E.

His third request for intervention was refused.

After years of trying unsuccessfully to obtain a travel document, DIAC recently referred the case for assistance with a further request on the grounds of the asylum seeker's statelessness. Years of delay could have been avoided if the Minister's guidelines had been observed at the first request.

A decision to his fourth request is pending.

3. Presenting the RRT's findings regarding humanitarian claims

Despite the current jurisdiction of the RRT not extending to consideration of humanitarian claims, in some cases the RRT has referred to humanitarian issues even though it has stated that they remain within the sole discretion of the Minister.

More recently, changes have been discussed with a view to enabling the RRT to refer a case to the Minister for consideration; however it is difficult to see how this

could work consistently given the Tribunal's statutorily defined function, which is to decide whether a person satisfies criteria for a Protection Visa.

Where any RRT references are made to humanitarian issues, asylum seekers are undeniably assisted at the s.417 stage; however this is premised on the Minister being made aware of the Tribunal's findings or comments. In the absence of this information being presented, even the most compelling humanitarian cases can be refused.

CASE STUDY #20

An asylum seeker from Asia applied for a Protection Visa together with his wife and two adult dependant children.

Six of his nine children were living in Australia as permanent residents or citizens. One child remained in the country of origin.

His Protection Visa application was refused by DIAC and the RRT. However in its decision the RRT referred extensively to the humanitarian issues in the case, noting the history of violence the asylum seeker had endured: having been a prisoner of war as a child, living through civil war, having his home burnt down and escaping attacks on the civilian population. His frail health and age were mentioned as was the impact of separating the asylum seeker and his family from their children in Australia. The RRT included a separate paragraph in its decision entitled '*Humanitarian Considerations*' which was unequivocally intended to support a humanitarian request for intervention.

In the summary prepared to the Minister obtained under FOI, the Tribunal's findings were reduced to one sentence towards the end of the information and stated, '*The RRT found Mr [X] did not have a well founded fear of persecution and that Mr [X's] claims were predominantly humanitarian factors which solely remained matters for the Minister's discretion.*'

The Minister refused to intervene.



Whilst it is impossible to know what persuaded the Minister not to intervene, it is highly contentious for DIAC to insist, as they have done, that the Minister had all the salient information in the case.

Despite repeat requests having been made, including on the basis that the RRT's findings were not put to the Minister in their entirety, DIAC has not referred the case again for consideration.

In October 2008 DIAC stated that the case would not be referred to the Minister, partly because information was received that '*...indicates that medical attention for the conditions suffered by Mr [X] can be accessed locally at the health clinic*' were he to return to his country of origin. Mr X suffers from diabetes, hypertension, TB and gout and these have only been successfully treated in Australia.

This asylum seeker and his spouse, who are elderly and in frail health, and their two children now face removal.

4. Repeat requests and 'new information'

History over the last seven years has shown that ministerial intervention is least likely to occur on a first request.

Once a first request has been refused by the Minister, an asylum seeker is expected to make arrangements to depart.

Any repeat request made for intervention is assessed by the Ministerial Intervention Unit (MIU) within DIAC in each state. At present and following new Ministerial Guidelines on Ministerial Powers which came into effect in December 2008, a repeat request is not referred to the Minister unless there is 'significant change in circumstances which raise new, substantive issues not previously provided or considered in a previous request'

Although this is the requirement, what has constituted 'significant change', 'new' and 'substantive' information has been questionable.

It is highly contentious for decision-makers at MIU to insist that 'new' information led to repeat requests being referred to the Minister. While intervention is welcomed in all these cases, the process cannot remain unquestioned. In most repeat requests, the circumstances that were raised in a first request were raised in subsequent requests, such as the reason why a person could not return to their country of origin, their family composition in Australia and the length of time they had lived in Australia. These were ultimately what led to an intervention.

CASE STUDY #21

An asylum seeker from Asia applied unsuccessfully for a Protection Visa. She and her husband had lived in Australia for almost eight years and applied for ministerial intervention four times before they were approved. The information presented in each request had not changed: the circumstances of their fleeing and why they could not return; their daughter was an Australian Permanent Resident; they had no family left in their country of origin; the asylum seeker had nine siblings who were all Australian citizens; and she cared for her chronically ill sister.

In other cases 'new' can only be defined as information that loosely falls within the Minister's guidelines for intervention and certainly of less importance than the information that did fall within the guidelines but was disregarded. In our recent experience this is the way that the 'legacy' cases are being referred for ministerial consideration.

CASE STUDY #22

A 50 year old asylum seeker from Africa applied unsuccessfully for a Protection Visa in 2004 on the basis of ethnic persecution in his country. His family has been in hiding since he left his country. In Australia he had a stroke and suffers from chronic poor health. He requires daily medication including blood thinners, which he cannot obtain in his home country.

Two requests for ministerial intervention were refused.

A third request lodged in 2008 restated the compelling nature of his case and his health needs, which will go unmet if he is returned.

The third request was recently referred to the Minister despite there being no 'new' information presented by his advocates.

There is no merit in continuing with the line that it is 'new' information that is leading to a referral, as opposed to political and cultural change and an understanding of the human cost involved in leaving these cases unresolved.

CASE STUDY #23

An asylum seeker from Asia arrived in Australia with her husband and three daughters in 1996 and applied unsuccessfully for a Protection Visa.

She and her husband separated while in Australia and she made several requests to stay in Australia with her children. The information in her fifth request was not new, although it was compelling. There were risks to her and her youngest daughter's safety if returned as failed asylum seekers. Two of her daughters had become Permanent Residents in Australia and the family faced separation if they were returned. All three daughters were studying at university on scholarships and were exceptional students. Countless community support had been provided indicating the family's level of integration in Australia over the 12 years they had lived here.

The asylum seeker's fifth request was successful.

RECOMMENDATIONS

- ★ **Introduce a pro-forma for DIAC officers to use that summarises an applicant's case against the criteria set out by the Minister's Guidelines to ensure that there is no dilution of claims and that all relevant factors are included in a clear and concise manner.**
- ★ **Provide reasons for decisions where a request is refused.**
- ★ **Provide legal advice to asylum seekers to ensure requests contain all relevant information.**
- ★ **Develop a faster decision-making process for the Minister.**
- ★ **Grant humanitarian discretion to DIAC officers to remove the need to approach the Minister. This is predicated on DIAC officers having received appropriate education and training.**

V COMPLEMENTARY PROTECTION

The time for a system of complementary protection in Australia is long overdue. At the time of writing this paper the Federal Government has just announced that almost \$5 million will be dedicated to establishing such a system.

While such a reform would be welcome, the dangers regarding the quality and consistency of decision-making remain. Education and training of decision-makers in assessing claims under a system of complimentary protection is imperative given the concerns identified above.

Under such a system, DIAC will assess an asylum seeker's claims under the *Refugee Convention* and if refugee criteria are not met, go on to assess particular protection needs arising under other relevant human rights treaties such as the *Convention Against Torture and International Covenant on Civil and Political Rights*, where Australia's obligations not to refoule or return an asylum seeker where they could face torture are invoked.

Jane McAdam (2008) states that,

'...decision-makers would continue to rigorously test and develop the bounds of the refugee definition in accordance with evolving human rights norms and comparative jurisprudence, but would also have additional grounds on which they could grant protection in accordance with Australia's international obligations.'

To date, DIAC and the RRT have been reluctant to take an expansionist approach to refugee and particularly to humanitarian claims. The cases where this has happened have been the exception.

If they are to have increased responsibility and a role to play in the development of refugee and human rights law, then ongoing education and training as well as a robust system of review must remain a priority.

RECOMMENDATIONS

- ★ **Under a system of complementary protection, asylum seekers who are found not to be refugees under the Refugee Convention are to be assessed as to whether they are owed protection under:**
 - ★ *The Convention relating to the Status of Stateless Persons*
 - ★ *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
 - ★ *The International Covenant on Civil and Political Rights*
 - ★ *The International Convention on Economic, Social and Cultural Rights*
 - ★ *The International Convention on the Elimination of All Forms of Racial Discrimination*
 - ★ *The Convention on the Elimination of all Forms of Discrimination Against Women*
 - ★ *The Convention on the Rights of the Child.*
- ★ **Provide ongoing and adequate education and training for DIAC officers and appropriate systems of review before the RRT.**
- ★ **The s.417 process to remain in place for humanitarian cases falling outside the refugee or complementary protection criteria.**

VI SECTION 48B OF THE MIGRATION ACT

Once an application for a Protection Visa has been refused, an asylum seeker is barred by s.48A of the Migration Act from making a new application. Only ministerial intervention pursuant to s.48B of the Migration Act can permit an asylum seeker to make a new application. However there are guidelines that need to be met in order for this to happen including that any additional information provided must:

- 1] appear to be credible;
- 2] be Convention-related;
- 3] enhance the applicant's chance of making a successful claim;
- 4] not have been provided previously for plausible and compelling reasons.

The Guidelines also provide that any *non-refoulement*⁹ obligations under the *Refugee Convention*, the *Convention Against Torture* and the *International Covenant on Civil and Political Rights* must be taken into account when considering exercising powers granted by s.48B of the Migration Act.

The concerns with s.48B mirror those with s.417 – the ministerial process is discretionary, non-reviewable, non-transparent and often lengthy.

Furthermore, the most vulnerable asylum seekers seeking to make use of s.48B are often faced with

credibility issues surrounding the late disclosure of information, or there has been an insistence by DIAC that they obtain evidence, which they cannot get, to prove their claims. This has been the recent experience for women disclosing domestic violence, sexual assault or trafficking, relevant to a refugee claim.

For women making a late disclosure of domestic violence, this may be because she does not have insight into the nature of the family violence as a crime, she is not aware it may be relevant to refugee claims or she held fear of retaliation if she separated from an abusive partner.

For women making a late disclosure of sexual assault or trafficking this may be because of reasons including culture and shame, a lack of trust or a lack of hope until that time.

Decision-makers have displayed a lack of sensitivity to these issues and applied s.48B inconsistently.

In its current form, Australia is also at risk of breaching its international obligations towards asylum seekers, particularly its *non-refoulement* obligations.

Asylum seekers who have applied under s.48B including on the grounds that new information has come to light, such as Summons or Warrants of Arrest being issued against them in their country of origin, have not always been successful.

RECOMMENDATIONS

- ★ Where women need to make their own application or a new application raising sensitive issues not previously put such as family violence, they should not have to seek ministerial intervention under s.48B to do this. An alternative and more direct process with safeguards should be introduced.
- ★ Continue to develop a staff culture of compassion and respect for clients.
- ★ Provide ongoing and adequate education and training for DIAC officers regarding assessment of credibility and evidence.
- ★ Incorporate the principle of *non-refoulement* into domestic law.
- ★ Developing a faster decision-making process for the Minister under s.48B.

⁹ The obligation of non-refoulement is found in Article 33(1) of the *Refugee Convention* which states: '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 obligation is enshrined in Article 3 of the *Convention Against Torture* which prohibits the return or transfer of any person to a country where there are substantial grounds for believing he or she would be at risk of being subjected to torture.



VII REMOVALS

Two seminal reports have been prepared regarding the return and removal of asylum seekers: *'Returning Failed Asylum Seekers from Australia'* (Corlett, 2007) and *'Removing Seriously Ill Asylum Seekers from Australia'* (2007).

The recommendations in these two reports are comprehensive and commendable.

From the outset it is acknowledged that there is no comprehensive term to cover the situation for asylum seekers who face return. The concepts of 'voluntary'

and 'involuntary' are problematic, given the coercive range of measures open to DIAC to ensure that asylum seekers leave Australia. It is appropriate to use the word 'remove' or 'deport' in some cases given the duress that was involved.

Critical issues that remain unaddressed include 'fitness to travel' assessments, in the absence of judicial or independent oversight and the process itself. These are concerns which affect both asylum seekers in detention or in the community.

CASE STUDY #24

In October 2007 an asylum seeker was deported. He and his family had been persecuted in their country of origin and the RRT accepted he had a well-founded fear of persecution on political grounds but found that he could relocate in his country. At the time of his deportation he had spent approximately three years in detention. In detention he was diagnosed with major depression and Post Traumatic Stress Disorder. He had self-harmed on numerous occasions.

A written request in August 2007 for an updated mental health assessment was met with the following response from the Detention Health Services officer:

'Thanks for forwarding [the lawyer's] concerns regarding Mr X to Detention Health. I have sought advice from IHMS regarding Mr X's mental state and suitable access to mental health services. They have advised that in 2007 Mr X has seen the mental health nurse on 15 occasions (most recently 24 July) and the psychiatrist on 4 occasions (most recently 13 July; and being seen again today). In addition he has seen the visiting GPs and registered nurses on a regular basis. IHMS have advised that there are currently no concerns regarding his mental health.'

Three requests for ministerial intervention were refused.

On the day of his removal he was taken to an isolation cell from midday, dressed in 'suicide prevention' clothing and helmeted. At 3am he was sedated in order to be physically removed.

Preceding his removal the 'International Obligations and Intervention' team were satisfied his circumstances did not fall within guidelines for humanitarian intervention, including under the ICCPR or the CAT and his case *'was thoroughly assessed against Australia's international obligations'*.

While the case received some media coverage at the time of the removal the former Minister of Immigration saw fit to defend the decision to remove by stating the man's claims *'were all lies'*.

Through ongoing advocacy and following an inquiry the asylum seeker was eventually allowed back in Australia in August 2008.

CASE STUDY #25

In August 2007 DIAC attempted to remove an asylum seeker from immigration detention. At approximately 3.30pm he was taken from detention to Sydney Airport. At approximately 4.40pm his lawyer was notified of the attempted removal by the man's fiancé. His lawyer telephoned the case officer at Villawood to confirm this, given the man had recently been assessed as 'not fit to travel' and given that no outcome had been received to his request for ministerial intervention. The Case officer stated the request had been refused and that the client was with 'removal officers'.

The refusal decision was sent after the asylum seeker had been taken to the airport.

The asylum seeker had a history of depression and self-harm. He had spent two weeks in a psychiatric hospital prior to his removal.

A Federal Court injunction was obtained that night preventing his removal.

RECOMMENDATIONS

- ★ **Fitness to travel should be assessed against clear guidelines and should cover both physical and mental health.**
- ★ **Seriously ill individuals should only be returned if their condition can be treated or managed in their country of return.**
- ★ **There should be judicial or independent oversight of fitness to travel assessments.**
- ★ **Minimum standards of care must be developed for the return or removal process.**
- ★ **Asylum seekers should not be returned to civil war, natural disaster or where basic needs such as food and shelter cannot be met.**
- ★ **The Government should increase aid and development programs in countries of return.**

CONCLUSION

In its thirty-nine concluding observations regarding Australia, reported on 22 May 2008, the United Nations *Committee Against Torture* refers to eight immigration matters including:

- Concerns over mandatory detention policy and calls for its abolition;
- A call for the end of 'excised' offshore locations for visa processing such as Christmas Island;
- Lack of incorporation into domestic laws of the principle of *non-refoulement* whereby no State shall expel, return or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture;
- Education and training of immigration officials and personnel including health service providers.

Over the last seven years the ASRC has identified similar concerns.

The above recommendations are a starting point to ensure Australia's international obligations to asylum seekers are upheld both substantively and procedurally in law and practice. Only then will the immigration system move away from a deterrence-focussed culture and embrace the true spirit of the United Nations' *Refugee Convention*.



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