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Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
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Thursday, 21 July 2005

Dear Secretary

Public Submission to Senate Legal and Constitutional Committee
Inquiry into the administration and operation of the Migration Act 1958

Proposal to amend the Migration Act

Summary: Australia does not adhere to clauses of "non-refoulement" in the Convention when removing failed asylum seekers from Australia. Forced deportations breach the UN Refugee Convention as well as several other conventions. Removals from Australia should be in line with Convention demands and be voluntary, in collaboration with removee, as a last resort only, to a destination chosen in consensus with the removee.

Introduction: several points underpinning the proposal

1. The United Nations Refugee Convention is quite explicit about the status of refugees, also both before and after the process of acceptance by member countries. The UNHCR states that *refugee status exists prior to and independent of the recognition of this status* by member countries. The clear implication of this is that the Minister or politicians, or a judge or assessment panel may well say "this is not a refugee", but such statements are at all times a subjective interpretation of how that Minister, politician, judge or assessing officer views the refugee case against the guidelines of the Convention. The implication is also one where countries need to incorporate this notion in its assessment and in its public statements, for example in the media and in parliament.

2. A Convention country that cannot conclude that an asylum claimant is a refugee in their understanding and assessment still has an obligation to this claimant. The claimant may have failed the assessment, but it is not correct to call the claimant "a failed refugee", or "not a refugee" in keeping with the point made above.

3. The obligations a country such as Australia has to those who do, in its view, not fall within the criteria for refugee status, are several, but the most familiar obligation is one where we promise to "not refoule" a claimant. In common terms we promise to not return the claimant to

a country where he or she is in fear of persecution. This fear, as defined in the convention, is not one as assessed during the refugee claim assessment, but solely *as perceived by the claimant and as expressed by the claimant*. After all, the claimant was unsuccessful in gaining refugee status, yet the country cannot say that the claimant does not have any validity when he/she expresses to have a fear for persecution when returned to the country he/she fled from. While this seems a contradiction - because the country has just concluded that the claimant's claim 'to be in fear of persecution' does not hold validity in its assessment - is simply is a truism when looking at the Convention that the assessment of "fear for persecution" is one simply as defined by the claimant. The criterion simply is "if the asylum claimant fears it". This being the case, there is a ground for 'collaboration' with the asylum claimant, also in this area.

Because of Australia's non-refoulement obligations, it also stands clear that a partisan defender - such as a lawyer or migration agent of the claimant's choice, accompanies a claimant throughout this phase.

4. Australia has forcibly removed asylum seekers. To the methods during these journeys belong physical restraints such as hand-cuffs, foot-cuffs, mouths taped up, hoods, and chemical restraints - injections or oral sedatives.

5. Australia has also removed people to destinations where they are at a serious risk for further persecution, imprisonment, torture, or death. Several reports and literature now published, testify of these removals.

6. While many Convention countries apply a process of "secondary assessment" for those who cannot fall within the narrow Refugee Convention criteria, evaluating whether the claimant could be granted a humanitarian visa, Australia does not have embedded in the Migration Act such a secondary assessment system. Australia falls well short compared to other countries in this area.

7. The number of asylum seekers who reach Australia, either "unannounced" by boat or by other means, represents a mere trickle compared to other countries.

8. People who arrive by boat, unannounced, simply do so because they exercise their explicit right: the creation and formulation of *the UN Convention for the Status of Refugees* derives from the fact that boatpeople around the time of the Second World War were repelled from countries' harbours. Boatpeople who arrive in Australia do not have a lesser right to do so that those who arrive unannounced by plane. It is certainly not illegal.

9. The notion of "third country" when considering removal from Australia is an option that only gains credibility in the eyes of the countries approached for this purpose, if it is well-known that Australia does not shirk its responsibility but carries the weight of the world-wide refugee placement and intake, also of unannounced arrivals, and that Australia's treatment of refugees including unannounced arrivals is beyond reproach and of the highest and best international standard and standing.

10. Recent changes to the Migration Act have created a role for an Ombudsman as an outside arbiter. This role is as yet unexplored, but may well be extended in the future.

Proposal

Project SafeCom proposes that the Migration Act be amended so that the Act is convincing and leaves no doubt about the fact that

1. Australia will never forcibly remove asylum claimants from Australia

2. Removal from Australia is a last resort, and secondary determination and the granting of humanitarian visas at all times takes precedence over removal

3. Australia recognises that *the fear of persecution upon return to the country of origin* may exist independent of the assessment by Australian authorities of the validity of a refugee claim under the UN Convention, and Australia therefore recognises and pro-actively exercises its obligation to "not refoule" asylum seekers

4. If, as a last resort only, Australia intends to move towards removal of an out-processed asylum seeker it will do so only in a process of consensus decision-making between the minister or his/her delegate and the asylum seeker. If a consensus cannot be reached, the Ombudsman will act as an arbiter until the consensus has been reached. This consensus process will include the option of the asylum seeker nominating a "red zone destination" or a country or countries where he/she will not be removed to, in keeping with item (3). Australia will support the claimant also by providing costs of lawyer(s) and/or migration agent(s) chosen by the claimant and assisting the claimant throughout this phase

5. The option of resettlement of an out-processed asylum seeker in a "third country" will be vigorously pursued in collaboration with the asylum seeker within the consensus model mentioned in item (4), but the option of "third country resettlement" ranks lower than the option of "secondary determination" mentioned in item (2)

Yours Sincerely,

For Project SafeCom
Jack H. Smit