

SENATE LEGAL AND CONSTITUTIONAL
LEGISLATION COMMITTEE

INQUIRY INTO THE PROVISIONS OF THE
MIGRATION AMENDMENT (JUDICIAL REVIEW) BILL 2004

SUBMISSION NO: 2

DATE RECEIVED: 27 APRIL 2004

ORGANISATION: UNITED NATIONS HIGH
COMMISSIONER FOR REFUGEES
(UNHCR)

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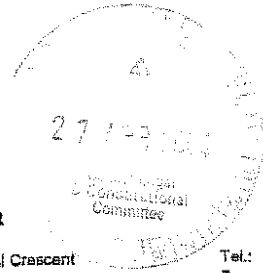
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Re: Inquiry into the Migration Amendment (Judicial Review) Bill 2004

Dear Ms. Gell

We would like to refer to your letter dated 05 April 2004 regarding the above-mentioned subject. UNHCR would like to thank the Australian Senate Legal and Constitutional Committee for giving us the opportunity to present a written submission on this issue. However, on this occasion, UNHCR RO Canberra deems it unnecessary to make a full submission.

As you are probably aware, UNHCR has already made a submission to the Senate Legal and Constitutional Affairs Committee inquiry into the operations of Australia's Refugee and Humanitarian Program in 1999, which included our comments on the then Migration Legislation Amendment Bill (No.5) 1997, which was pending before the Parliament at that time. In that submission, UNHCR had stated its views on the importance of maintaining a full judicial oversight of any administrative process that directly affects Australia's compliance with its international obligations. In particular, we also stated that:

"...a main strength of Australia's administrative process is the supervision of the courts. Judicial consideration of legislation contributes to compliance by establishing parameters of Australia's international legal obligations. Similarly, procedural safeguards that are from time to time elaborated by courts enhance administrative procedures that implement legislation. An ancillary benefit of judicial oversight is the considered interpretation of the Convention. Australian judicial opinion on the meaning of the Convention is cited virtually by every country in the world where refugee status determination exists. Equally, Australian legal precedent informs UNHCR's own interpretation of the Convention."

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In this regard, we would like to stress that UNHCR's view on the importance of judicial review of immigration decisions, including those of the Refugee Review Tribunal remains the same. UNHCR appreciates your interest in our views and for engaging in constructive dialogue. We hope that you will further consult us in the future regarding similar issues.

We are also attaching herewith a copy of relevant Conclusions from UNHCR's Executive Committee, a governing body of the High Commissioner's Program, of which 54 States (including Australia) are presently members, for your information.

Yours sincerely



Michel Gabaudan
Regional Representative

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REFUGEE STATUS DETERMINATION

Conclusions Specific to Refugee Status Determination

The Executive Committee,

No. 8 (XXVIII) – 1977 – Determination of Refugee Status

(a) Noted the report of the High Commissioner concerning the importance of procedures for determining refugee status;

(b) Noted that only a limited number of States parties to the 1951 Convention and the 1967 Protocol had established procedures for the formal determination of refugee status under these instruments;

(c) Noted, however, with satisfaction that the establishment of such procedures was under active consideration by a number of Governments;

(d) Expressed the hope that all Governments parties to the 1951 Convention and the 1967 Protocol which had not yet done so would take steps to establish such procedures in the near future and give favourable consideration to UNHCR participation in such procedures in appropriate form;

(e) Recommended that procedures for the determination of refugee status should satisfy the following basic requirements:

(i) The competent official (e.g. immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State, should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority.

(ii) The applicant should receive the necessary guidance as to the procedure to be followed.

(iii) There should be a clearly identified authority -- wherever possible a single central authority -- with responsibility for examining requests for refugee status and taking a decision in the first instance.

(iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.

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(v) If the applicant is recognized as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status.

(vi) If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing stem.

(vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.

(f) Requested UNHCR to prepare, after due consideration of the opinions of States parties to the 1951 Convention and the 1967 Protocol, a detailed study on the question of the extra-territorial effect of determination of refugee status in order to enable the Committee to take a considered view on the matter at a subsequent session taking into account the opinion expressed by representatives that the acceptance by a Contracting State of refugee status as determined by other States parties to these instruments would be generally desirable;

(g) Requested the Office to consider the possibility of issuing-for the guidance of Governments-a handbook relating to procedures and criteria for determining refugee status and circulating -- with due regard to the confidential nature of individual requests and the particular situations involved -- significant decisions on the determination of refugee status.