

REFUGEE COUNCIL OF AUSTRALIA

INCORPORATED IN A.C.T. - ABN 87 956 673 083

37-47 ST JOHNS RD, GLEBE, NSW, 2037
PO BOX 946, GLEBE, NSW, 2037
TELEPHONE: (02) 9660 5300 • FAX: (02) 9660 5211
info@refugeecouncil.org.au • www.refugeecouncil.org.au

May 2002

POSITION PAPER ON COMPLEMENTARY PROTECTION

Introduction

Humanitarian Status in Australia

- i. Inefficient Use of Resources
- ii. Issues of Transparency and Accountability
- iii. Adequacy of present system in meeting actual protection needs

1. Introduction:

Although the cornerstone of the international protection regime remains the 1951 Convention Relating to the Status of Refugees (the Convention), there is increasing reason to believe that it alone is inadequate in defining actual protection needs. The Convention stipulates strictly defined and legal criteria in determining refugee status with the result that fewer than half of the world's displaced people, who UNHCR have identified as "at risk", are or would be considered refugees in a de jure sense.

In some respects this clearly relates to historical factors. The Convention is clearly a child of the World War II experience and the root causes of population displacement today have shifted somewhat. By far the majority of conflict induced displaced people today are fleeing generalised violence and human rights abuses stemming from civil war. As the Convention specifies that a person must face or fear persecution, that is they must be individually targeted for who they are, what they are or what they believe in, victims of such events are unlikely to qualify for protection. The predominance of civil war has also led to massive numbers of internally displaced people who, by definition, also fall outside of protection provided for by international law.

Many learned commentators have also noted a corresponding trend in the developed world of states excluding asylum seekers with genuine protection needs by insisting on an increasingly stricter legal application of the Convention.

There is currently great concern that the nexus between human rights and refugee protection is gradually being eroded and being replaced with a legal regime, the prime purpose of which is to control refugee inflows while simultaneously appearing to be satisfying international obligations. The response by those concerned that the initial spirit of the Convention should prevail over a narrow legal interpretation, however, has been divided. Some believe that the Convention itself should be revised comprehensively to accommodate the new reality. A more realistic approach is held by those who seek domestic legislation aimed at broadening

eligibility for protection in a manner that would complement the Convention as it now stands. UNHCR, itself, appears to take the latter position in which the concept of de-facto refugee status sits side by side with the de-jure refugee. RCOA also firmly believes that the Convention should not be tampered with and agrees with the European Council for Refugees and Exiles's (ECRE) view on the role that domestic or other legislation must play in this. As ECRE noted:

The term 'de-facto refugee' is itself an indication that the legal definition is no longer thought to be congruent with today's refugee reality.... Legislation, whether on the national or an international level, cannot modify the refugee reality but it can modify the legal concept so the reality is adequately met. Where this is the case there is no longer a need to distinguish between "de-jure" and "de-facto" refugees.

The extent to which individual countries have responded to such a challenge is a moot point. The Scandinavian countries of Denmark and Sweden have introduced comprehensive legislation which recognises fully the protection needs of certain groups of people who fall outside of the Convention but nevertheless have compelling humanitarian reasons to stay. De-facto refugees in these countries receive the same social and political rights as de-jure refugees. In the UK, de facto refugees can enjoy quasi-residency status under its Special Leave to Remain legislation.

Elsewhere in Europe the situation is not as clear. De-facto refugees in Belgium, France and Greece have no formal rights at all and their continued presence in those countries is subject to a temporary waiver of a deportation order which must be reviewed regularly.

Most of the other states in Europe fall somewhere in between these two extremes of full legal status and persona non grata. De-facto refugees in Germany, Switzerland and Austria enjoy a slightly more secure status. Domestic legislation allows for the provision of temporary protection against refoulment but the presence of such people is "merely tolerated" as indicated by the German word Duldung. Accordingly they are granted few if any social rights.

2. Humanitarian Status in Australia:

Australian legislation also allows for stay in Australia for non-Convention reasons through the on-shore program. This is provided for in s.417 of the Migration Act. In accordance with the Act, the Minister for Immigration has the non-compellable and non-appealable discretionary power to grant permission to stay in Australia for humanitarian and other reasons if it is deemed to be in the interests of Australia. In this, Australia explicitly recognises the inherent limitations of the 1951 Convention in determining the protection needs of individuals (although clearly not to the same extent as it recognises it in its Off-shore program).

The recently revised Ministerial guidelines relating to the application of his power under the Act refer to serious non-Convention human rights abuses as grounds for consideration and there is also an explicit attempt to link Australia's obligations under other International Human Rights Covenants and Treaties (eg ICCPR and CAT) to the process.

The Minister's powers are non-delegable and non-compellable. He is under no obligation to exercise it and although any decision to intervene must be tabled in Parliament, the Minister is under no obligation to explain or justify his decision not to exercise discretion.

Whilst RCOA appreciates that such an avenue exists under domestic legislation, it believes that there are several serious problems which need to be addressed. These include:

i. Inefficient Use of Resources:

The present system forces people with no claim to Convention status to go through a lengthy and expensive process in order to have their actual claims for protection assessed at the Ministerial level. All applications for protection under s.417 must first have failed at both the primary and appeal stages of the refugee determination process. RCOA has consistently argued that the present systems threatens the integrity of the refugee determination process because, amongst others:

- * those with genuine non-Convention claims to protection are forced to wait many months, even years, before their cases can be considered against appropriate guidelines;
- * those with genuine claims to Convention status suffer because the large number of non-Convention cases being considered cause unnecessary delays in the processing of claims by de jure refugees;
- * the determination process becomes cumbersome and more expensive to maintain as its channels become bloated with pro-forma claims;
- * given the many responsibilities that the Minister is charged with and the demands on his time, the present system does not appear to be the most efficient way in which to deal with such matters. The current Minister, himself, has acknowledged the backlog of cases which regularly build up.

ii. Issues of Transparency and Accountability:

Ministerial discretion is both non-compellable and non-appelable. This means that:

- * no actual decision on humanitarian status is actually taken. The Minister may simply choose to substitute a more favourable decision of the RRT, if he deems it to be in the public interest to do so;
- * because no decision is made against a set of legally binding criteria, there exists no avenue of appeal available to the applicant. This is despite the fact that the appeal to Ministerial discretion is in many instances the first time that the applicant's claims are being assessed against relevant guidelines;
- * these guidelines are deliberately broad. They are thus open to a multitude of interpretations, yet, unlike the case with legally binding criteria, there is no way of insuring that any principle of consistency across interventions is applied;
- * although there is no suggestion of this being the case with the present Minister, there exists no "built-in" protection against political influence or interference. Such a situation is unconscionable given the stakes being played.

iii. Adequacy of present system in meeting actual protection needs:

RCOA further questions whether the present arrangements adequately identify the actual protection needs of applicants. Although some controlling factors need to be considered including where stricter "manifestly unfounded" procedures exist, comparisons to like countries reveal that Australia lags behind in terms of granting de facto refugee or humanitarian status.

During the 1997-8 period, Australia granted only 64 s.417 approvals. During 1997, Denmark, a country which received a comparable number of asylum applications, granted 3570. In

Sweden, the figure was 7110 de facto refugee approvals. The UK recognised 4740 along these lines.

The evidence that the Australian system is not adequately recognising actual protection needs becomes of more concern when overall protection rates (both Convention and non-Convention) are compared. During 1997, 24% of all asylum seekers received some form of protection in the UK. This figure rises dramatically in the cases of Sweden, Denmark and Canada where the respective figures are 45%, 55% and 52%. The figure for Australia is a mere 15% for the 1997-98 period.

In a recent review of Migration Regulation 4.13B, the Joint Standing Committee on Migration in its majority report left open the possibility that it would support the creation of a humanitarian visa class in the future in the context of a more comprehensive review of the Refugee and Humanitarian Program. The committee's dissenting report came out strongly in the support for the creation of such a humanitarian visa. Although RCOA is aware of the many difficulties involved in introducing a separate humanitarian stream with established criteria (including the perceived danger of increased judicial interference) it believes that serious consideration should be given to replacing the present process with one which recognises the protection needs of de facto refugees in a transparent and cost-effective manner. The models presented by the Scandinavian countries of Denmark and Sweden deserve further attention in such respect from the point of view of program management.

The Refugee Council thus recommends that serious consideration be given to reforming the present process of recognising de facto refugee status. Of particular concern to RCOA is the need to establish clear criteria against which humanitarian claims can be assessed in a transparent and accountable manner.