



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

Senate Select Committee on Ministerial Discretion in Migration Matters

Inquiry into Ministerial Discretion in Migration Matters

Submission by United Nations High Commission for Refugees

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to comment on the issue of ministerial discretion insofar as it impacts on Australia's international obligations as they relate to asylum seekers, refugees and stateless persons.
2. UNHCR will be addressing its comments only to the grant of protection visas under the term of reference b) *the appropriateness of these discretionary ministerial powers within the broader migration application, decision-making, and review and appeal processes.*

UNHCR Standing to Comment

3. Australia has assumed responsibility to extend protection to asylum seekers and refugees through accession to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (the Refugee Convention).¹ UNHCR is regularly requested to comment on national legislation regarding refugees and related issues by States, pursuant to the Preamble and Article 35 of the Refugee Convention as well as the Statute of the Office of the United Nations High Commissioner for Refugees (the Statute).
4. The supervisory role of UNHCR relating to the protection of refugees worldwide is complemented by the Conclusions developed annually by the Executive Committee of the High Commissioner's Programme (EXCOM), comprised of State Parties to the Refugee Convention and its Protocol. The EXCOM Conclusions are developed through a consensual process requiring the agreement of States, and set international protection standards. Australia has traditionally taken an active role in the work of EXCOM.
5. When the *1961 Convention on the Reduction of Statelessness* entered into force, UNHCR was provisionally entrusted by the United Nations General Assembly with the role of fulfilling the functions foreseen under Article 11 "of a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority". This provisional role was extended by way of General Assembly

¹ The term 'Refugees' Convention' is used to refer to the *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, [1954] ATS 5, (entered into force for Australia 22 April 1954) as applied in accordance with the *Protocol Relating to the Status of Refugees*, opened for signature on 31 January 1967, [1973] ATS 37, (entered into force for Australia 13 December 1973).

Resolution 3274 in 1974. It was renewed and indefinitely extended through General Assembly Resolution 31/36 in 1976.

6. In 1995, the Executive Committee of the High Commissioner's Programme discussed the problem of statelessness, adopting a Conclusion on the Prevention and Reduction of Statelessness and the Protection of Stateless Persons (Conclusion No.78 (XLVI) of 1995). UNHCR was requested to strengthen its efforts in the area of statelessness. UNHCR was encouraged to continue its activities on behalf of stateless persons and, moreover, was requested actively to promote accessions to the *1954 Convention relating to the Status of Stateless Persons* and the *1961 Convention on the Reduction of Statelessness*, as well as to provide technical and advisory services. These responsibilities were reconfirmed in General Assembly Resolution 50/152 of December 1995.
7. This commentary examines the ministerial discretion power on section 417 of the Migration Act in light of relevant international instruments and EXCOM Conclusions.

Non-Refoulement Obligations

8. Under the Refugees' Convention a refugee is any person who has:
 - ... a well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion, is outside the country of his nationality or of habitual residence, if stateless and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.
9. Article 33 of the Refugees' Convention prohibits States Parties from returning ('refouling') a refugee to the frontier of a country where, amongst other things, his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.
10. UNHCR would note that the use of ministerial discretion can, and has in the past acted as a safeguard or added level of review to ensure that Australia meets its non-refoulement obligations under the 1951 Convention, and in that light should be preserved and commended.
11. On the other hand, the presence of Ministerial discretion is not in itself sufficient to secure the obligations of Australia under the 1951 Convention because by its very nature it is non-compellable and non-reviewable.

Ministerial Discretion for Excised Offshore Entry Persons

12. A new application of Ministerial discretion regards the ability of excised offshore persons recognised as refugees to apply for an Australian protection visa. A refugee who has been recognised as such by the competent authorities has obtained a regularised status legalising that individual's presence in Australia. Despite this, national law requires that in order for a refugee to move from an excised area to the rest of Australia's territory, the Minister must lift the bar and allow the recognised refugee to apply for a valid visa, a subclass 447 Secondary

Movement Offshore Entry (Temporary) Visa.² According to the requirements of this visa, in addition to refugee like criteria, the person must also meet standard offshore health and character requirements.

13. This restricts the recognised refugee's movement within the State's territory, and is inconsistent with Article 26 which provides that a refugee has the right to move freely within a Contracting State's territory and to choose their place of residence. Further, it imposes restrictions on the movement of a refugee whose status in the country has been regularised, in contravention of Article 31(2) of the Refugee Convention.
14. UNHCR would advise that the use of Ministerial discretion in this context is inappropriate. The refugee has engaged Australia's protection obligations at this point.

Sur place claims

15. *The Migration Legislation Amendment Act (No.6) 2001* disregards any conduct engaged in by the asylum-seeker in Australia (on *sur place* claim) unless the latter satisfies the Minister that conduct was engaged in for purposes other than strengthening his/her refugee claim. UNHCR is concerned that the Minister's authority is discretionary and non-compellable, and therefore may not provide an adequate safeguard against the risk of *refoulement* in the event that the applicant's activity (despite such activity being undertaken only for the specific intention of establishing or strengthening his/her protection claims) has come to the attention of authorities in the country of origin and, as a consequence, the applicant would suffer persecution if returned. UNHCR strongly recommends that it is desirable that such activity be included in the applicant's claim and should not be subject to Ministerial discretion.

Complementary Protection versus Temporary Protection

16. UNHCR would like to share with the Committee for the benefit of its deliberations recent international debate and consensus on the emerging issue of 'complementary protection'.
17. There is a need to differentiate between Temporary Protection as defined by UNHCR, Temporary Protection as defined by Australia, and Complementary Forms of Protection as defined by UNHCR. UNHCR believes that the term "temporary protection" should only be applied to mass influx situations where a State is overwhelmed by spontaneous arrivals, and where arrivals are not given an individualised refugee status determination. Under the Australian legislative regime, a "Temporary Protection Visa" is given routinely to a refugee recognised by a sophisticated and lengthy individualised procedure. Complementary protection, on the other hand, applies to people who do not meet the formal definition of a refugee but have issues around safety of return or general humanitarian issues. States sometimes grant these people time-limited visas, with lesser rights than refugees. It is an important emerging issue for States, as explored below.

² In DIMIA web site, www.immi.gov.au New Visa Regime, Questions and Answers, If the s46 bar is lifted and the person remains in the excision zone, s/he will be eligible for subclass 447 Secondary Movement Offshore Entry (Temporary) visa.

Complementary Protection

18. A number of asylum countries have in place administrative or legislative mechanisms for regularizing the stay of persons who are not formally recognized as refugees, but who are nonetheless in need of protection, or for whom return is not possible or advisable for a variety of reasons. It is a positive way of responding pragmatically to certain international protection needs.
19. After the Global Consultations, a two-year process of discussing the future of the 1951 Refugee Convention, States, including Australia, affirmed a framework document called the *Agenda for Protection*. It states:
 - Provision of complementary forms of protection to those who might not fall within the scope of the 1951 Convention, but require international protection.
 - Within the framework of its mandate, ExCom to work on a Conclusion containing guidance on general principles upon which complementary forms of protection should be based, on the persons who might benefit from it, and on the compatibility of these protections with the 1951 Convention and other relevant international and regional instruments.
 - States to consider the merits of establishing a single procedure in which there is first an examination of the 1951 Convention grounds for refugee status, to be followed, as necessary and appropriate, by the examination of the possible grounds for the grant of complementary forms of protection.
20. States currently use a variety of mechanisms to abide by their international obligations of non-refoulement for persons who are not refugees (ie do not have a fear of persecution for the reasons set out under the 1951 Convention), but who have pressing humanitarian concerns about their return to their country of origin.
21. States may decide to allow prolonged stay solely for compassionate reasons, such as age, medical condition, or family connections. In cases where removal is not possible, either because transportation is not feasible, or if travel documents are unavailable or cannot be obtained, continued presence may be allowed for practical reasons. The persons concerned are normally not asylum-seekers or, if so, have had their applications properly rejected and were found not to be in need of international protection. These cases must be clearly distinguished from cases where international protection needs and an obligation to respect the fundamental principle of non-refoulement are present, and which are thus of direct concern to UNHCR.
22. Of those cases where an international need for protection is present, two main categories have been identified by the June 2000 Standing Committee paper, entitled "Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime":³
 - (a) Persons who should fall within the terms of the 1951 Convention relating to the Status of Refugees or its 1967 Protocol, but who may not be so recognized by a State as a result of varying interpretations;

³ EC/50/SC/CRP.18, 9 June 2000

(b) Persons who have valid reasons for claiming protection, but who are not necessarily covered by the terms of the 1951 Convention.

Beneficiaries who could meet the 1951 Convention/1967 Protocol criteria

23. Varying interpretations by States of the inclusion criteria set out in Article 1 of the 1951 Convention have resulted in significant differences in recognition rates between States for persons in similar circumstances. Some persons who are recognized as refugees in one State may be denied such status in another.

24. At least three groups can be identified on whom divergent views concerning the interpretation of the refugee definition criteria have emerged:

(a) One important group consists of those who fear persecution by non-State agents for 1951 Convention reasons. Although in most countries they are recognized as refugees under the Convention, in a few countries they are denied refugee status and provided with an alternative status;

(b) Another group comprises refugees who flee persecution in areas of on-going conflict. In a number of countries, they are treated as 'victims of indiscriminate violence' and provided with complementary protection. This is the case even when the conflict they flee is rooted in ethnic, religious or political differences, which specifically victimize those fleeing. In other States, this may well be the basis for their recognition as Convention refugees;

(c) A third group consists of persons who fear or suffer gender-related persecution, and who otherwise fulfil the criteria under the Convention. In a significant number of States, they are provided only a complementary or subsidiary status, often on a legislative basis, instead of being recognized as refugees. In other jurisdictions, such persons are recognized as fulfilling the Convention criteria.

25. It is UNHCR's recommendation, based on relevant State practice, Executive Committee Conclusions and the outcomes of the Global Consultations (to which Australia made an important contribution), that the above categories should be covered by the 1951 Convention and 1967 Protocol. (Further documentation on this point can be provided to the Committee on request.) To achieve overall consistency and to ensure a full and inclusive interpretation of the Convention refugee definition, a harmonized approach within the Convention regime is desirable. There may now be greater potential for inconsistency between Australian practice and that of other States due to the introduction of *Migration Legislation Amendment Bill (No. 6) 2001*, especially relating to category (c) gender-based persecution.

Persons who have valid reasons for claiming protection, but who are not necessarily covered by the terms of the 1951 Convention.

26. Persons who may not necessarily be 1951 Convention refugees but who nevertheless need international protection are commonly referred to as refugees falling under UNHCR's wider competence. This competence is generally

understood also to cover persons outside their countries who are in need of international protection because of a serious threat to life, liberty or security of person in the country of origin, as a result of armed conflict or serious public disorder. For example, persons fleeing the indiscriminate effects of violence and the accompanying disorder in a conflict situation, with no specific element of persecution, might not fall under a strict interpretation of the 1951 Convention refugee definition, but may still require international protection, and be within UNHCR's competence. This is discussed in detail below under Australia's obligations under international human rights treaties.

Substantive rights of refugees under the 1951 Refugee Convention

27. UNHCR accepts that the 1951 Convention does not govern particular domestic visa categories. However, the 1951 Convention does oblige State signatories to "as far as possible facilitate the assimilation and naturalization of refugees" under Article 34. UNHCR also strongly believes that voluntary repatriation in conditions of safety and dignity remains the preferred solution for refugees. If the current visa allowed for the basic rights of refugees under international law, and for a reassessment only under cessation grounds, its provisional nature might be more acceptable.
28. However, the conditions of the Temporary Protection Visa are unacceptable to UNHCR in their denial of the Convention right to travel documents as well as the denial of family reunion.
29. While the amendments allow for the Minister to take decisions to waive the requirements in certain cases where he perceives it to be in the public interest, in our view, such a discretion is insufficient to fulfil Australia's obligations. Moreover, a public interest test is inappropriate for what is more properly the fulfilment of an international legal obligation.

The "Seven Day Rule"

30. The other pressing issue that arises from the reassessment process from UNHCR's perspective, is the application of the new "seven-day rule" which creates "rolling" TPVs and potentially a permanent block to family reunion and travel papers for these people.
31. UNHCR has concerns about the seven-day rule both in terms of the impacts on the asylum-seeker and the logistical issues raised. For example, asylum-seekers may have legitimate reasons for taking longer than seven days to approach the authorities of a country. The reference to UNHCR is even more troubling to us in the sense that UNHCR's presence in a country may be very minimal - such as PNG where we have one officer. UNHCR is sometimes present in an armed conflict situation where our office would be unable to provide protection. It also implies that UNHCR itself is a physical provider of protection, rather than the fact that the provision of protection is the sole prerogative of States. UNHCR would welcome the opportunity to share the current context of our relevant field operations in this regard.

32. UNHCR believes the substantive test of effective protection agreed to by States at the recent Lisbon Roundtable would be more appropriate rather than such a minimal threshold test. UNHCR believes that it is necessary that careful consideration be given to the facts of a particular claim, and to available country information.

Australia's Non-refoulement Obligations – International Human Rights Instruments

33. UNHCR makes reference to the analysis by the Human Rights and Equal Opportunity Commission of Australia's international human rights obligations under the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the Convention Against Torture in the context of non-refoulement.

Convention Against Torture

34. UNHCR would recommend that CAT claims are considered at the primary stage of protection assessments, so that this crucial issue can be reviewed by the same system which reviews refugee status as the consequences of a wrong decision are as severe. At present, the only way to have a CAT claim considered is by an internal non-reviewable submission by the Department at the deportation or cancellation stage, or by way of a section 417 application to the Minister. A complaint to the UN Committee against Torture may take years to process and is only persuasive in its authority. This may mean that a person with a valid CAT claim could spend many years in immigration detention.

1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness

35. The UNHCR's role in relation to stateless persons has arisen from concerns that, due to their lack of national protection, stateless persons are placed in a position analogous to that of refugees. Stateless persons hold an unequal status in their country of residence which, particularly when aggravated by political changes, may result in complications, including displacement and flight. The basic human rights of stateless persons are, in principle, to be respected in the country of habitual residence. Such persons are not, therefore, assumed to be in acute need of international protection unless they are also refugees. However, statelessness brings an added element of vulnerability and, in some instances, stateless persons are also in need of protection.

36. It is also possible for persons to be stateless *without* facing persecution. If the individual is stateless but has no well-founded fear of persecution, the 1954 and 1961 Statelessness Conventions are the reference points for determining the appropriate response.

37. Currently, there is no avenue for Australia to consider the claims of a stateless person who does not also have a refugee claim, except under a section 417 application which is non-compellable and non-reviewable. UNHCR would recommend that statelessness claims are considered at the primary stage of

protection assessments. Due to a lack of nationality, stateless people can spend long periods in detention awaiting deportation.

Conclusion

UNHCR would note that the use of ministerial discretion can, and has in the past acted as a safeguard or added level of review to ensure that Australia meets its international legal obligations under the 1951 Convention, the Statelessness Convention and international human rights treaties, and in that light should be preserved and commended. On the other hand, the presence of Ministerial discretion is not in itself sufficient to secure the obligations of Australia under the 1951 Convention because by its very nature it is non-compellable and non-reviewable.

Recommendations

Recommendation One

The consideration of obligations under other international instruments is positive, but should be considered as part of the initial DIMIA officer protection assessment and, where necessary, also at later stages of the refugee status determination procedure. This is particularly important considering the practice of non-reviewable immigration detention may mean that valid cases spend years in detention or on a temporary visa exhausting the asylum process until discretion is exercised. This should also be incorporated into the Offshore Processing Guidelines.

Recommendation Two

UNHCR would recommend that DIMIA policy, procedures and training should therefore incorporate detail on these international treaty obligations, as well as the 1951 Convention.