Asylum determination in Australia

Based on research for the asylum project conducted by JUSTICE, ILPA and ARC

Supplementary report 5

JUSTICE
Immigration Law Practioners' Association (ILPA)
Asylum Rights Campaign (ARC)

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ASYLUM DETERMINATION IN AUSTRALIA

Contents

Background to research

This supplementary report forms part of the research for the asylum law project conducted in 1996-97 by JUSTICE and ILPA (Immigration Law Practitioners' Association) and supported by the Asylum Rights Campaign. The main report from that project, *Providing protection: towards fair and effective asylum procedures*, critically assesses asylum determination procedures used in over ten countries, and identifies the principles which should underlie a fair and effective process. Other supplementary reports which were produced as part of the research include:

- *Article 3 ECHR and UNCAT and humanitarian protection in selected countries*, Supplementary Report 1
- *Asylum determination in Canada*, Supplementary Report 2
- *Asylum determination in selected European countries: Germany, Austria, Hungary, Poland and Switzerland*, Supplementary Report 4
- *Asylum determination in Australia*, Supplementary Report 5

The research in *Providing protection* and the supplementary reports was based on sources available in the UK, and on information collected by researchers during visits to the Netherlands, Germany, Austria, Hungary, Poland, Canada and Australia during 1996 and 1997. Additional material from other states was provided by refugee agencies and lawyers working in those countries. The supplementary reports were revised in August 1997.

Copies of *Providing protection* and of the supplementary reports are available from JUSTICE (tel: +44 171 329 5100; fax: +44 171 329 5055; email: justice@gn.apc.org) and ILPA (tel: +44 171 251 8383; fax: +44 171 251 8384; email: ilpa@mcr1.poptel.org.uk).

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1. Introduction

A research visit was made to Melbourne, Victoria and Sydney, New South Wales, over two working weeks in December 1996 and January 1997. Research and reporting on the Australian system was done by a researcher with experience of working as a lawyer and adviser to asylum seekers in Australia. The researcher met and spoke with people involved in the system at various levels, including representatives of the Department of Immigration and Multicultural Affairs (DIMA); and appellate decision-makers, research and other staff at the appellate authority, the Refugee Review Tribunal (RRT). In addition, discussions were held with representatives of the Refugee Council of Australia (RCOA); legal officers at the Australian Human Rights and Equal Opportunities Commission (HREOC), and refugee lawyers, who included private practitioners, salaried Legal Aid representatives and legal advisers employed by Refugee Advice and Casework Service in Victoria and New South Wales.

The research was supplemented with written commentaries and other materials on the Australian system. It was also informed by a lively discussion which was going on in the Australian media at the time of the visit about multiculturalism and race issues in Australia more generally. In public debate at the time, considerable attention was being focused on the refugee decision-making structures, following a major government review of immigration decision-making, and suggestions that significant changes were planned for the RRT in particular.

Several features of the Australian system were of particular interest to the research. They included:

- the offshore (i.e. overseas) application programs for refugee and humanitarian protection, and perceived problems associated with them;
- the primary decision-making procedure, including the role of the case officer and the applicant's representative;
- the appeal process conducted by the Refugee Review Tribunal (RRT).

Apart from these decision-making features which differ from those in Britain, it is interesting to consider the Australian system because of its parallels with the UK. The structure of the Australian onshore protection system is similar in many respects. As in Britain, civil servants in Australia take primary decisions on refugee claims, following an initial face-to-face interview. An independent appellate authority consisting of a single member may review a negative decision on the merits; although Australia has no further quasi-judicial appeal body beyond the RRT. Following appeal, an unsuccessful appellant may seek judicial review from a court. There is also discretion vested in the Australian Immigration Minister to grant protection to a refused refugee applicant for humanitarian reasons.

This broadly similar institutional structure means that it is possible to assess the

usefulness in the UK of some of the different procedures and tools used in the Australian system. In considering the usefulness of the Australian system as a comparable model, however, contextual differences must be kept in mind. The most significant of these is that Australia deals with a far smaller number of applicants, generally from different countries of origin.

2. Refugee protection and laws in Australia

Australia signed the 1951 Convention in 1954 and acceded to the 1967 Protocol in 1973. Under Australian law, international instruments are not directly effective at domestic level, but the Convention is effectively incorporated into national law under the Migration Act 1958 and Migration Regulations. Since 1994, the Migration Act enables a person seeking refugee status to apply for a 'protection visa', which may be granted if she or he can show that he or she is someone 'to whom Australia has protection obligations under the Refugee Convention...' (s36, Migration Act). The Migration Regulations prescribe certain other requirements, including health and public interest tests; and if all of the criteria are satisfied, the Minister is obliged to grant a protection visa (s65(1), Migration Act).

The competent authority for determining refugee status in Australia is the Minister for Immigration and Multicultural Affairs, acting through his delegates in the Department (DIMA). In cases where a person applies for refugee or other special protection from outside the country, embassy staff employed by the Department of Foreign Affairs and Trade (DFAT) may be involved in receiving applications or fact-finding related to the determination of claims. DIMA officers and appellate decision-makers in Australia may also consult DFAT on factual and other questions concerning applicants or countries of origin.

The number of people applying for protection in Australia is low, when compared with most European countries. In 1995-96, the total number of asylum cases was 5,830, concerning 7,640 people (primary applicants and dependants. Figures from the DIMA 1995-96 Annual Report). This represented a 23% rise in applications from the previous year, and continued the pattern of small, gradual increases since 1992, when 4,114 applications were made. The only countries in the EU with comparable levels to those in Australia are Italy and Finland. Applicants come from a wide range of countries, including many in Asia and South East Asia, but also the Middle East, Africa, South America and Europe. Major source countries in recent years have included China, Fiji, Indonesia, the Philippines, Tonga, Sri Lanka, Iran and Lebanon. In 1995-96, DIMA noted increases in applications from a range of countries including Burma, Iraq, Iran, Korea and Sri Lanka.

In 1995-96, the proportion of applications made in Australia which were successful was 14.6% (829 claims from primary applicants, representing 1,194 people after dependants are included. Figures from the DIMA 1995-96 Annual Report). The 4,845 rejected cases comprised 85.4% (6,399 people, including dependants). Humanitarian status was awarded by the Minister, in the exercise of his discretion, in 63 cases. The outstanding primary applications at the end of June 1996 totalled 6,860.

Until recently, Australia did not formally set a limit on the number of people who could be granted refugee status in its territory. For some years, the Minister for Immigration had

fixed a quota for those receiving protection after applying from *abroad* (see discussion of offshore programme below); but this did not restrict the number of *onshore* applicants who could receive protection. This policy was changed in 1996. In July, the new Immigration Minister announced that 10,000 places would be available for offshore refugee and humanitarian applicants, and a maximum number of 2,000 places for onshore claimants for refugee status. The Minister stated that if on-shore grants were to 'exceed 2,000, the excess will be absorbed into the offshore program, so that humanitarian resettlement services can properly meet needs' (source: Media Release by the Hon Philip Ruddock MP, Parliament House Canberra, MPS28/96, 3.7.96). There is some disquiet among refugee supporters and advocates at the decision to restrict the number of onshore applicants recognised in this way.

Australia has an established, if controversial, history of refugee protection. It has demonstrated its commitment to protection principles in the past by accepting individuals found to be Convention refugees, and through special assistance programmes open to people from particular countries or vulnerable groups fleeing persecution and other risks. It also played a role in the Comprehensive Plan of Action (CPA) for resettlement of Vietnamese refugees held in camps in Hong Kong and Indonesia in the 1970s and subsequent years. It is a donor to UNHCR and member of its Executive Committee (EXCOM). However Australia has been criticised internally and internationally for some of its policies and practices. In particular, the mandatory detention of all non-citizens without current permission to enter or stay in Australia was challenged in a complaint to the UN Human Rights Committee, and found to violate the International Covenant for the Protection of Civil and Political Rights. Other concerns include the very low levels of government support available to assist asylum seekers during the asylum determination and appeal process, and the law which severely limits the scope for unsuccessful applicants for asylum to seek judicial review.

Despite the relatively small numbers of asylum applicants in Australia, the issue of refugee protection has been highly contentious in media discussions and political debate in the past. Successive immigration ministers have talked of the 'threat' of large influxes, and the perceived need to control refugee flows to protect national interests. Fears have emerged (or been provoked) notably on occasions over the last two decades when asylum seekers have arrived in small boats on Australia's northern coast. In 1989 and the early 1990s, a number of people arrived by this route from Cambodia, via Singapore and Indonesia. Later boats have contained Chinese nationals and people of Sino-Vietnamese ethnic origin from southern Chinese provinces (Guangxi and Guandong). Others included Vietnamese refugees originally resettled in China under the CPA who claimed to suffer persecution in China based on their ethnic origins.

Media discussions around these arrivals in many cases have focused on the perceived threat of 'floods' of unwanted foreigners who might be enticed to come to Australia in the same way. Several politicians have also focused on such public fears, in what could be seen as attempts to win populist support. Such comments rarely make it clear that the number of people arriving in Australia by this route is very small: the total number of 'boat people' who arrived between November 1989 and August 1995 was 1,919. The tone and scale of media and political responses do not appear to be in proportion to this low figure. It seems that many Australian citizens are surprised at this total, perceiving from the level of coverage that it must be far greater.

The refugee debate in Australia continues to elicit divergent views and some controversy. Since a Liberal (conservative) government came to power in March 1996, it has sought to review and introduce changes to current laws and processes where it is felt reform is needed. These changes have drawn criticism from refugee advocates, who have argued they are too restrictive, and will limit the scope for refugees to gain protection.

3. CLAIMS FOR PROTECTION FROM ABROAD: Australian offshore programmes

3.1 Categories of protection for offshore claimants

There are three components to the Australian offshore protection programme. People applying from overseas may be granted permission to come to Australia under (1) the refugee resettlement programme; (2) the Special Humanitarian Programme (SHP) or (3) one of the Special Assistance Categories (SACs).

Offshore refugee programme

The refugee resettlement programme provides for the recognition of a fixed number of people as 1951 Convention refugees, after applying for protection at an Australian overseas post. The quota for 1996-97 was 3,335; compared with 4,000 in 1995-96 and 1994-95. Australian Immigration Department officials stationed at the foreign posts interview candidates, and assess whether they meet the 1951 Convention criteria. Like claimants within Australia, applicants from abroad are subject to health and character tests. Most applicants for refugee resettlement from abroad are referred by UNHCR. Within the offshore refugee category, the Department also provides a special 'Woman at Risk' programme, which aims to offer priority resettlement opportunities to refugee women and their dependants. To qualify, an applicant must be registered as being 'of concern' to UNHCR; must be alone without male protection, or be the head of a family; and identified as a person at risk of victimisation, harassment or serious abuse because of her sex.

Special humanitarian programme

The special humanitarian programme is available for applicants overseas who have experienced, or who fear, gross discrimination amounting to serious violation of their human rights, and who have some connection with Australia. This may include having worked or studied in Australia, or having family ties or another sponsor. The quota places available for 1996-7 totalled 2,133, a decrease from 2,800 in 1995-96 and approximately 3,700 in 1994-5.

Special assistance categories

Special assistance categories may be available for identified groups with 'close links' to Australia who are vulnerable or at risk, but who would not necessarily satisfy the 1951 Convention refugee or special humanitarian requirements. They may include, for example, people at risk from situations of conflict, civil strife or generalised violence. The quota allocation for special assistance categories in 1996-97 was 4,500; in 1995-96, it was 6,200, and in 1994-95, 5,400. The quotas and special assistance categories for particular nationalities and ethnic groups are reviewed each year on the basis of the perceived areas and extent of need.

To qualify for admission under a SAC, an applicant must have an undertaking of support from a person or body who meets the stipulations in the regulations, usually a near relative or a recognised community group. In some cases, an undertaking is needed from a specific support group, such as the Ahmadiyya Muslim Association (for SAC Class 216, Ahmadis) or the Jewish Welfare Society or Molokan Community Organisation (SAC Class

210, Minorities of former USSR). Additional requirements may also apply; for example, that the applicant show 'substantial discrimination or serious distress on the basis of ancestry or religion' (for SAC Class 210, Minorities of former USSR) or 'substantial discrimination' (for Burmese in Thailand, SAC Class 213).

Quotas

The quotas which apply to the special humanitarian and special assistance programmes are also geographically limited. The Minister sets the quotas within these categories after input from the Refugee Council, among others, on the appropriate size and composition of the programme, and where the greatest areas of need are perceived to lie. The geographical quotas may mean, however, that even a person who meets all requirements and can show great need may not secure a place if the limit for his or her region or country has already been reached that year. For example, a person from Afghanistan who satisfies the test for special humanitarian status, by showing that she faces 'gross discrimination amounting to a violation of her human rights', may not be admitted if the SHP quota for Afghanistan is full. This is so, even if the SHP quota allocated to Sudanese, for example, is not full. The spare places are not transferable.

The Special Humanitarian Programme and Special Assistance Categories are seen by the Australian government as voluntary initiatives through which it offers assistance going beyond its international obligations. The quotas, the criteria and their method of application are defined solely by domestic law, under regulations which are not debated in Parliament (although they are published in the government gazette before promulgation).

3.2 Offshore application processes

The offshore application and decision-making processes are complex, and in many cases take considerable time. In practice, the extensive formal requirements and procedural steps prove extremely difficult for many applicants to satisfy, especially where they are living in very basic conditions and remote areas in exile or in foreign border camps. This is problematic, given that people in these circumstances will often be in greatest need of wider forms of protection and resettlement opportunities.

Application forms for the offshore refugee resettlement programme are available at Australian overseas posts, and may be obtained with help from UNHCR. The application form for an SHP or SAC place must be obtained in Australia, usually by an applicant's nominator and/or near relative. That nominator must fill in any applicable part of the form with his or her details and any necessary undertaking of support. In practice, most nominators seek legal advice in Australia and, if possible, complete a considerable portion of the applicant's details to ensure accuracy and correct English.

In the case of the Special Humanitarian Programme, the nominator must lodge the form (with the nominator's section completed) at a local DIMA office in Australia. The local office will check the forms and send them to an Australian overseas post in the country where the applicant waits. The Australian overseas post must then locate the applicant directly and send him or her the relevant section of the application to complete.

When it is returned, the overseas DIMA representative (or in some cases, a diplomatic staff member) will assess the completed application, and may invite the applicant for an interview if it is considered the case has a reasonable chance of success. If he or she is found to satisfy the basic criteria, the applicant and any dependants must undergo health and character checks. Subject to these, the person may be granted a visa to travel to Australia. In most cases, the fare must be paid by the nominator or applicant. (DIMA only assists with travel costs for a very small number of successful offshore applicants under the refugee resettlement and Women at Risk programmes). In other cases, assistance from the International Organisation on Migration (IOM) may be available.

If the person is rejected after interview, there is no appeal against that decision. The nominator may use the Freedom of Information procedure to request a copy of the written decision (which is not otherwise issued as a matter of course).This may help the applicant to prepare a fresh application. If she or he was accepted initially, but failed to pass a health or character check, the only avenue for challenge is judicial review in the Federal Court. Reviews are rarely undertaken, and very infrequently with success. Some challenges to offshore refusals have been brought as test cases and won, and it is perceived that they have to some degree improved the standard of offshore decision-making. In most cases, however, a lack of resources prevents applicants and nominators from considering court action.

If an offshore applicant is refused without an interview, his or her nominator may ask for the decision to be reconsidered, or submit a fresh application. There is no limit to the number of reconsiderations or fresh applications which may be brought, but success on a second application is rare.

For SAC applications, the procedure is slightly different. After completing the undertaking to provide support, the nominating person or organisation must send the application directly to the overseas applicant. In many cases, where post and other communication services are slow, unreliable or nonexistent, it is difficult or impossible to ensure that the papers reach the applicant without interference or at all. Many applicants in refugee camps, or in short-term accommodation in a temporary host country are extremely difficult to contact.

When and if the original papers are received, the applicant for a SAC place must complete and sign his or her portion and lodge the application at the nearest Australian overseas post. She or he must also supply additional documents, including proof of identity for dependants included on the application, passport photographs, copies of current passports where available, certified copies of educational qualifications, the nominator's letter of support and proof of the link between the nominator and applicant (for example, birth or marriage certificates.)

After lodging the claim, the applicant may be interviewed, and if successful, undergoes medical and character checks. After satisfactory completion of these, a visa to travel to Australia may be issued. For the SAC place, the applicant or nominator must meet the costs of travel to Australia.

3.3 Status granted

Persons accepted under all the offshore refugee and humanitarian programmes receive a permanent residence visa immediately. In most cases, this brings an immediate entitlement to rights equivalent to those enjoyed by Australian citizens with respect to social security, public health care, employment and education. In addition, some refugee and humanitarian programme entrants may seek material help under government-funded schemes which may be administered through community groups. Family reunion is also available (although many offshore humanitarian applicants will seek to include their immediate family members in their own protection application). In practice, however, recent changes to the categories and calculation method for family reunion quotas mean that fewer places will be available for family members of special humanitarian and refugee admittees than in the past. Since 1996, amendments to family reunion rules have meant that the number of family reunion entrants is deducted from Special Humanitarian quotas, so that the overall number of places available to primary entrants and their families is smaller.

3.4 Comment

The offshore programmes represent a commendable response from the Australian government to the need for protection beyond the 1951 Convention, especially for people who cannot reach safe countries which will grant them permanent asylum. However a number of problems are apparent in their terms and practical application. These include:

1. *Logistical difficulties.*

Serious practical problems face applicants in receiving and lodging application documents. Coupled with the obligation to complete all relevant forms in English, and to provide original or certified copies of supporting documents, these formalities are insurmountable for many bona fide humanitarian candidates.

2. *Accurate and fair assessment of claims.*

Decisions are taken in most cases by DIMA officers who are placed in rotation in overseas diplomatic missions. Effective decision-making is made very difficult by the demanding conditions under which they operate in many posts, the extremely large numbers of applications in all categories and the lack of operative supervisory mechanisms to provide guidance and clarification of the criteria in difficult cases.

Inconsistency is frequently apparent in decision-making, both between and within posts, and among ostensibly similar applications. Advisers in Australia will generally recommend to nominators that a rejected offshore application be resubmitted, because there is a chance it may be accepted on re-application. According to advisers, success often appears to be a matter of chance, as the same application will sometimes succeed on the second consideration, even without new evidence or circumstances. It was suggested by one lawyer that the real challenge is to make an offshore application stand out in some way from the generality of people in equally dire circumstances.

As a proportion of those who apply, only a very small number of offshore claimants are

invited to an interview. It is not clear what determines whether an interview is granted. Applicants are urged to ensure their handwriting is neat, as one view maintains that those applications which are not immediately legible may not be considered properly, in the face of thousands of other applications and candidates.

3. *Form and quality of decision-making.*

Refusal notifications in offshore cases are extremely brief. They comprise one double-sided page which lists the criteria for the relevant programme category, with a tick or a cross in the box beside each requirement.

Some people infer from this that the reasoning which goes into offshore decisions is perfunctory, and that claims are not investigated beyond a superficial level. If this is so, it will be very difficult to correct even basic errors, because the lack of accessible appeal avenues means that most decisions can never be challenged. This implies significant potential problems for accountability and standards.

People who act for applicants and nominators perceive that the quality of decision-making has improved in recent years. This may be due to the fact that DIMA officers, rather than diplomatic personnel alone, now assess and determine claims. The Refugee Council has given training and input to offshore decision-makers, which may have helped increase their awareness of other perspectives and wider issues concerning persecuted groups and displaced persons. Further, DIMA has been prepared to accept and respond to reasonable criticism of practices at certain posts, and address specific problems where they have arisen.

4. *UNHCR's role.*

The criteria for protection in most of the offshore categories clearly state that while registration as a 'person of concern' to UNHCR may be taken into account in determining claims, it is not decisive. In effect, however, it is felt by many observers that UNHCR selection is essential. The Refugee Council of Australia has questioned this heavy emphasis on UNHCR endorsement on the grounds that UNHCR's focus is different from that of the Australian programme requirements. UNHCR, for instance, concentrates its regional programme on people who are clearly appropriate for and in need of resettlement. In the Australian Special Humanitarian programme, by contrast, an applicant's immediate resettlement or integration prospects are not relevant. Further, UNHCR offices in some areas, who are clearly not directly accountable to governments, have been reported as registering offshore applicants to Australia on dubious or inaccurate grounds, or in circumstances allegedly involving corruption.

5. *Impact on onshore protection programmes.*

A further difficulty in principle has been identified. It is suggested by some asylum advocates that the offshore programme is used effectively to undermine Australia's onshore refugee protection system in the political arena. Ministerial statements in recent years have included many references to what are called 'refugee queue-jumpers' and the 'refugee queue'. The implication behind this notion is that people who are given protection whilst offshore - who are awaiting selection under the government's defined and changeable criteria - are somehow more deserving than those who 'jump the queue' and

arrive in Australia to request asylum. This line of argument overlooks Australia's international obligations (under the 1951 Convention) to those within its territory. Additional forms of protection for those in regions of origin are important, but they do not reduce or alter the obligations owed to refugees within state territory.

Several other practical problems have been associated with the offshore programme. These have included difficulties in securing competent and independent interpreters in foreign posts, and ensuring that they are not themselves involved in political or racial tension; the dangers which face people who must secure or use their own documentation, while trying to prepare their applications (for example, Sri Lankan Tamils); and the lack of financial assistance to help nominators in Australia, let alone overseas applicants themselves, to prepare applications.

There are, however, positive aspects of the offshore programme. They include:

- provision of wider protection than the strict terms of the 1951 Convention;
- an opportunity for safe, free and legal entry to the territory, without needing to use expensive and forged documentation through agents;
- a recognition that Convention obligations imply a commitment to help people at the source of refugee flows and not merely at the stage where they constitute a domestic 'problem'.

Whilst acknowledging these positive aspects of offshore programmes, it is nonetheless clear that systemic problems with the application and decision-making process remain, which are difficult to address. The UK has experience of a similar scheme, though one which operated in much more secure circumstances than those prevailing in many refugee-producing countries. The 'special voucher' scheme was set up to allow in an annual quota of British nationals from East Africa, who had been forced to flee to temporary sanctuary in other countries. That scheme exhibited many of the same problems as the Australian off-shore system: the inflexibility of the various quotas, the arbitrary nature of decisions and criteria, the difficulty of providing effective help and of challenging irrational or incorrect refusals.

The Australian off-shore system replicates many of those problems; as well as additional problems in respect of those living in insecurity. Any overseas resettlement programme therefore needs to be based on two essential propositions:

- that it complements, but does not in any way replace, the obligation to provide protection to those who make claims after they have arrived on the territory;
- that it addresses the practical difficulties shown in the Australian scheme:such as access to application forms and processes, requirements which are realistic and which do not compromise applicants' safety, competent and well-resourced decision-making procedures, and an effective process for challenging wrong decisions.

4. CLAIMS MADE IN AUSTRALIA: Onshore applications and decision-making

In general, an application for protection made upon or after arrival in Australia will lead to one of three outcomes.

1. 1951 Convention refugee status, or grant of a 'protection visa'.

2. Permanent residence on humanitarian grounds, granted in a very small number of cases at the discretion of the Immigration Minister to people determined not to be refugees, who are nevertheless at risk of discrimination or human rights violations if returned; where it is in the public interest to do so.

3. Rejection, which may follow full consideration of the claim; or after the applicant is found not to be entitled to access to the determination procedure.

People seeking protection are permitted to remain in Australia until a final decision is made, including any review or appeal. The conditions under which a person may await determination will depend, among other factors, on whether she or he entered lawfully.

4.1 Non-admittance to the procedure

There are two groups of asylum seekers who are ineligible to apply for refugee protection in Australia. These are:

1. *Repeat applicants*, who have previously applied for protection and been rejected. Repeat claimants are prohibited by legislation from lodging a second or further application, except in cases where the Minister finds that it is 'in the public interest' to permit it. This discretionary power is intended to cover cases, for example, where new information has come to light after the final determination, or where a person is shown to be a refugee *sur place*.

2. *People coming from 'safe third countries'*. Under legislative changes in November 1994, people deemed to have access to effective protection in a 'safe' third country are not admitted to the determination process. 'Safe third countries' are prescribed in the regulations, after the Minister has laid a statement before Parliament concerning the country's record of compliance with relevant international law on the protection of asylum seekers; its record in meeting human rights standards in relation to the group(s) in question; and its willingness to admit and allow refugees to remain. The Minister holds a residual discretion to allow a person from a safe third country to apply for protection if the public interest requires it.

The safe third country exclusion has been invoked for Vietnamese who were refused protection under the Comprehensive Plan of Action, and who travelled to Australia from the Galang processing camps in Indonesia. In January 1995, the People's Republic of China was designated a safe third country for Vietnamese refugees settled there. In late 1995, Papua New Guinea was gazetted (under a new, accelerated safe country designation process) as safe for all categories of applicants.

4.2 Detention during the determination process

The first point of contact for people coming to Australia by air or authorised sea traffic is with immigration or customs officials at the airport or port. If a person requests asylum on arrival at one of these places, she or he is immediately referred to an immigration officer. Those without a right to enter are placed in custody to await consideration and determination of their case by a trained onshore refugee division officer from the DIMA. People coming into Australian waters in unauthorised vessels are usually intercepted by the coast guard. As unauthorised arrivals, they are also placed in detention pending assessment of any asylum claim.

Under Australian law, non-citizens who arrive without valid travel documentation, including a current visa for entry, are categorised as 'unlawful non-citizens' and must be detained. This mandatory detention provision is unique among refugee-receiving countries. It requires an immigration officer to detain any persons who she or he 'knows or reasonably suspects' to be an unlawful non-citizen, whether detected at point of entry or within the country (Migration Act, s189). In addition, special provisions were inserted into the Migration Act in 1992 to deal with 'designated persons'. These are non-citizens without visas who have 'been on a boat in the territorial sea of Australia after 19 November 1989 and before 1 September 1994' (Migration Act, s177). These sections retrospectively authorise the detention of so-called 'boat people' following a successful 1992 legal challenge to their prolonged incarceration; preclude any court from ordering the release of designated persons, and remove the courts' power to order compensation for unlawful detention. In the amending Act, the stated reason for introducing these provisions was 'because the Parliament considers that it is in the national interest that each non-citizen who is a designated person should be kept in immigration detention until she or he...leaves Australia or...is given a visa.'

In many cases, the mandatory detention regime also applies to people who arrive with a valid visa for entry (such as a tourist or business visa) but who declare their intention to seek asylum on entry. This is because a person found to have reasons for coming to Australia which are different from those expressed in his or her visa application is liable to have his or her visa cancelled, and immediately becomes an unlawful non-citizen. In effect, this provides very little incentive for those with valid visas to request asylum at the port of entry. If they wait until after entering the country to lodge a claim, they appear more likely to receive a bridging visa and permission to remain in the community pending determination of the claim.

There are some limited exceptions to the blanket detention policy for unlawfully present asylum seekers. These permit the release of some minor or aged asylum seekers, those with evidence of psychiatric or other medical conditions, and people released in the exercise of ministerial discretion. In general, however, all those seeking asylum without a valid right to stay must await their determination in one of several purpose-built immigration detention centres around the country. DIMA is required under the Migration Act to give priority to dealing with claims from detainees.

Detention and access to the procedure

In theory, applicants in detention have the same access to the application process as other claimants. In practice, however, this can be problematic. As soon as a person has

been detained, immigration officers are obliged by the Migration Act to ensure that the detainee is made 'aware of his or her right to apply for a visa...; and of the fact that she or he may not be released until she or he has received a visa or been removed' (Migration Act, s192 and Div 3. Parts C, D and G). Detainees have two days to apply after being informed of these matters.

However these rights and requirements are significantly qualified by s193 of the Migration Act, which provides that the obligation to inform and the guaranteed right to seek a visa on refugee protection grounds or otherwise do not apply to detainees who have been refused entry to the country; or have been caught after 'bypassing' immigration clearance, or have been refused permission to leave a vessel unauthorised to land in Australia (ss 193(1), 249 Migration Act). Further, the legislation specifically states that an immigration officer is not required to advise such a person if she or he has a right to apply for a visa; given him or her an opportunity to do so, or 'allow...access to advice (whether legal or otherwise) in connection with applications for visas' (Migration Act s193(2)).

Thus the legislation expressly permits immigration authorities to deny access to the application process for certain categories of detained applicants. This represents a serious restriction on the rights of a certain groups of asylum seekers (or would-be asylum seekers), and a limitation on their ability in practice to make a claim.

The detention of asylum seekers has been the subject of considerable controversy. Critics of the Australian detention regime object to its mandatory nature and indefinite length, which can lead to some asylum seekers remaining incarcerated for up to two years while their cases are considered. In 1993, a complaint was lodged with the UN Human Rights Committee on behalf of a Cambodian asylum seeker who had been detained since 1989 without a final decision on his case. The complaint alleged that the detention rules and procedures were in breach of a number of Australia's human rights obligations in the International Convention on Civil and Political Rights 1966 (ICCPR), and in particular the prohibition on arbitrary detention (ICCPR, art 14). The case, known as *A v Australia,* was considered by the Human Rights Committee early in 1997. It found that the detention had amounted to arbitrary detention in contravention of Article 14. In its recommendations, the Committee discussed the controls which are required to limit the use of detention, and emphasised the need for an effective system for challenge and review of detention decisions. As at mid-1997, the Australian Parliament had not taken steps to change its laws to provide such a review, or otherwise to bring its laws in line with the Committee's decision.

There has also been widespread concern about the conditions in which many asylum seekers are held. This is particularly contentious for the centre at Port Hedland, a remote area on the far north-west coast of Australia, thousands of kilometres away from any major city. Allegations have been made that food, schooling for children, medical treatment and facilities, and activities for detainees are unsatisfactory. The government has sought to address several of these concerns. But as long as access to the centre and the detainees is difficult, it is hard to ensure that standards are maintained.

Alleged failures to observe the basic rights of detained asylum seekers have raised serious questions about the Australian government's compliance with international standards and humane practice. It appears to fall short, not only of human rights treaty obligations, but also of UNHCR's minimum requirements for the treatment of asylum

seekers, including EXCOM resolution 44(1988).

4.3 Support during the determination process

Non-citizens with a lawful right to be in Australia may apply for asylum at any time after entry. There is no time limit for lodging applications. In most cases, lawful non-citizens who seek protection before their permission to remain expires will receive a 'bridging visa' authorising their ongoing stay pending a decision on their claim. Conditions attached to a bridging visa may vary. In most cases, it will entitle an applicant to work (although people who do not have a current visa at the time of making their application will only receive work rights where hardship grounds are shown). Under changes announced in March 1997, work rights in future will only be granted to people who apply for refugee status within 14 days of their arrival.

Mainstream social welfare benefits are not available to asylum seekers in Australia. Material support may be available in some cases, however, under the Asylum Seekers' Assistance (ASA) scheme. This scheme, set up in 1992, was designed to assist asylum seekers found to be 'without means of support or disposable assets' by offering a limited living allowance and/or access to basic health care. The living allowance amount is fixed below basic social security rates, and may be paid fortnightly. ASA is administered under an agreement between the government and the Australian Red Cross, which determined eligibility for the scheme and fixed the amount payable according to individual or family needs. In an apparent attempt to limit the cost of ASA payments, the DIMA continues to give priority to the applications of people receiving ASA support.

Until 1996, ASA was available to all applicants awaiting a decision at primary or merits review level. It has since been cut back so that it will not be available for the first six months following an application; and after refusal at the primary stage. Combined with restrictions on work entitlements, the result is that people who fail to apply during the first two weeks after arrival will be ineligible either to work or to obtain social support until at least six months after submitting their claim. For those who do receive support after six months, it may be offered until the time at which a primary decision is made; but if the decision is a refusal and the applicant wishes to challenge it, his or her right to support pending the review is lost.

4.4 The procedure: application and decision-making

The application form

Each applicant for a protection visa is required to fill out a detailed written application form in English. The form is attached at Annex A.

In the main part of the form (sections 64 - 79) each primary applicant must set out the grounds of the claim. The form asks for these in the form of a number of specific prompts, including: 'I am seeking protection in Australia so that I do not have to go back to..' 'Why did you leave that country?' 'What do you fear may happen to you if you go back to that country?' 'Who do you fear may harm you..?' If the space available on the form is insufficient, applicants may attach further pages to continue their responses. Applicants

are not required to answer these questions in this format; they may choose instead to provide a separate statement in a narrative form. Many advisers recommend this approach on the basis that it permits the applicant's individual voice and personal story to emerge more vividly and clearly.

Explanatory notes accompanying the application form recommend that applicants seek help if necessary to complete the form. Applicants are also reminded that any person who charges them for help or advice must be a registered migration agent.

Applicants must pay a small lodging fee when submitting their forms. Legal aid may in some cases be available to meet the application fee, if there is proven need.

Interview and initial consideration of claims

After the application form is received by DIMA, the applicant will usually receive an acknowledgment together with an appointed date and time for an interview. The applicant is also invited to submit any further documents or evidence in support of his or her application. Under the Migration Act, asylum seekers are not specifically entitled to be heard in person. In virtually all cases, however, a personal interview will be conducted by the official who makes the decision. According to the DIMA, 'manifestly unfounded' cases may be rejected on the papers alone, but this appears to occur rarely, if at all. The time between lodging the application and the initial interview can vary. According to DIMA representatives, this interval depends largely on the amount of time required by the DIMA case officer to prepare for the interview. If the case is complex and it proves difficult to gather information about the claim, it may be a number of months. In other cases, it may be a fortnight.

Under previous practice, DIMA case officers would also write to claimants before the interview, notifying them of any information or material adverse to their claims, and inviting them to respond in writing. This procedure is based on the administrative law principle which requires adverse allegations to be put to a person before a decision significantly affecting his or her interests is made. In asylum cases, this may include an allegation that a document is fraudulent, based on tests by the DIMA Document Authentication Unit, or questions regarding the relationship between the primary applicant and alleged family members; or more generally concerning the circumstances in the country of origin. In an effort to streamline primary decision-making, DIMA now puts such adverse information to claimants verbally at interview, and gives them an opportunity to answer it.

An interview is conducted by the DIMA case officer who is allocated to the case. Officers are usually not lawyers, but they will have received 'training in the application of the Convention' and will often have a degree of specialist knowledge about the country from which the applicant comes. Specialisation is not a deliberate DIMA policy, but it occurs in practice as officers gather more experience of claims from a particular area or group. In the main, DIMA officers will have started their careers in the Department, or have been recruited from other parts of the public service.

Those who are part of the onshore refugee determination section in DIMA deal only with refugee status applications, and will not consider other immigration or non-asylum cases. The notional caseload which each officer presently must deal with appears very light by

contrast with UK standards; on average, the figure is 46 cases per case officer per year. This means that the time and resources they can put into assessing complex claims is considerable. It has been suggested that this caseload may be increased dramatically. Some DIMA officers are opposed to this, anticipating that greater workloads could affect the quality of decision-making and reduce the extent of scrutiny they feel is appropriate for most of the claims before them.

Interviews vary in length, depending on the complexity of the case, the applicant's language ability and other factors. If the person has indicated on the application that an interpreter is needed, services will be provided by DIMA free of charge. The applicant may be accompanied by a lawyer, friend or other supporter, but that person may not usually participate in the interview (although some case officers may accept their help with clarification or other brief, non-obstructive comments). In practice, most people are not legally represented at the primary interview, and lawyers do not consider it is necessary. Many will have been assisted, however, with prior preparation of their application form and advice on how to approach the interview.

All primary interviews are tape recorded. This was introduced a number of years ago, and is seen as a valuable safeguard and timesaving measure for decision-makers and applicants alike. One DIMA officer said that 'we accept [taping] as vital to ensuring...the accuracy of what was said.' A simple, general use retail cassette recorder is used, with a dual tape deck to allow two copies to be made simultaneously. One copy of the tape is given to the applicant at the interview, and one is attached to the file. As a general rule, the tape is not transcribed or referred to again unless an issue arises at a later stage about the account given, the translation or the nature of the questions asked.

Following the primary interview, the DIMA case officer who conducted the interview will consider the claim and conduct any further necessary research. If a query or difficulty arises, the officer will frequently make direct contact with the applicant or his or her representative. The aim of such contact is to prevent unnecessary mistakes or confusion which may lead to an incorrect decision.

According to reports, the relationship between representatives and departmental officers in most cases is co-operative. This is said to facilitate the decision-making process and improve the quality of decisions made in general.

Decision-making

In assessing whether a person is a 1951 Convention refugee, DIMA case officers are said to apply the five-stage test developed by Prof James Hathaway in his key text, *The Law of Refugee Status* (1989). In addition, they use guidelines developed by the DIMA in conjunction with UNHCR, the Refugee Council of Australia and others, in considering cases which raise gender issues. They are published, and it is intended that they will be revised on a regular basis. It is perceived that the guidelines have worked to raise awareness of gender issues among onshore refugee determination personnel, and improve their handling of cases where such issues arise.

When a decision is made, a written notification is sent to the applicant in a standard form. If the application is granted, detailed written reasons are not provided. The aim of this is to prevent applicants 'tailoring' their applications to meet DIMA's perceived requirements

for approval. It is said not to cut down significantly on the time required to dispose of the file, however. If a positive decision is made, the officer writes to the applicant informing him or her that she or he must undergo a health test. The claimant need not satisfy any minimum health standard, but the check is seen as necessary to make a record of the person's condition and ensure it poses no threat to others in the community. There are also 'character' checks, mainly consisting of a police database check for convictions or involvement with unlawful activities. (In practice, it does not appear that this has to date resulted in any refusals on exclusion grounds.)

Where an application is refused, detailed written reasons are provided. The DIMA has a template which prescribes the structure and elements which reasons for refusal must contain. It is emphasised by DIMA, however, that this template does not provide any kind of pro forma approach to decision-making, but merely creates a consistent framework for analysing the claim. It requires the decision-maker to set out the relevant legislative provisions; the Convention refugee definition; the evidence before him or her; and the various tests applied, together with findings based on the evidence and conclusions on the application of the relevant tests.

Statistics

The average processing time for claims lodged and processed in 1995-96 was 2.1 months from interview to decision (compared with 2.4 months in 1994-95). After claims made in previous years were included, the rate for all primary applications decided in 1995-96 was 13.4 months, according to Departmental figures. The DIMA Annual Report stated that this average period was far longer than previous years, because it was distorted by a backlog of old applications made by PRC nationals in 1989 and later, on which no decisions were made until some time later. In priority cases, the average processing times were: for detainees, 1.2 months from interview to finalisation; for torture trauma victims, 3.5 months; and for recipients of ASA funding, 3.1 months.

The unit cost of a decision in 1995-96 was quoted as approximately $A2,000, down 6% from the cost in 1994-95. The total number of decisions made was 5,674 (covering 7,593 people, including primary applicants and their dependants). This left an outstanding caseload of 6,860 (9,650 people). Applications were approved in 14.6% of a total of 5,674 cases (comprising 829 applications, relating to 1194 people). The initial refusal rate was thus 85.4% (4,845 cases concerning 6,399 people).

4.5 Information resources in decision-making

Decision-makers have access to a large and detailed collection of information resources. These include an internal database, the DIMA Country Information Service Network (CISNET), which is prepared and maintained in Canberra, and which includes information on most countries from which refugees in Australia come. In addition, all DIMA case officers have access to the internet and to CD ROM, online news and information services and hard copy publications from Reuters. They can access materials from UNHCR, the Canadian Documentation, Information and Research Branch's Question and Answer database. Monographs and periodicals from a wide range of domestic and international sources are available in libraries in Melbourne, Sydney and Canberra, including the US State Department Human Rights reports, Human Rights Watch, Amnesty International

reports, and news items, including local publications from refugee source countries. An extensive collection of human rights and refugee law jurisprudence is also maintained. In addition, DIMA liaises closely with the DFAT, which provides general reports on country of origin conditions, as well as responses to specific questions relevant to individual cases or groups. All requests and information items sought and obtained through the DIMA channels are logged on computer, and past requests and items can be retrieved by any DIMA officer at any time.

DIMA also shares research resources with the RRT (see below), an arrangement which is perceived to bring mutual benefits. DIMA considers that the resources invested in its research facilities are vital to all its work. This applies not only to the determination of asylum claims, but also to the development and implementation of asylum programmes in future.

4.6 Comment

There are a number of positive features of the Australian primary decision-making process which are of interest in considering effective alternative models. These include:

- the use of a detailed, broadly-framed application form which allows applicants to set out details of their claims, as well as other information concerning identity, background and family situation;

- the allocation of a case to one case officer within the onshore refugee determination division of the DIMA. This appears, first, to encourage a high standard of work and investment of personal responsibility in each case by the decision-maker. Second, it allows a relationship of contact to be established between the case officer and applicant or representative, which can facilitate communication and clarification of queries relating to a claim;

- the procedure which allows - and requires - the case officer making the decision to receive the claim form, undertake research on the case and prepare for and conduct the interview;

- use of cost-effective tape-recording facilities to verify and record the interview with benefits to both parties;

- extensive background information for decision-makers on country conditions;

- the opportunity created by the time between arrival, application lodgment and interview for applicants to seek advice and assistance before attending an interview ;

- the priority which is given to processing claims from certain categories of vulnerable and disadvantaged applicants, including detainees and torture victims;

- the issue of guidelines and templates to assist and structure decisions;

- the relatively short time between application and decision, for current cases.

The far smaller number of applications means that some of these features are more practical in Australia than in most European countries. However, in most cases, these are provisions which greatly assist the decision-making process.

5. APPEALS AND REVIEW: the Refugee Review Tribunal (RRT)

Following refusal of a claim at first instance, an asylum seeker in Australia may apply for review of the decision before the Refugee Review Tribunal (RRT). The empowering legislation of the RRT requires it, in carrying out its merits review function, to 'pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick' (s420, Migration Act). It is thus seen as a quasi-judicial administrative review body which is required to assess the correctness of a decision on the facts and the law, but without the formality, costs and delays frequently associated with court proceedings. This is reiterated in the Migration Act section which provides that 'the Tribunal, in reviewing a decision, is not bound by technicalities, legal forms or rules of evidence and ..must act according to substantial justice and the merits of the case' (s420(2)).

5.1 Structure

The RRT was created by statute in 1993 as a specialist merits review authority with power to hear challenges to refugee status decisions. It is independent of DIMA; its members are appointed by the Governor-General (the Queen's representative in Australia), on the basis of recommendations from the Immigration Minister. The Minister is also responsible for the RRT in the sense that he or she accounts for its operations in Parliament.

Members' terms vary in length, but generally last about four years. Not all members are lawyers, although many have legal backgrounds or refugee work experience, either in the public service or elsewhere. Some have been refugee lawyers and advisers themselves. Others are drawn from fields which may have some connection with the immigration or refugee area, including psychologists, counsellors, academics and public officials.

5.2 Jurisdiction

The RRT's review jurisdiction extends to consideration of decisions to refuse or to cancel a protection visa; or to grants of protection, where the Minister challenges a positive decision. It has no power to review the cases of people who are not physically in Australia when a decision is made; or where the Minister has issued a 'conclusive certificate' stating his belief that it would be contrary to the public interest to review or change it. This may occur if she or he perceives that a reversal of the decision would 'prejudice the security, defence or international relations of Australia', or the review would require Cabinet deliberations to be disclosed (s411(3), Migration Act).

The powers of the RRT on review allow it to affirm, vary or set aside a decision and substitute its own (s415); or to remit a case for reconsideration at the primary level, with directions or recommendations' for certain types of matter (s415(2), Migration Act).

5.3 Statistics

(All statistics given below are from the RRT Annual Report, unless otherwise stated)

Approximately 4,000 applications for review of a primary decision were lodged in 1995-96. This represented an increase of around 10% from the number of applications in 1994-95. No precise figures are available, but it is estimated that approximately 60% of primary refusals were challenged. The majority of appellants were people from China, followed by Fiji, Indonesia, Sri Lanka, Tonga, the Philippines, Pakistan, Turkey and Iraq.

The RRT made 3,384 decisions in 1995-96 (with a total number of 4,492 cases finalised, including withdrawals and invalid appeals or ineligible appellants). This represented a 14% increase in output from the previous year. It set aside 18% of primary decisions, and affirmed 82%. (This makes an interesting comparison with the approval rate at first instance, which was 14.6% in 1995-96.)

The average review period from application to disposal for all cases finalised (including withdrawals) was 300 days. The bulk of this period appears to be time waiting for a hearing, as the average time between hearing and finalisation is 45 days. On average, each member (including full and part-time personnel) disposed of 75 cases in the year. The average cost of reaching an appeal decision was estimated at $A1,000 (approx £450).

282 applications for judicial review were lodged against RRT decisions, representing a challenge to 8.2% of decisions.

It is clear that the caseload borne by individual RRT Members in Australia is significantly less than that of adjudicators in the UK system, and the time they devote to dealing with each individual case is more. Because of the large backlogs in the UK system, however, the time taken for cases to be finalised is not notably less. The Australian statistics suggest that the level of scrutiny which appeal cases receive may be greater; and if this is so, it is interesting that the proportion of primary decisions set aside under the Australian review process is considerably higher than in Britain (18% of refusals overturned, compared with approx 6% in the UK in 1996).

5.4 Procedure

In general terms, the Migration Act prescribes four main stages in the review process. These are:

1. Lodging of the application for review, which must be completed in a prescribed form and filed together with supporting evidence and written argument.

2. A review of the case on the papers and, if possible, a decision which is favourable to the applicant. This may be made without an oral hearing.

3. If a favourable decision cannot be made on the papers, the applicant is granted an oral hearing under statute, conducted by a single RRT member with a right to assistance (but not representation) by an 'adviser'.

4. The preparation of a written decision based among other things on research from the RRT's documentation facilities; and notification of the decision to the appellant, with written reasons.

In addition to the statutory provisions, the RRT has prepared a set of practice directions which are intended to assist the Members in conducting hearings and making decisions. These are updated progressively, and published each year in the RRT's Annual Report. The aim of the practice directions is to 'prescribe general procedural guidelines to facilitate the application of the legislative provisions and to ensure efficient conduct of matters before the RRT. They are not binding on RRT Members, but they are intended to ensure fairness and consistency in review decision-making.

Lodging the appeal

If the appellant is in detention, an appeal must be lodged within seven days of the initial refusal. Following recent rule changes, other applicants who are refused at the primary stage have 14 days in which to seek review (reduced from 28). The appellant must pay a fee on lodgment of the appeal.

The application must be made on a prescribed form, and include any further evidence which was not before the primary decision-maker, including third party opinions and any statements from the appellant in statutory declaration form, setting out matters which she or he wishes the RRT to consider. The appellant may also file written legal argument concerning the appeal issues, prepared by him or herself or an adviser. All materials must be in English, or accompanied by a formal translation arranged and paid for by the appellant.

The DIMA is notified as soon as any application for review is made. Within ten working days, the case officer who made the initial decision must provide the RRT with the statement of fact-findings, evidence and reasons for the decision, together with 'any other document in the [Department's] control' concerning the claim or its review (s418, Migration Act). This timescale appears to be generally observed. The DIMA may also make further written submissions concerning the appeal issues when the appellant has filed his or her evidence and written arguments (s432, Migration Act). The Department may also be requested by the RRT to undertake specific investigations and report to the relevant Member (s427). In most cases, these written submissions and answers to requests represent the extent of the DIMA's involvement in the appeal process.

Appeal fees

In addition to the standard fee for lodging an appeal, rule changes made in 1997 will require appellants to pay an additional amount if their cases do not succeed. This 'penalty' fee has been set at $A10,000 (L5,747); an amount which is far in excess of the resources of most asylum seekers awaiting the outcome of an appeal. It is unclear precisely how the government intends to enforce this requirement, particularly against failed appellants who are removed; it seems likely that they will simply incur a debt to the Commonwealth which must be repaid immediately if they ever return to Australia for any reason. The 'penalty fee' has been criticised strongly by refugee advocates and the legal community generally, many of whom argue that it is a restriction on the right of access to justice, and a cynical attempt by the government to dissuade rejected claimants from appealing.

Review 'on the papers'

After all material has been received, the RRT Member assigned to the case examines the documentation which was before the primary decision-maker together with any new material. If, on the basis of that material, the RRT is prepared to make a decision 'that is most favourable to the applicant' (s424(1), Migration Act), the appeal can be decided without oral evidence.

Under proposals announced in March 1997, it is planned to extend the power to decide 'on the papers' to allow Members to make negative decisions without an oral hearing. This represents a significant departure from the current rules, which stipulate that appellants are legally entitled to a hearing unless their appeal is to be granted (s425(1)(a), Migration Act).

To date, relatively few appeals have been decided each year on the papers (approximately 2% or 23 out of 1117 cases in July to Oct 1996). However in the view both of RRT Members and refugee advisers, the paper procedure is a useful mechanism which saves time and resources in some cases. These are notably those in which credibility does not feature as a major issue. In addition, the process of considering the appeal on the papers alone is seen as valuable preparation for the hearing which will otherwise follow; the Member must 'really think about the issues', rather than wait until the hearing to see what the new oral evidence raises.

Preliminary identification of issues

Prior to the hearing, RRT Members will often seek to clarify or isolate certain issues which are central to the appeal. In exceptional cases, this may be done through a preliminary hearing or formal pre-hearing conference, provided for in the practice directions. In fact, conferences are rare, because most RRT Members consider they will add to the cost, length and complexity of the case. The more common method is for the Member to identify key questions via correspondence or through telephone discussions with the appellant's adviser (or, where relevant, the Departmental officer). This process is also used to finalise procedural matters, such as any outstanding questions relating to evidence, documentation or interpreters.

Preliminary identification of issues in this way is seen as valuable for several reasons. First, if the questions formulated by the Member pinpoint an ambiguity or apparent misunderstanding in the primary decision, it can be clarified quickly so that the Member can concentrate at the hearing on the substance of the claim. Second, if the Member raises an issue relating to further evidence or documents needed, the applicant and/or DIMA officer is forewarned and can try to obtain them before the hearing.

Thirdly, the discipline of setting out questions is said to clarify the issues in the Member's mind, which leads to more relevant, focused inquiries at the hearing. It also compels and permits the applicant to prepare t o meet the points which are raised, instead of requiring him or her to re-state all aspects of the claim, when not all may be disputed. Finally, preliminary correspondence about the key questions may remove the need for a hearing altogether. If the Member's question is answered by the new evidence or responses submitted, he or she may be prepared to grant the appeal on the papers.

In practice, it should be noted that not all Members use this opportunity to clarify the issues in advance. There is no present obligation under the legislation to do so, but the (non-binding) practice directions encourage it. There is some suggestion that the Principal Member may direct that pre-hearing identification of issues be carried out, which would make it a requirement in all cases. Practitioners agree that where it is used, it helps all participants by encouraging proper preparation, and leads to more effective, focused hearings.

Non-adversarial procedure

The hearing before the RRT is designed to be non-adversarial in nature. In keeping with this approach to determination, the RRT is vested with specific powers of inquiry and investigation which are similar to those in inquisitorial forums. These include power to make inquiries and conduct research of its own, or require evidence or investigations to be carried out on specific matters (s425, Migration Act). Any such material located by the RRT is considered in addition to that put before it by the DIMA or the appellant. Where the RRT intends to have regard to adverse material, however, it must put it to the appellant in accordance with the requirements of natural justice (practice directions, 5(b)).

At oral hearings, the DIMA is not represented before the RRT. Under the legislation, power exists to hear oral submissions from the DIMA, but this has been used only once, according to accounts from RRT Members. Such participation is seen as unnecessary and unlikely to contribute anything further to the information before the RRT. Like the applicant, the DIMA's case officer may file additional documentary material with the RRT before the hearing, which may deal with the individual applicant or the general situation in his or her country of origin. The DIMA may also present written submissions on the evidence or other aspects of the case. It is also bound to undertake any investigation or medical examination which the RRT requires, which may happen if the RRT has specific queries arising out of the DIMA's decision.
If the applicant requests an interpreter at the hearing, the RRT will arrange it free of charge. The applicant may be accompanied at the hearing by an 'adviser', who may be a lawyer. This person is entitled to be present and take notes, but may not play any further role in proceedings unless leave is given by the RRT Member. In most cases, the adviser will not be permitted to intervene during the hearing, although under the practice directions, she or he may 'unobtrusively' offer advice. The adviser is often given an opportunity to speak at the end of the hearing, and make remarks or clarify points which may not have been effectively made. The result of this diminished role for advisers on both sides is that the appellant is very much the focus of the hearing, rather than the arguments or technical or evidentiary points which representatives might otherwise be raising.

In the absence of opposing counsel, the RRT Member takes an inquisitorial role in examining the applicant's case. The way in which this is done will depend on the individual member. The practice directions give an indication in general terms of how oral evidence should be taken; for instance, stating that 'an applicant may be allowed to narrate his or her evidence in the first instance, or will be given the opportunity to do so at a later point in the hearing'. However these are not binding, and in many cases are not followed.

Interrogative techniques vary greatly from member to member. It appears that most Members will ask applicants to tell their story in their own words, and then ask specific questions about the answers or the case generally. Others will conduct the entire hearing by question and answer. In some cases, a Member will confine the hearing to particular issues which have been identified with a representative in advance. Others are said to take a very aggressive approach, interrogating appellants at length, as if in an attempt to ambush them; and disregarding the fact that this may cause added distress or confusion. In such case, the 'non-adversarial' description seems misleading, because it can appear to the appellant that the RRT Member is in fact acting as the party opposing his or her claim.

The wide variety of approaches to hearings is criticised by appellants' advisers and independent observers. Different approaches are said to produce inconsistency in decision-making. The quality of the decision may depend on how effective the Member's examination of the applicant and resulting grasp of the evidence has been. The non-binding nature of the practice directions, and the flexibility which results, is seen by some as good, on the grounds that it allows members to adapt the process to the needs of the case and ensure the hearing does not become too formal. Others maintain that it would be preferable if the practice directions were converted into regulations or other binding form, so that appellants could benefit from more specific procedural guarantees.

Under changes announced in early 1997, the RRT Principal Member will have power to give directions on the operation of the RRT and conduct of reviews. Thus it is possible that the present procedural norms will become more formalised, assuring more consistency in practice and firmer assurances of minimum standards.

Other criticisms of the inquisitorial RRT process could arguably be met by the introduction of basic safeguards and better training for decision-makers. Specific training in effective and sensitive questioning methods, which take account of the problems facing potentially traumatised applicants, could improve the standard of questioning at hearings.

In addition to problems with inconsistent and insensitive hearing methods, another perceived drawback in the inquisitorial model is the workload it can impose on the decision-maker. RRT Members must prepare extensively in advance for each review hearing, so that questions to the appellant are pertinent and directed to the question of his or her need for protection. A degree of preliminary background research on factual and country information is also essential to ensure that the claim is fully understood and properly assessed.

It seems to be generally agreed in the Australian system that the relaxation of the formal rules of evidence, and the assumption of a more proactive role by an impartial appeal decision-maker, are more conducive to better and fairer decision-making than rigid, aggressively adversarial processes. The RRT can provide a flexible and less intimidating environment for exploring appellants' claims. With improvement in training in effective and fair questioning, and clear, binding norms to ensure procedural fairness and consistency, it appears that the RRT model offers innovative possibilities for an effective alternative model for good merits review decision-making.

5.5 Comment

In summary, some major interesting features of the RRT hearing model are:

- a format which focuses the reviewer's attention on the appellant and his or her story;
- an effective allocation of DIMA resources in using one case officer only to prepare and manage the primary claim determination and appeal, using the benefit of knowledge gathered in making the initial decision. An additional DIMA officer is not needed to participate in the appeal hearing;
- an obligation on all representatives to prepare their arguments and evidence in advance, to be submitted in written form to the RRT;
- the ability of the RRT Member to clarify specific questions in dispute, and invite parties to submit specific evidence or arguments on the contentious points.

Disadvantages which could make it problematic or difficult to use in other systems are also apparent. These include:

- the need for extensive training of review decision-makers who are accustomed to the adversarial approach, to assist them to conduct examination impartially and sensitively, in keeping with the principles of natural justice;
- the role of a review decision-maker as 'active' inquisitor rather than impartial arbiter between competing assertions. This could be seen by some decision-makers as sending them too far in the direction of becoming opponents of the appellant, and as safeguarding the interests of the executive;
- the need for greater resources and time for decision-makers at appeals than is currently feasible in the UK and many other countries (however, there may be time savings for departmental decision-makers and those who would otherwise represent the department at appeals).

5.6 Information resources

The RRT has access to remarkably comprehensive and high-quality information materials relevant to asylum law and to facts relating to the countries of origin of appellants. These resources include DIMA's extensive computer database of country information, known as CISNET (see discussion above). All RRT Members have access to CISNET computer searching facilities, and to electronic data from other sources, including media providers, online publishers and universities. If RRT Members are reluctant or unable to use the databases themselves, they can ask trained staff who will retrieve the data for them.

In addition, there are hard copy document libraries in both the Melbourne and Sydney RRT offices (which are the only two fixed hearing venues, as distinct from circuit facilities). The Sydney collection is comprehensive, both in terms of its legal materials and country data. The Melbourne library is smaller, but Melbourne members can access the

Sydney materials.

A key element in the information resources which are available is the staff. In total, over 30 researchers are employed in the Legal Research and Country Research teams, with the specific task of carrying out research for the RRT and its Members. Their tasks are to update the library and databases, to find answers to queries put by Members, and to conduct general research on countries and issues which arise commonly in appeals. Every piece of information requested by and given to RRT Members is recorded and published on the database. This means that it can be searched and referred to be other Members who have a similar query, without the need for duplicated work.

The RRT research section is also aiming to put together a set of authoritative 'core' materials on key countries and issues for use in relevant appeals. The countries targeted include those producing the greatest numbers of applicants, or those where the political situation is most complex. Issues may include topical matters raising protection issues, such as gender persecution (on which the Australian DIMA has published guidelines for use at primary level); persecution based on sexual preference, faith conversion and persecution; forcible conscription; the one-child policy, and others.

The intention is to use these core materials as a basis for considering all claims which raise the same issue or relate to the group or country in question. The core file contains all of what are perceived to be the most central, accurate and current materials on the issue. RRT Members are encouraged to start from the core file, and consider in addition any other items which may be relevant to the claim or issue in question. The appellant's adviser and the DIMA may of course submit any additional material they consider to be appropriate. This system aims to reduce the time needed to gather basic materials about the country or issue, and allow members to channel time and resources into examining more difficult and disputed questions.

In addition to the in-house country and legal research staff at the RRT, Members have access to resources offered by the DFAT. DFAT prepares general reports on countries in which Australia maintains postings, and will accept and respond to specific queries from RRT Members about circumstances or facts on the ground. These may be very detailed (for example, what does an arrest warrant from X regional police look like? what colour are the walls in Y prison?) or more general (for example, what are the political conditions in region A today?). Further, it was also said that RRT Members can refer to a 'document authentication' unit run within the DIMA. However this body was controversial among applicants' supporters, who felt that not enough was disclosed or known about its expertise, procedures or functions; and that as a result, it was difficult to challenge during appeals.

The extensive information available to the RRT is generally acknowledged as helping it to produce well-informed, comprehensive evaluations of the facts. As the RRT is the last level of fact adjudication for most cases in the Australian system, this high quality of factual source matter is seen as critical. The cost of the information base has attracted controversy in the past, in the context of wider reassessment of Australia's immigration decision-making system. As a method of helping to ensure accurate and fair decision-making, it is respected both by supporters of applicants and Departmental representatives.

5.7 Decisions and further review

RRT Members are required to aim for an output of 90 decisions per annum (approximately two per week). They are bound by a statutory obligation to provide detailed reasons for decisions (s430(1)), whether to grant or reject an appeal. Under legislation, RRT decisions must be published; and in addition to being available in hard copy, are accessible free of charge on the internet, in full text format. People without access to the internet may come into the registry and search decisions on screen at a public terminal, which is also free of charge.

Following a negative RRT decision, Australian law permits an applicant no further challenges based on the merits. Judicial review may be sought from the Federal Court; the effective scope of this review has been reduced, following legislative amendments. Several of the important grounds for seeking judicial review of administrative decisions were abolished some years ago in respect of asylum claims (including, among others, for breach of the rules of natural justice, or on grounds of reasonableness, or irrelevant considerations). Most recently, the government has proposed further restrictions, so that even the lawfulness of a decision may not be challenged so long as the decision-maker had authority to make the relevant decision. This would effectively deny access to the courts for asylum seekers who wish to challenge the lawfulness of decisions.

6. CONCLUSIONS

As a framework for decision-making and for giving effect to basic principles of protection, there are a number of aspects of the Australian system which are commendable. Several of these could offer useful scope for consideration or adaptation in other systems. In some areas, however, caution must be used to ensure that these elements are not misapplied or undermined over time, and that their practical application does not fall short of the principled aims which may have inspired them. For example, the procedure for offering broader forms of protection to people outside Australia's territory is extremely important as a means of honouring international commitments and human rights principles going beyond the 1951 Convention. Such processes should not, however, be permitted to undermine the principles and public commitment to protection for refugees who arrive in the country. Similarly, a thorough and rigorous appellate system, such as that used by the RRT, is extremely valuable as a check on first instance decision-making. It should not, however, be surrounded by barriers which may make it inaccessible to genuine claimants, such as those who cannot risk the imposition of fees if unsuccessful.

The most recent reforms proposed by the Australian government must be of great concern. They appear to violate standards of procedural fairness, and other fundamental principles including access to the courts. They risk undermining a system which, while it may have required some procedural reform, broadly offered an opportunity for fair consideration and reconsideration of a relatively small number of on-shore asylum claims.

Madeline Garlick
August 1997

C

Application for **an applicant who wishes to submit their own claims to be a refugee**

DEPARTMENT OF IMMIGRATION AND ETHNIC AFFAIRS

Application for a Protection Visa (866)

Please complete in English, using BLOCK LETTERS.
You must use a pen (pencil is not acceptable).
You must answer ALL questions. If any question is not applicable, write 'N/A'.
If you need more space to answer any questions, attach a sheet of paper giving the required details and include the part (Part C) and question number to which the information refers.

Details of applicant

What is your full name?
Family name
Given names

Applicant Number – as shown in Question 1 on Part B

What other ways do you spell or write your name? – include full name in your own script or characters (if applicable)

What other names have you been known by?
(such as name before marriage, previous married name, alias)
Also write in your own script or characters.
If you changed your name, describe why and when you changed your name.

Sex Male ◯ Female ◯

Date of birth (DAY / MONTH / YEAR) / / **and age** years

Place of birth
City, town or village
State or province
Country

If you are called for an interview, will you need an interpreter? No ◯ Yes ◯ ▸ In which language(s) and dialect?

Are there any other factors we will have to take into account (such as access for a disabled person)? No ◯ Yes ◯ ▸ Give details

Which languages do you speak, read or write?

Language / Dialect in order of preference	Speak	Read	Write
	◯	◯	◯
	◯	◯	◯
	◯	◯	◯

Continued overleaf ▸

McMILLAN PRINT

9 **Ethnic group you belong to**

10 **Your religion** (if any)

11 **Your marital status** – tick all those which apply to you

		DAY MONTH YEAR		TOWN/CITY AND COUNTRY
Never married ◯				
Engaged ◯ ▶	Date of intended marriage	/ /	▶ Place of intended marriage	
Married ◯ ▶	Date of marriage	/ /	▶ Place of marriage	
De facto ◯ ▶	When did the relationship begin?	/ /	▶ Place where relationship began	
Separated ◯ ▶	Date of separation	/ /	▶ Place of separation	
Divorced ◯ ▶	Date of divorce	/ /	▶ Place of divorce	
Widowed ◯ ▶	Date when became widowed	/ /		

12 **Your current residential address in Australia**
This must be the address where you are living.
A Post Office Box Number is not acceptable as a residential address

Postcode

13 **Your telephone numbers**

Home (STD)

Work (STD)

14 **Your occupation or profession**

15 **Are you currently employed?** No ◯ Yes ◯ ▶ Give details

Name and address of employer

Employer's telephone number (STD)

Number of hours of work per week

Citizenship

16 **Your citizenship at birth**

17 **Your current citizenship** – if different to at birth

Date acquired (DAY / MONTH / YEAR) / /

18 **Do you hold any other citizenship?** No ◯ Yes ◯ ▶ Which countries?

19 **If you are stateless, how, when and why did you lose your citizenship?**

20 **Country of residence before arrival in Australia**

21 **Date of departure from that country** (DAY / MONTH / YEAR)

22 **What was your status in that country?**

Citizen ◯ Permanent resident ◯ Student ◯

Refugee ◯ Temporary resident ◯ Visitor ◯

Other (describe)

Travel to Australia

23 **Did you enter Australia as a:**

Visitor ◯ Transit passenger ◯ Student ◯

Migrant ◯ Ship deserter ◯ Stowaway ◯

Other (describe)

24 **Date of arrival in Australia** (DAY / MONTH / YEAR)

25 **Details of your current travel document**

Type of document (e.g. passport)

Document number

Nationality of document

Place of issue

Date of issue (DAY / MONTH / YEAR)

Valid until (DAY / MONTH / YEAR)

26 **Give details of the travel document you used to enter Australia** – if different to your current travel document

Type of document (e.g. passport)

Document number

Nationality of document

Place of issue

Date of issue (DAY / MONTH / YEAR)

Valid until (DAY / MONTH / YEAR)

27 **Have you ever had, or used, any other passport or travel document?**

No ◯ Yes ◯ ▶ Type of document

Document number

Nationality of document

Name on passport

Where is it now?

28 **Did you ever travel outside your home country before your current journey to Australia?**

No ◯ Yes ◯ ▶ Give details

Countries you have been to	Purpose of travel	Date of departure from home country DAY MONTH YEAR	Date of return to home country DAY MONTH YEAR
		/ /	/ /
		/ /	/ /
		/ /	/ /
		/ /	/ /
		/ /	/ /
		/ /	/ /
		/ /	/ /

Continued overleaf ▶

29 **Give details of the most recent Australian immigration authorisation granted to you** – if applicable

Type of authorisation (e.g. visa, entry permit)	
Visa or permit number	
Place of issue	
Date of issue (DAY MONTH YEAR)	/ /
Valid until	/ /

Previous addresses

30 **Give details of all addresses OUTSIDE AUSTRALIA where you have lived for 12 months or more in the last ten years**

	MONTH YEAR	Country	Address
From	/		
To	/		
From	/		
To	/		
From	/		
To	/		
From	/		
To	/		
From	/		
To	/		
From	/		
To	/		
From	/		
To	/		

Give details of all addresses IN AUSTRALIA where you have lived for any period

	MONTH YEAR	Address
From	/	
To	/	
From	/	
To	/	
From	/	
To	/	
From	/	
To	/	
From	/	
To	/	
From	/	
To	/	
From	/	
To	/	
From	/	
To	/	

Education

32 **Give full details of all the education you have undertaken (in any country)**

Total number of years

From Month / Year	To Month / Year	Name of school/institution	Address (village/town/city and country)
/	/		
/	/		
/	/		
/	/		
/	/		
/	/		

33 **Give details of university, trade or similar qualifications you have obtained**

Qualification	Year

Past employment

34 **Give details of all your past employment**

For the periods you were not employed, show the reason, e.g. studying, unemployed, national service, in prison, etc.

Make sure that you cover the whole time since leaving school, except for your current employment.

	Month / Year	Employer's name and address OR show if studying, unemployed, in national service, in prison etc.	Position/occupation	Monthly salary in local currency
From	/			
To	/			
From	/			
To	/			
From	/			
To	/			
From	/			
To	/			
From	/			
To	/			
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From	/			
To	/			
From	/			
To	/			

Continued overleaf ►

Your reasons for claiming to be a refugee

The reasons you give in this section should be **your** reasons only.

Other members of your family unit who have their own reasons for claiming to be a refugee should give their reasons on a separate Part C.

You should answer all the following questions in your own words. You should tell us below everything about why you think you are a refugee. In answering the questions below, you should tell us if you think any events you refer to are because of:

- your race
- your religion
- your nationality
- your membership of a particular social group
- your political opinion
- other reasons

Your claims will be assessed against the definition of a refugee set out in the United Nations Convention. The definition is provided on page 1 of Part A of this form.

You should, wherever possible, provide dates, locations etc. in respect of any events/occurrences to which you refer.

You should provide any evidence that you have which supports your claims.

35 ***I am seeking protection in Australia so that I do not have to go back to:***
(Give name of country or countries)

36 **Why did you leave that country?**

If you need more space to answer, insert extra pages as required

37 **What do you fear may happen to you if you go back to that country?**

If you need more space to answer, insert extra pages as required

Continued overleaf ➤

38 **Who do you think may harm/mistreat you if you go back?**

If you need more space to answer, insert extra pages as required

Why do you think they will harm/mistreat you if you go back?

If you need more space to answer, insert extra pages as required

40 **Do you think the authorities of that country can and will protect you if you go back? If not, why not?**

If you need more space to answer, insert extra pages as required

Continued overleaf

41 **When did you leave your home country?**
(DAY / MONTH / YEAR)

/ /

42 **Airport or port of departure from your home country**

43 **How did you leave?**

Legally ◯ ▶ Give details of your exit permit

Illegally ◯ ▶ Describe how you left

44 **Did you have difficulties obtaining a travel document (such as a passport) in your home country?**

No ◯ Yes ◯ ▶ Give details

45 **Has your travel document been extended by the authorities of your home country?**

No ◯ Yes ◯ ▶ When (give dates)

Where (city and country)

46 **Do you have your travel document with you now?**

No ◯ ▶ Where is it and why?

Yes ◯

47 **Is your travel document valid for return to your home country?**

No ◯ ▶ Why not?

Yes ◯

48 **Did you have to visit an Australian High Commission, Embassy or Consulate to obtain your visa?**

No ◯ Yes ◯ ▶ When (DAY / MONTH / YEAR)

/ /

In which city?

49 **Were you interviewed in connection with the issue of your Australian visa?**

No ◯ Yes ◯ ▶ What reasons did you give for wanting to go to Australia?

50 **Did you ever apply to migrate to any country other than Australia?**

No ◯ Yes ◯ ▶ To which country?

Date of application

/ /

Where did you apply?

City Country

What was the outcome of your application?

51 **Have you ever applied for refugee status in any country other than Australia?**

No ◯ Yes ◯ ▶ In which country?

Date of application / /

What was the outcome of your application?

Name of any international agencies you registered with and dates / /

52 **Are you registered with or have you had any contact with the Embassy, High Commission or Consulate or other representatives of your home country in Australia?**

No ◯ Yes ◯ ▶ Give details

53 **Are you in contact with relatives in your home country or any other country?**

No ◯ Yes ◯ ▶ Describe how you contact them and give any information which you think is relevant to your claim

54 **Have you returned to your home country since arriving in Australia?**

No ◯ Yes ◯ ▶ Give details: When?

Why?

Did you return with the full knowledge of the authorities of your country? No ◯ Yes ◯

Did you re-enter your country legally? No ◯ Yes ◯

55 **Do you receive or are you entitled to a pension or any regular income from any country?**

No ◯ Yes ◯ ▶ Give details

56 **Do you still have military service obligations in your home country?**

No ◯ Yes ◯ ▶ Give details

Continued overleaf ▶

Applicant's declaration

57 **Please read and sign this declaration**

I declare that:

- *The information I have supplied on or with this form is complete, correct and up-to-date in every detail.*
- *I understand that if I have given false or misleading information, my application may be refused, and any visa issued may be cancelled.*
- *I understand that if this application is approved, any person not included in this application will not have automatic right of entry to Australia by way of this application.*
- *in accordance with the Migration Act 1958, I undertake to inform the Department of Immigration and Ethnic Affairs of any changes to my personal circumstances (e.g. marital status, changes to the family composition) while my application is being considered.*
- *I undertake to inform the Department of Immigration and Ethnic Affairs if I change my address for more than 14 days while my application is being considered.*
- *I authorise the Australian Government to make any enquiries necessary to determine my eligibility for permanent stay in Australia, and to use any information supplied in this application for that purpose.*
- *I have read and understood the information supplied to me in this application.*

WARNING: The provision of false or misleading information in this Declaration is subject to penalties under the *Migration Act 1958*.

Applicant's signature

Date (DAY / MONTH / YEAR) / /