

'Effective Protection' update: In the last newsletter, we run a discussion paper on the principle of effective protection elsewhere. This update outlines UNHCR's views on the concept as it relates to Indonesia.

UNHCR's VIEWS ON THE CONCEPT OF EFFECTIVE PROTECTION AS IT RELATES TO INDONESIA

UNHCR Canberra has recently reviewed a decision of the Australian Refugee Review Tribunal on the application of the seven-day rule on the basis that "effective protection" was available in Indonesia.

In its finding, the Tribunal reasoned that the refugee could have sought protection from UNHCR in Jakarta, and is therefore only eligible for another TPV.

Quite apart from the consequences which are suffered by the refugee being granted only a TPV, the decision of the Tribunal is a significant one, given that this is the first time the Tribunal has declared that Indonesia offers effective protection on the assumption that the authorities do not refoule refugees/asylum seekers and that UNHCR's presence suffices to provide effective protection.

UNHCR considers that the absence of a threat of refoulement on its own is not sufficient to measure the effectiveness of the availability of protection. The speech by UNHCR's Director of International Protection to the recent session of the UNHCR's Executive Committee elaborates on this in greater detail. In setting out the minimum requirements of "effective protection", the Director emphasized that ascertaining the availability of protection should be informed by the rights set out in the 1951 Convention and the 1967 Protocol as well as other international human rights instruments. It was stated that effective protection is sufficient if, at a minimum, the following is reliably guaranteed:

- there is no likelihood of persecution, of refoulement or of torture or other cruel and degrading treatment;
- there is no other real risk to the life of the person[s] concerned;
- there is a genuine prospect of an accessible durable solution in or from the asylum country, within a reasonable timeframe;
- pending a durable solution, stay is permitted under conditions which protect against arbitrary expulsion and deprivation of liberty and which provide for adequate and dignified means of subsistence;
- the unity and integrity of the family is ensured; and
- the specific protection needs of the affected persons, including those deriving from age and gender, are able to be identified and respected.

Based on the above stated indicators, the protection situation in Indonesia cannot be characterized as affording effective protection. Indonesia is not signatory to the 1951 Convention relating to the Status of Refugees nor to the 1967 Protocol; neither does it have any legislative framework for the protection of refugees. The country thus lacks a legal foundation for international protection of refugees based on which the minimum requirements as set out above could be reliably guaranteed.

Asylum seekers and refugees in Indonesia do not have lawful residence in the country, and are tolerated by the authorities, thus risking arbitrary detention by local law enforcement agencies, and even refoulement under the Immigration Law. Despite UNHCR's intervention, legal regularization of the status of asylum seekers and refugees with the authorities has so far been unsuccessful. There is no lawful access for these persons to the labour market and thus they are not able to work legally, which obviates any adequate and dignified means of existence. There is no possibility of exercising any civil, economic, social or cultural rights. Durable solutions are not guaranteed either, and there are considerable numbers of UNHCR recognized refugees who are rejected for resettlement, and who remain without any prospects of a durable solution. Furthermore, there are no options for family reunification, nor any systematic means, established by the State, of identifying specific protection needs of refugees, including those with special vulnerabilities, nor of addressing them.

The presence of UNHCR in a country cannot be equated with the provision of effective protection. International protection is afforded by States and not by an international organization. The protection activities to be carried out by UNHCR in exercising its mandate as elaborated in Art. 8 of its Statute, which are primarily promotional in nature, reflect that UNHCR does not itself afford protection. It may also be added that UNHCR in Indonesia has a limited presence, and does not have field offices outside the capital city, Jakarta, in a country that consists of many thousands of islands. Moreover, the facts reveal that the refugee in this case was not aware of the existence of UNHCR in Indonesia, and thus he could not have approached the office to seek assistance. This is a factor which should be taken into account in terms of the weight placed on asylum seekers having access to UNHCR in Indonesia.

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