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SUBMISSION TO THE SELECT COMMITTEE ON MINISTERIAL DISCRETION IN MIGRATION MATTERS

July 2003

Introduction

The Refugee Council of Australia (RCOA) welcomes the opportunity to provide input into the inquiry being conducted by the Select Committee on Ministerial Discretions in Migration Matters.

The Refugee Council of Australia is the peak non-governmental agency in Australia concerned with issues relating to refugees and asylum seekers and represents over 90 organisational members and a similar number of individual members. The Council works to promote humane, flexible and legally defensible policy towards refugees, asylum seekers and displaced peoples by the Australian Government and the Australian community.

Noting that the context of this inquiry is potentially broad, RCOA wishes to limit its comments to a subset of the group of people who seek Ministerial intervention on migration matters, namely those who have compelling humanitarian reasons not to return to their country of origin, in particular where their claims:

- can only be examined after the person has lodged a refugee status claim and has been rejected at both primary and review stages; and

- involve issues pertaining to a possible denial of fundamental human rights[1] if the person is returned to the country of origin.

Complementary Protection

It has long been the view of the Refugee Council that the current way in which these people's protection needs are examined is cumbersome, costly and inefficient and that there are better ways for Australia to ensure that our obligations towards these people are met. To this end, the Council released a Position Paper on Complementary Protection in 2002, a copy of which is included as Appendix A. It is our view that this paper will not only provide useful background information to the Committee but that it also covers many issues pertinent to the Committee's Terms of Reference. The Council therefore commends the Position Paper to the Committee and stresses that the comments contained in this submission should be seen as supplementary to the core arguments outlined in the Paper.

In addition, RCOA asks the Committee to note that since the preparation of the Council's Position Paper, the Executive Committee of the United Nations High Commissioner for Refugees, of which Australia is a member, has adopted the Agenda for Protection.[2] The Agenda is the product of a wide-ranging consultative process and sets out the framework for action by UNHCR, States and other players to further refugee protection. The Agenda makes specific reference to complementary protection, setting out as the third objective of Goal 1:

Provision of complementary forms of protection to those who might not fall within the scope of the 1951 Convention but require international protection.

Explicit mention is made of the role for States:

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.

RCOA would like to think that the Committee will see itself as having a legitimate role in considering how the Australian Government can work towards the implementation of this objective, given that the Government made a commitment to do so when it voted for the adoption of the Agenda for Protection.

The Inquiry's Terms of Reference

The following section addresses each of the Committee's terms of reference, noting as we do so that:

· additional material is contained in the aforementioned Position Paper (Appendix A);

· the theoretical arguments in this submission will be supplemented by case-specific examples in the submission of the Refugee and Immigration Legal Centre (RILC), a community legal centre with which the Council has close ties.

a) The use made by the Minister for Immigration of the discretionary powers available under sections 351 and 417 of the Migration Act 1958 since the provisions were inserted in the legislation.

The Refugee Council is supportive of the notion that a minister be given discretionary powers but argues that such powers should only be used in the most exceptional of circumstances, for instance where the system has fallen down leaving a person in a very vulnerable situation without recourse to appeal and it is deemed in the public interest to intervene. As will be discussed in the following section, however, the Minister is called upon to use his s417 powers[3] in a way that is far broader than was envisaged when the powers were introduced.

Further, when the provisions were introduced for the use of discretionary powers, it was the practice that the Minister would set out in Parliament the case-specific reasons why he/she had chosen to exercise these powers. This is no longer done. The Minister now uses a standard reporting format, making reference to public interest. This means that it is no longer possible for Parliament to scrutinise the reasons why decisions have been made, making the process far less accountable and opening the way for criticism that the system is being abused. b) The appropriateness of these discretionary ministerial powers within the broader migration application, decision making, review and appeal processes.

Currently the Minister for Immigration's s417 powers are not used in accordance with the criteria the Council outlined above as being acceptable. Far from being asked to use his powers on rare occasions, the Minister in the course of this year will have before him:

· most of the 1,700 East Timorese who applied for refugee status in the early 1990s;

· all of the Kosovars (some 140 people) who were granted 3-year Temporary Humanitarian Concern visas which expire in August;

· cases where the decision has been affirmed by the RRT: this will involve the cases of some 9-12,000 people, most of which are presented to the Minister in summary version but in about 500 cases, DIMIA will prepare a more detailed submission for the Minister's consideration.

During the course of next year, it is possible that the Minister will also have before him over 2,000 submissions from refugees currently in possession of a Temporary Protection Visa which expires in the next year and in whose case it has been determined that the conditions in the country of origin have changed.

The workload is such that would be considered unreasonable for any full-time worker, let alone a minister of the crown with exhausting portfolio responsibilities.

RCOA argues that when the s417 powers were introduced that it was never intended that they be used for a caseload of this magnitude. The need to introduce an alternative way of dealing with these cases is obvious and, RCOA contends, this can best be achieved with the introduction of an administrative determination process integrated into the current two-tier system.

It is common practice in Europe for protection applications to be assessed against both refugee and humanitarian criteria by administrative decision makers at both the primary and review stages. Governments argue[4] that this is the most cost-effective, efficient and transparent way to assess whether a person has protection needs that fit within the protection obligations of the State. Further, and as outlined in the introduction, UNHCR recognised the importance of complementary protection in the Agenda for Protection.

RCOA's Position Paper gives international comparisons on the grant of refugee and humanitarian (complementary) status. Committee members might also be interested in more recent figures from UNHCR (Appendix B) that show the number of people granted refugee status and the number granted humanitarian status over a 10 year period (1992-2001) for various countries. Particular attention is drawn to the following countries that make up the top 5 in terms of total admissions per 1,000 inhabitants:[5]

Number of Visa Grants 1992-2001

	Refugee Status	Humanitarian Status
Denmark	15,016	38,407
Netherlands	51,870	96,426
Norway	923	23,507
Sweden	6,575	119,115

Switzerland	29,955	95,803
Australia	20,564	-

It is significant to note that the numbers granted humanitarian status far outweighs those granted refugee status, thus:

* preserving refugee status for those whose claims are unambiguously Convention related;
* ensuring that those with non-Convention protection claims and/or those whose claims fit into a grey area of refugee law receive the protection they need.

RCOA argues that this is the best way to deal with such issue. Without some form of humanitarian status there is the risk that either those in need of protection do not get it or the definition of a refugee employed in status determination will be stretched to such an extent that it risks undermining public confidence in the system.[6]Assessment of humanitarian status should consider, inter alia, whether the person:

· would be at risk of a serious breach of their rights (as set out in the two international Covenants,[7] the Convention Against Torture, the Convention on the Rights of the Child, the two Conventions Against Statelessness or any other relevant instrument) if returned to the country of origin or habitual residence;

· will be afforded effective protection (as defined according to human rights norms – and including the right to protection from non-refoulement[8]) in any third country being considered for possible return;

· is in need of life-sustaining medical care not available in the country of origin or habitual residence.

In considering what should be included as grounds for the grant of humanitarian status, heed must also be taken of the developments that have taken place as part of the process of harmonisation of European Union asylum law and policy, the Bangkok Principles[9] and the proposed text for a UNHCR Executive Committee Conclusion on Complementary Protection as set out in the final section of Appendix C.

In the domestic context, the grounds for the grant of a visa on humanitarian grounds should be set out in legislation and matters should be appellable. Any concerns about abuse of the judicial process can be readily dealt with by ensuring wider access to legal advice[10] and introducing leave provisions.

c) The operation of these discretionary powers by ministers, in particular what criteria and other considerations applied where ministers substituted a more favourable decision.

RCOA is of the view that criteria for the grant of complementary protection should mirror those set out in its response to (b) above, namely criteria related to the risks to which an applicant might be exposed if not granted protection. Complementary protection is especially appropriate in respect of applicants from states in which a specific source of threat may have been displaced, but the foundations have not been valid for future political stability.

A risk of a non-reviewable, non-compellable discretion is that criteria unrelated to the risks to which an applicant might be exposed if not granted protection can become the principal determinant of access to complementary protection, for example the presence of relatives in Australia. Given that Australia offers family reunion through offshore application to those who

meet identified criteria, the granting of s417 visas to applicants with no refugee claim, and no significant ‘humanitarian’ claim other than the presence of family members in Australia, could be seen as encouraging ‘queue jumping’—a notion which is meaningless in the refugee area, but not in the area of family and skilled migration.

d) The appropriateness of the ministerial discretionary powers continuing to exist in their current form, and what conditions and criteria should attach to those powers.

RCOA argues that the current application of the ministerial s417discretionary powers:

· fail to enable transparent and expeditious examination of Australia’s protection obligations to those whose claims are not Convention-related;

· are detrimental to Convention refugees in so much as the processing of their applications is delayed by the presence of applications in the system that can only be properly examined after they have passed through each stage of the administrative determination process;

· results in the Minister having to deal with an unrealistic workload;

· leaves the way wide open for perceptions of abuse and/or favouritism.

It is thus the view of the Refugee Council that the current system must change. We reiterate the argument that an administrative determination of complementary protection needs be introduced and argue that the Minister’s discretionary powers:

· be confined to exceptional cases where no other appeal avenues are open;

· require that a report be tabled in Parliament when the powers are used, outlining in as much detail as possible (without identifying the individual) the reasons why the Minister chose to exercise his discretion so that the use of these powers is open to scrutiny.

In Conclusion

The Refugee Council urges the Committee to use the opportunity of this Inquiry to go beyond a mere examination of how ministerial discretionary powers are currently being used. While this is a worthy issue, it does not go the real heart of the current problem – the absence of an effective administrative determination of complementary protection needs - which in turn results in a greater reliance on ministerial discretion than is practically and ethically wise. If a complementary protection mechanism was to be introduced:

· ministerial discretion could be reserved for exceptional cases;

· the Australian Government would be better able to identify those people to whom it is obliged to provide protection;

· substantial savings would be made because humanitarian cases could be considered at first instance; and

· Australia would be making a significant contribution to the implementation of the Agenda for Protection.

[1] As set out in the international human rights treaties to which Australia is a signatory.

[2] UNHCR Agenda for Protection: available in full from www.unhcr.ch.

[3] It is the Minister's s417 powers that are of relevance to RCOA and thus the Council's remarks will be confined to this.

[4] For example in the debate on Complementary Protection at UNHCR Excom 2001.

[5] It is important to note that, with the exception of Switzerland, each of these countries also has an active resettlement program.

[6] This is the case in Canada where almost 50% of applicants receive refugee status.

[7] The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

[8] Forced return to a country in which the person faces persecution.

[9] The Bangkok Principles were originally adopted at the Eighth Session of the Asian African Legal Consultative Committee in 1966 and revised in 2001.

[10] RCOA argues that the high number of manifestly unfounded claims brought before the Federal Court is a direct result of the reduction in access to legal advice. Where potential litigants are able to obtain advice from a lawyer with no financial interest in pursuing a claim, they are better able to make an informed assessment of the merits of appealing to the court and the risks if the action is unsuccessful.