Parliament of the Commonwealth of Australia

JOINT STANDING COMMITTEE ON MIGRATION REGULATIONS

AUSTRALIA'S REFUGEE AND HUMANITARIAN SYSTEM:

ACHIEVING A BALANCE BETWEEN REFUGE AND CONTROL

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FOREWORD

Over the past decade, a refugee crisis of proportions not seen since the Second World War has been developing on a global scale. Australia, like many other countries around the world, has been faced with an increasing number of asylum seekers applying for refugee status either once they have entered the country or upon arrival at the border. The dramatic growth in on-shore asylum seekers is a major international problem, which is likely to become considerably worse.

In response, Australia and other countries of resettlement, such as the United States, Canada, the United Kingdom and various European nations, have amended their refugee laws and processing arrangements. Their ultimate aim has been to achieve a balance between ensuring protection for genuine refugees and maintaining control over their refugee systems to guard against abuse.

These complex matters have been under consideration by this Committee over the past two years. The Committee has consulted widely with government and community representatives. In particular, the Committee has considered the recent experience of the Department of Immigration, Local Government and Ethnic Affairs in refugee processing. The recommendations in this report reflect and are based on the wide body of evidence gathered by the Committee.

The inquiry evidence also is reflected in the recent changes which the Government has introduced to Australia's refugee and humanitarian determination system. Many of the changes which have been implemented during the course of the inquiry are matters in relation to which the Committee received evidence and identified deficiencies.

This report sets out the principles and policies which need to be adopted within Australia's on-shore refugee and humanitarian system. While some of these already may have been included in the recent amendments to Australia's refugee processing arrangements, implementation of the Committee's recommendations will ensure that the balance between refuge and control is achieved.

The recommendations in this report will be compared with the proposals which other countries around the world are bringing to the refugee debate. Whatever the outcome of this debate, it is evident that the refugee crisis is an international problem which will continue through this decade and into the 21st Century.

For this reason, it is important that nations such as Australia continue to pursue the twin goals of achieving the best humanitarian outcome for asylum seekers, while maintaining control over their refugee programs and systems. It is towards these goals that the Committee has directed its recommendations in this report.

As Chairman, I wish to express my appreciation to all those who have contributed to this inquiry and the preparation of this report. In particular, my thanks go to my fellow Committee members for the time and effort they devoted to the inquiry. Special thanks also go to Dr Kathryn Cronin, the Committee's specialist adviser, for her valuable advice and support throughout the inquiry. Thanks also are due to the Committee secretariat, including the current Secretary Mr Andres Lomp, the previous Secretary Ms Robina Mills, and staff members Ms Dianne Fraser and Ms Cassandra Paulus. Finally, I wish to thank the many parliamentarians, Ministers and government officials of other countries who provided the Committee and myself with valuable information about the refugee programs and systems within their countries.

Dr Andrew Theophanous, MP
Chairman

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TERMS OF REFERENCE

The Joint Standing Committee on Migration Regulations was established on 17 May 1990 to inquire into and report upon:

(a) regulations made or proposed to be made under the *Migration Act 1958*

(b) all proposed changes to the *Migration Act 1958* and any related acts;

(c) such other matters relating to the *Migration Act 1958*, regulations or reports as may be referred to it by the Minister for Immigration, Local Government and Ethnic Affairs.

ABBREVIATIONS

AAT	Administrative Appeals Tribunal
AD(JR) Act	*Administrative Decisions (Judicial Review) Act 1977*
AIA	Amnesty International Australia
ALRI	Australian Lawyers for Refugees Incorporated
AMCS	Australian Migration Counselling Services
Amnesty	*Amnesty International*
ARC	Administrative Review Council
Attorney-General's	Attorney-General's Department
CAAIP	Committee to Advise on Australia's Immigration Policies
Committee	Joint Standing Committee on Migration Regulations
Convention	1951 Convention Relating to the Status of Refugees
DILGEA	Department of Immigration, Local Government and Ethnic Affairs
DORS	Determination of Refugee Status
ELICOS	English Language Intensive Courses for Overseas Students
HRC	Human Rights Commission
INS	*Immigration and Naturalisation Service (USA)*
IRB	Immigration and Refugee Board (Canada)
IRO	International Refugee Organisation
Migration Act	*Migration Act 1958*
Minister	Minister for Immigration, Local Government and Ethnic Affairs
NPC	National Population Council

OECD	Organisation for Economic Co-operation and Development
PRC	People's Republic of China
Protocol	1967 Protocol Relating to the Status of Refugees
RACS	Refugee Advice and Casework Service
RCOA	Refugee Council of Australia
RRT	Refugee Review Tribunal
RSAC	*Refugee Status Advisory Committee* (Canada)
RSRC	Refugee Status Review Committee
SHP	Special Humanitarian Program
UK	United Kingdom
UKIAS	United Kingdom Immigrant's Advisory Service
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
USA	United States of America
USSR	Union of Soviet Socialist Republics

RECOMMENDATIONS

Chapter Two: The World On The Move: International Perspectives On The Refugee Problem

The Committee recommends that:

1. to assist in future decision making regarding Australia's refugee determination system, the Department of Immigration, Local Government and Ethnic Affairs monitor and keep up to date with overseas experiences and developments in relation to refugee law and processing arrangements. (paragraph 2.76)

Chapter Four: The Law And Practice Concerning Refugee Status

The Committee recommends that:

2. there be a thorough investigation into the consequences of the decision in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 87 ALR 412, and that this investigation of processing primary decisions and the review of refugee claims be undertaken after a reasonable number of claims have been processed or a reasonable period of time has elapsed; (paragraph 4.56) and

3. the Department of Immigration, Local Government and Ethnic Affairs monitor the workings of the regulation 177 and regulation 178 safeguards and keep statistics and details on:

   - the number of deportees granted refugee status;
   - the number of deportees lodging refugee applications only when asked, pursuant to regulation 178(c), if they have lodged refugee applications; and
   - the time such applicants take to lodge their refugee application, the outcome of such application, and if the refugee application is unsuccessful, the delay and additional expenses incurred in their deportations.

   Such details should be submitted to this Committee at the end of 12 months so that the Committee can consider afresh the terms of the safeguard in regulation 178. (paragraph 4.98)

The Committee, while endorsing the principle of granting initial four year temporary stay to refugees, recommends that:

4. the guidelines to the review body for refugee determinations (at present the Refugee Status Review Committee, but from 1993 the Refugee Review Tribunal) be amplified to include guidelines for that body to recommend that the Minister for Immigration, Local Government and Ethnic Affairs grant permanent residence to certain exceptional refugees as described in recommendation 5; (paragraph 4.130)

5. the refugee cases recommended to the Minister should be restricted to those refugees who satisfy all of the following, namely that they have been tortured and traumatised and appear to have a therapeutic need to be granted the security of immediate permanent residence; (paragraph 4.130) and

6. the Minister's residual discretion under section 115 of the *Migration Act 1958* be the mechanism for granting immediate permanent residence to a few exceptional refugees, as or as soon as there are places available within the refugee program. (paragraph 4.130)

Chapter Five: The Law And Practice Concerning Humanitarian Status

The Committee recommends that:

7. the policy of giving short term extensions of temporary stay to particular groups in humanitarian need be continued; (paragraph 5.18)

8. short term extensions of stay not only should be given to individuals in a class or group affected by civil disorder, but also should be considered for individuals in groups whose homes or livelihoods have been affected adversely by a major natural disaster; (paragraph 5.18)

9. for the purposes of granting short term extensions of temporary stay, the geographical area which is affected by the civil disorder or natural disaster, and from which the particular groups in humanitarian need originate, can be either a nation state or parts of a nation state; (paragraph 5.18)

10. in cases where an extension or repeated extensions of stay in excess of one year have been given, before any further permit extension is granted, the applicants ought to be expected to show not only that they are citizens of the country affected by the civil strife or natural disaster, but additionally that their homes, livelihood or families are in areas affected by the conflict or disaster, or that they would be required to return to the area affected by the disorder or disaster if returned home; (paragraph 5.18) and

11. to facilitate future decision making about Australia's combined on-shore refugee and humanitarian arrangements, the Department of Immigration, Local Government and Ethnic Affairs monitor the case profiles within the present refugee backlog so as to determine the proportion of cases which are more appropriately humanitarian claims rather than refugee claims. (paragraph 5.85)

Chapter Six: The Refugee And Humanitarian Determination Process

The Committee recommends that:

12. a senior member be appointed to the Refugee Review Tribunal with responsibility for allocating work to Tribunal members, to ensure the development and enhancement of country expertise among Tribunal members; (paragraph 6.93)

13. as a mechanism for ensuring consistency in decision making among Tribunal members, the senior member of the Refugee Review Tribunal be empowered to constitute three member panels of the Tribunal to consider at first instance cases which are complex in nature or which illustrate 'model' case types. The decisions of such panels would not be binding on Tribunal members, but would be of persuasive authority; (paragraph 6.93)

14. the Department of Immigration, Local Government and Ethnic Affairs establish and maintain, with the assistance of other Commonwealth Departments, particularly the Department of Foreign Affairs and Trade, a current and comprehensive database, to be updated monthly, relating to every country in the existing refugee case load; (paragraph 6.93)

15. the country information database maintained by the Department of Immigration, Local Government and Ethnic Affairs be available to all departmental officers and the Refugee Review Tribunal. The Tribunal should have access to all information and documentation available to the Department, including confidential security information; (paragraph 6.93)

16. security information provided to the Department of Immigration, Local Government and Ethnic Affairs, along with the information sources of the Department of Foreign Affairs and Trade, be kept confidential; (paragraph 6.93)

17. the reasons given to refugee applicants for decisions by the Department of Immigration, Local Government and Ethnic Affairs and the Refugee Review Tribunal include the findings concerning the country situation relevant to the applicant's case; (paragraph 6.93)

18. in situations where an applicant is taken to be excluded from Convention protection on national security or serious criminal grounds, in accordance with the provisions set out in Article 1F and Article 32 of the Convention Relating to the Status of Refugees, the Minister for Immigration, Local Government and Ethnic Affairs be empowered to provide a conclusive certificate to this effect; (paragraph 6.93)

19. refugee applicants be able to access any publicly available country information used by the Department of Immigration, Local Government and Ethnic Affairs or the Refugee Review Tribunal in their case determinations; (paragraph 6.93) and

20. the Refugee Review Tribunal be empowered to recommend to the Minister for Immigration, Local Government and Ethnic Affairs that, in deserving cases which do not meet the requirements for grant of refugee status, the Minister grant stay on humanitarian grounds, in accordance with the Minister's discretionary powers under section 115 of the *Migration Act 1958*. (paragraph 6.93)

Chapter Seven: Border Claimants: Processing And Detention Practices

The Committee recommends that:

21. the Department of Immigration, Local Government and Ethnic Affairs ensure that any instructions relating to the recognition, referral and processing of border refugee claimants be kept up to date, be stated in detail and highlighted prominently in all procedural advice and other relevant information provided to border immigration officials; (paragraph 7.31)

22. the provisions in the *Migration Act 1958* relating to the detention arrangements for border claimants be rewritten in a simplified and comprehensible manner. The rewritten provisions should not make legal distinctions concerning custody of border claimants based on the mode of transport which they have used to travel to Australia or their method of arrival in or at Australia. The rewritten provisions also should not use a variety of terms, for example prohibited entrant, prohibited person and designated person, to describe the same or similar class of persons. Rather, the provisions should use, as far as possible, a single descriptive term for border applicants; (paragraph 7.68)

23. given the new expeditious processing arrangements for border claimants, the Government retain the policy of holding border claimants for refugee status in detention until such time as their applications can be processed; (paragraph 7.134)

24. the detention facility at Port Hedland be maintained to ensure that processing targets in relation to border claimants for refugee status are met; (paragraph 7.134)

25. priority be directed to the expeditious processing of border claimants, with adequate resources to be directed to the Department of Immigration, Local Government and Ethnic Affairs to ensure that processing targets are met; (paragraph 7.134) and

26. public funding be available through the Department of Immigration, Local Government and Ethnic Affairs for the provision of legal advice and assistance to border claimants in relation to the preparation of primary applications for refugee status. Thereafter, publicly funded legal assistance to refugee claimants seeking review of a refusal decision, whether to the Refugee Review Tribunal or the Federal Court, be provided via the Legal Aid Commission, based on the merits of the particular case. (paragraph 7.134)

Chapter Eight: Citizens Of The People's Republic Of China

The Committee recommends that:

27. the Government end the uncertainty concerning the long term future of People's Republic of China (PRC) permit holders in Australia by announcing the arrangements which will be used to differentiate between those who from June 1994 will be granted permanent residence, those who may be granted a further four year temporary entry permit, and those who will be returned to the PRC; (paragraph 8.46)

28. as non-discriminatory criteria are an important principle in Australia's refugee determination system, from June 1994 PRC permit holders should be eligible to apply as follows:

    - for permanent residence, on the basis of relevant universal selection criteria; or

    - for continuing protection, to be established on a case by case basis against internationally accepted criteria; (paragraph 8.46)

29. to assist in determining whether there is a need for on-going protection for PRC permit holders, an in-country assessment of human rights provisions in the PRC should be prepared for use by the Department of Immigration, Local Government and Ethnic Affairs, and assurances should be sought from the Government of the PRC that those PRC permit holders who return to the PRC will not suffer discrimination or detention upon their return; (paragraph 8.46) and

30. those PRC permit holders who do not meet selection criteria should be granted, on expiry of their permits, a short extension of stay, say three months, to enable them to put their affairs in order and make appropriate arrangements for departing Australia. (paragraph 8.46)

Chapter One

THE INQUIRY

Introduction

1.1 The Joint Standing Committee on Migration Regulations (the Committee) began its inquiry into refugee and humanitarian visas and permits in June 1990. As a result of an announcement in October 1990 regarding imminent changes to the arrangements for the determination of refugee status, the Committee adjourned its review, re-commencing it in February 1991.

1.2 The focus of the Committee's inquiry was Australia's on-shore refugee and humanitarian system. The on-shore system governs persons who seek asylum upon arrival at Australia's borders (border claimants), or persons who are temporary or illegal entrants in Australia who seek asylum from within Australia. The on-shore system is to be distinguished from Australia's off-shore refugee and humanitarian program.

1.3 The off-shore refugee and humanitarian program is a distinct component of Australia's migration program. Applicants apply outside Australia and are selected in accordance with criteria set down in the Migration Regulations.

1.4 The on-shore refugee and humanitarian system is separate from Australia's immigration processes. The Minister for Immigration, Local Government and Ethnic Affairs (the Minister) determines whether applicants are refugees within the 1951 Convention Relating to the Status of Refugees (the Convention) and the 1967 Protocol Relating to the Status of Refugees (the Protocol). The arrangements for on-shore applicants are provided for partially in the *Migration Act 1958* and Regulations. On-shore claimants are not migrants. They are to be afforded protection.

1.5 The on-shore refugee and humanitarian system creates quite distinctive control problems. These matters are discussed in this report.

Background to the inquiry

1.6 Over the past five decades, Australia has played a leading role in the resettlement of refugees from various regions of the world. Relative to population size, Australia and Canada have been two of the largest recipients of refugees in the post World War II era. Australia is one of only five countries accepting significant numbers of refugees for resettlement, the others being the United States of America (USA), Canada, France and Israel. In the case of France, the refugees accepted for

resettlement are almost exclusively from Indo-China. Israel accepts Jewish refugees. Since the Second World War, Australia has resettled more than 450,000 refugees and displaced persons.[1]

1.7 In the past ten to 15 years, though, a significant increase in the numbers of refugees world-wide has placed considerable pressure on traditional countries of resettlement. It is estimated that, at present, there are approximately 17.5 million refugees world-wide. The Office of the United Nations High Commissioner for Refugees (UNHCR) has grown to become the largest of the major United Nations agencies.

1.8 The dramatic increase in refugee numbers and the mobility of present day refugees have led to concerns within the United Nations and among individual member states regarding the accepted Convention definition of a 'refugee'. In response, a number of countries, notably Canada, the USA and European nations, have begun to review the requirements for achieving refugee status, and their procedures for assessing and processing refugee applicants.

1.9 Until 1989, the majority of Australia's refugees were accepted through formal off-shore resettlement programs. On-shore applications, from people physically located in Australia, numbered no more than 500 per year.[2] Refugee applications from undocumented arrivals at Australia's border also were low in number. However, a dramatic increase in on-shore applications, rising from 564 in 1988/89 to 13,954 in 1990/91[3], prompted the Government to review its policy and procedures relating to the acceptance of refugees in Australia. During the course of the inquiry, the number of on-shore applications for refugee status awaiting determination rose to a peak of 23,066 in December 1991 (see also Chapter 3).[4]

1 Department of Immigration, Local Government and Ethnic Affairs (DILGEA), *Review of Activities to 30 June 1987*, Australian Government Publishing Service (AGPS), Canberra, 1987, p. 65.

2 Evidence, p. S765.

3 Evidence, pp. 765, 767.

4 DILGEA, *Determination of Refugee Status (DORS) Monthly Report*, April 1992, p. 16.

1.10 At the same time as on-shore applications were increasing, there was a reduction in the number of persons granted entry to Australia through the off-shore refugee and humanitarian program, from 21,917 in 1981/82 to 11,948 in 1989/90. Within the off-shore program, the special humanitarian program component increased from 1,701 in 1981/82 to 10,411 in 1989/90, while the refugee component decreased from 20,216 in 1981/82 to 1,537 in 1989/90.[5]

1.11 It is in the context of this changing refugee environment, both at the international and domestic level, and the rising crisis of numbers within the on-shore system, that the Committee embarked on its inquiry into refugee and humanitarian visas and permits.

Inquiry process

1.12 The inquiry was advertised nationally on 16 June 1990 seeking submissions from interested persons and organisations. In addition, the Committee sought submissions directly from organisations with an interest in refugee matters, including government departments and agencies, immigration advice agencies, legal bodies, aid agencies and ethnic community organisations.

1.13 There were 107 formal submissions to the inquiry and these are listed at Appendix 1. The formal submissions have been reproduced in four volumes, which contain a total of 1,009 pages of evidence. The Committee also received six exhibits, which are listed at Appendix 2.

1.14 Evidence was taken at public hearings held in Adelaide, Canberra, Darwin, Melbourne and Sydney in July and August 1990, February, April, July and October 1991, and March 1992. Some further evidence was taken in camera. The Committee heard from representatives of government departments, international agencies, community groups, including church representatives, and individuals working with asylum seekers. During its visit to Darwin, the Committee met with a group of Cambodian boat arrivals who were being held in detention pending determination of their status. A list of witnesses who gave evidence at the public hearings is provided at Appendix 3. The transcripts of evidence from the hearings comprise a total of 2,156 pages of evidence.

1.15 Copies of transcripts from public hearings and volumes of submissions are available for reference in the Committee secretariat, Parliamentary Library and National Library of Australia. References to evidence in the text of this report relate to page numbers in the transcripts and volumes of submissions.

5 DILGEA, *Australian Immigration - Consolidated Statistics*, cited in National Population Council (NPC), *Refugee Review*, July 1991, AGPS, Canberra, p. 127.

1.16 In addition to the above evidence, the Committee undertook broad research on international practice regarding refugees. The Committee sought and obtained much information from overseas, including material provided by Mr Tom Ryan, the Immigration Consul at the Canadian Consulate General in Sydney, and information from the House of Commons in Canada and from various overseas organisations dealing with refugee issues in their own countries, including Amnesty International (Amnesty) and the Immigration Law Practitioners' Association in the United Kingdom (UK). The Committee is grateful for the assistance provided to it by these persons and organisations.

Interim report

1.17 The Committee provided the Minister with an interim letter of advice on 17 July 1991. In that letter, the Committee noted its concern that undocumented arrivals could be kept in detention for long periods of time while their applications were being prepared, submitted and processed.[6]

1.18 The Committee concluded that strict time limits should apply for the lodgement of claims by undocumented arrivals and for the determination of those applications. The Committee recommended that:

- people arriving at the border without appropriate documentation be required to submit a written notice of intention to apply for refugee status at the earliest opportunity and at most within 48 hours;
- such claimants be required to submit a full application within 28 days from date of arrival, with the possibility of applying for a further extension of 28 days in appropriate circumstances;
- the Government provide increased assistance to organisations such as the Legal Aid Commissions and the Refugee Advice and Casework Service (RACS), in order that claimants are able to meet the requisite deadlines;
- border claimants be given priority in the assessment of their applications; and
- for border claimants a period of three months be the target time for the initial determination of their claim and that priority be given by the Refugee Status Review Committee (RSRC) for the determination of any appeals from border claimants.[7]

1.19 The Minister responded to that report by announcing on 13 August 1991 that a 28 day time limit would apply for the lodgement of refugee applications after an initial intention to apply had been indicated. In the case of border arrivals, the time limit would apply from the date of arrival.[8] Further measures to expedite the refugee determination process, particularly for border claimants, were announced by the Minister on 12 February 1992.[9] These are discussed in the chapters which follow.

Developments during the inquiry

1.20 During the inquiry, the Committee had to come to terms with a number of significant developments relevant to Australia's refugee and humanitarian system. Substantial changes to the determination procedures came into effect on 10 December 1990. Further changes were announced by the Minister on 12 February 1992, 5 May 1992[10] and 15 July 1992[11], including the decision to establish a Refugee Review Tribunal (RRT). The Committee's inquiry acted as an important catalyst for many of the most recent changes, with evidence to the Committee identifying a number of problems within the existing refugee determination system. As a result of these changes, it was necessary for the Committee to seek supplementary information from the Department of Immigration, Local Government and Ethnic Affairs (DILGEA) on several occasions, and to take additional evidence at public hearings.

1.21 In this report, the Committee considers the recent changes to Australia's refugee and humanitarian system. While these changes have addressed some of the concerns which were evident during the course of the inquiry about the efficiency and effectiveness of the system, the Committee has made a number of recommendations aimed at overcoming the deficiencies which have remained. Adoption of the Committee's recommendations will ensure a fairer and more efficient system for determining refugee and humanitarian status.

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6 Joint Standing Committee on Migration Regulations, *Special Report No. 1, Recommendations to the Minister for Immigration, Local Government and Ethnic Affairs*, September 1991, AGPS, Canberra, p. 3.

7 ibid.

8 Ministerial Press Statement 50/91, 13 August 1991.

9 Ministerial Press Statement 12/92, 12 February 1992.

10 Ministerial Press Statement 26/92, 5 May 1992.

11 Ministerial Press Statement 35/92, 15 July 1992.

Report structure

1.22 In the report, the Committee has focused on the following areas:

- the international perspective on refugees (Chapter 2);
- the nature of the numbers crisis facing Australia (Chapter 3);
- the law and practice of refugee and humanitarian entry to Australia (Chapters 4 and 5);
- the procedures for determining refugee and humanitarian entry (Chapter 6);
- the processing and detention practices applicable to border claimants (Chapter 7); and
- the situation regarding citizen's of the People's Republic of China (PRC) (Chapter 8).

Chapter Two

THE WORLD ON THE MOVE: INTERNATIONAL PERSPECTIVES ON THE REFUGEE PROBLEM

Introduction

2.1 The 1951 Convention Relating to the Status of Refugees afforded *protection to refugees who had a well founded fear of persecution, based on events* prior to 1 January 1951. The drafters of the Convention were not prepared to sign a 'blank cheque' to provide protection to all the world's displaced and needy.[1]

2.2 In 1967, when numerical pressures on the asylum systems of Western countries had declined, the Protocol Relating to the Status of Refugees was adopted. The Protocol lifted the temporal restriction which had confined protection to those affected by pre-1951 events, and allowed refugees from all regions of the world to qualify for Convention protection. The Protocol signalled an open ended and much expanded obligation to refugees.[2] Now, however, countries are beginning to chafe under this obligation.

2.3 The UNHCR estimates that there are presently 17.5 million refugees and asylum seekers in the world. This figure was given before the present crisis in Yugoslavia, which is estimated to have produced 1.3 million refugees and displaced persons.[3] According to the UNHCR, the present asylum and refugee problem is 'bigger, more complex and as persistent as ever.'[4]

2.4 Two-thirds of the world's refugees live in camps in Africa, Asia and the Middle East. These countries continue to bear a disproportionate burden of sheltering refugees.

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1 J C Hathaway, *The Law of Refugee Status*, Butterworths 1991, pp. 6-9.

2 D A Martin, 'The Western Response to Asylum Seekers: Barriers and Screening Filters', unpublished paper to the Law and Society Conference, Amsterdam, 26-29 June 1991.

3 Churches Committee for Migrants in Europe, *Migration News Sheet*, May 1992, p. 8.

4 The 41st Session of the UNHCR Executive Committee (October 1990): Conclusion on International Protection and Related Issues, *International Journal of Refugee Law*, Vol. 3, No. 1, 1991 p. 144.

2.5 There are approximately 6 million Afghan refugees who have fled to Pakistan and Iran.[5] Sizeable populations of Vietnamese, Cambodian and Laotians reside in camps in Asia. Sri Lankan Tamils have moved in large numbers to India. Over 100,000 Vietnamese boat people currently are confined in closed camps and detention camps in Asia. They survive in harsh conditions. Most of them will be rejected as refugees and denied resettlement under the United Nations sponsored Comprehensive Plan of Action. They remain confined until Vietnam permits their forcible return. On the Thai-Cambodian border over 300,000 Cambodians await implementation of a United Nations plan to effect a political settlement and their return to Cambodia. Several thousand Burmese students in Thailand and 270,000 Burmese muslims (Rohingyas) who have sought asylum in Bangladesh are resisting efforts to return them to Burma.[6]

2.6 On the African continent, there are major refugee populations in the Horn - Djibouti, Somalia, Ethiopia and Sudan. Civil war and famine in Somalia has resulted in 30,000 deaths and some 650,000 people in flight. Kenya currently hosts 300,000 Somalian refugees. In West Africa in 1990, nearly 130,000 Liberians fled to Guinea and the Ivory Coast. More than 1 million Mozambicans are in Malawi in Southern Africa. In North Africa, mainly Algeria, there are 165,000 Sahrawis.

2.7 Refugees in the Middle East comprise 2.8 million Palestinians, and there are large numbers of people in flight from Iran, Iraq and Lebanon. Central America and Mexico host refugees from El Salvador and Nicaragua, as well as other Latin American refugees.[7]

2.8 Most of these refugee populations are housed in camps which provide minimal living conditions. Certain of the camps are closed, surrounded by barbed wire and continually guarded by police or armed personnel. In many camps, the physical security of refugees cannot be guaranteed. There are military or armed attacks on camps. Refugees are recruited forcibly into regular or irregular armed forces, and women and children refugees are subjected to physical violence and sexual abuse. There are refugee camps which hold four generations of people. Certain 'temporary' camps have survived ten, in some cases thirty, years.[8]

5 The Afghans represent the largest single displacement of a national group.

6 A C Helton, 'Refugees in the New World Disorder', address on the occasion of Refugee Week, Sydney, June 1992.

7 E Feller, 'UNHCR and the International Protection of Refugees - Current Problems and Future Prospects', *International Journal of Refugee Law*, September 1990, p. 336.

8 ibid.

2.9 These aspects of the refugee problem have not changed. A new complication arises because growing numbers of refugees are arriving in and on the doorsteps of Europe, North America and Australia. These are the so-called 'jet-people'[9], although in Australia's case 'boat people' continue to arrive as well. Some of these refugee claimants certainly are fleeing from discrimination, abuse and civil disorder. Others are using asylum as a mechanism for migration. The latter claimants do not meet the legal criteria for refugees. They could not qualify for entry under the reception countries' ordinary immigration rules. Stories abound of 'travel agents' who sell tickets and advice on asylum claims in Europe, North America and Australia.[10] Whatever the truth concerning the bona fides of this new wave of refugees, their arrival in unprecedented numbers has prompted the new reception countries to re-evaluate their on-shore refugee arrangements.

Nature of the problem

2.10 To focus on asylum seekers in Western countries is not to disparage the acute refugee crisis in developing countries, nor to overlook the 'impressive hospitality' which developing countries generally extend to refugees.[11] However, the arrival of large numbers of refugee claimants in Western countries presents distinctive problems. In the first place, their continuing arrival engenders a sense that immigration control is imperiled. Such fears 'resonate in public opinion' and are ripe for exploitation. Additionally, Western countries are now countries of first and last asylum. They cannot look to other nations for assistance in dealing with refugees, nor for resettlement of any refugee claimants.[12] Moreover, as American immigration law expert David Martin noted:

> These are all countries with highly developed legal systems, meaning that responses must be developed within a particularly demanding doctrinal and institutional framework.[13]

2.11 The fear of mass refugee-type movements in Europe was evidenced sharply in Italy's summary expulsion of 23,000 Albanians in August 1991. The European, American and Australian response to date has been to develop deterrents in order to limit access to asylum by refugee claimants. These mechanisms, which

9 J P Hocke, 'Beyond Humanitarianism', in G Loescher and L Monahan, *Refugees and International Relations*, OUP, 1990, p. 40.

10 D A Martin, op cit.

11 ibid.

12 ibid.

13 ibid.

include visa requirements, carrier sanctions and off-shore interdiction arrangements, such as the United States' Haitian Interdiction Program, act to discourage or obstruct those unlikely to qualify as refugees.

2.12 In most of these countries, about 80 or 90 per cent of refugee applicants are presently unsuccessful claimants.[14] Deterrence, therefore, appears a sensible control option. However, as many commentators have observed, such measures also impact on genuine refugees, preventing their escape from persecution.[15] No country has developed a control device which deters only those who are not refugees, while permitting safe haven for genuine refugees.

2.13 Western countries now are concentrating on refugee screening, and on careful and speedy adjudication which will allow prompt removal of those who do not qualify for protection.[16] This is said to provide a better solution. The removal of unsuccessful claimants provides real evidence of migration controls. It is a deterrent focussed not on genuine refugees, but on those with marginal and unsustainable claims.

2.14 Although there is broad consensus about the need for speedier adjudication of refugee claims, it is not always easy to reach agreement about the provision of additional resources required for processing, or for the trimming of excessive and costly layers of adjudication which presently exist in the refugee determination systems of many countries. It is feared that such streamlining may affect the fairness or accuracy of the process. As Martin stated when summarising these concerns:

> If [government officials] are blocked from developing swifter and more efficient procedures, or from systematic implementation of negative decisions (for example, because of effective, if short-sighted, refugee advocacy or judicial intervention), all signs point toward a proliferation of barriers and obstacles - which are much harder for activists and judges to affect. This is not in the best interests of refugee and asylum seekers.[17]

14 ibid.

15 E Feller, 'UNHCR and the International Protection of Refugees - Current Problems and Future Prospects', *International Journal of Refugee Law*, September 1990, p. 337.

16 D A Martin, op cit, p. 9.

17 ibid, p. 10.

2.15 Martin stated further:

> We have to learn how to be more realistic about the protection for those already inside. Obviously many should be allowed to stay. Their refugee claims are meritorious and these claimants should be told so, as speedily as possible. ... But others, even if their individual stories are sympathetic, do not qualify. We must find ways to reach that judgement swiftly, protecting essential guarantees of fairness but not insisting on every possible procedural protection nor endless layers of review. And we must learn to act on that judgement, through prompt removal, lest we unwittingly induce governments simply to proliferate barriers to future arrivals.[18]

2.16 These are the lessons for the 1990s. The problems of the 1980s are evidenced in a recitation of refugee claimant arrival figures in Europe and North America. In 1983 a total of 90,000 asylum seekers made application at the border or from within Western Europe the USA and Canada. By 1989, that figure, excluding the large scale movements of Bulgarian Turks, Jewish and other emigrants from the Soviet Union, had jumped to 450,000.[19]

2.17 Europe, in particular, has been affected by these changes in migration. In a paper presented in 1987, Sweden's Immigration Minister noted that whereas in the mid-1970s some 70 per cent of total migration was on economic grounds, it was now 80 to 85 per cent on social and humanitarian (family and refugee) grounds.[20] The number of asylum seekers arriving in Europe grew from 104,000 in 1984, to 232,000 in 1988[21], and more than 500,000 in 1991. Germany received about 250,000 of these 1991 applications. Britain's share, some 50,000 asylum seekers, was ten times the British asylum application figure for 1989.[22]

18 ibid.

19 UNHCR figures, cited in 'The Year of the Refugee'.

20 J Widgren, 'Europe and International Migration in the Future', in G Loescher and L Monahan (eds), *Refugees and International Relations*, OUP, 1989, pp. 49-60.

21 D Joly and C Netleton, *Refugees in Europe*, Minority Rights Group.

22 House of Commons Debates 13 November 1991, 1082; H C Deb 196, 21 October 1991, c338W.

2.18 There was no European country unaffected by refugee claimant arrivals. Sweden, for example, registered 29,240 claims in 1990 and 27,323 in 1991.[23] Switzerland had 38,683 refugee applications in 1991, an increase of 18 per cent over the 1990 figure.[24]In Germany, which constitutionally guarantees the right to asylum, refugee claimants continue to arrive, with 187,455 asylum claims lodged to July 1992. This is 96,686 more than the same period last year. The majority of these were European, mostly from Yugoslavia and Romania.[25]

2.19 In the USA, on-shore asylum applications rose from 26,107 for 1987 to 101,697 in 1989. The number of asylum claimants fell back to 73,637 in 1990.[26]

2.20 Canada's on-shore asylum applicants grew from 1,500 in 1980 to 17,130 in 1987-88, and was 87,000 from January 1989 to December 1991.[27]

2.21 Not all of these claimants are border applicants. Germany has a large number of frontier claims, but in Britain about 75 to 85 per cent of current asylum applications are lodged by visitors, students or overstayers who are in the country.[28] In Canada, 37 per cent of 1991 refugee claims were lodged after entry.[29]

2.22 These dramatic increases in the number of refugee claimants have occurred within a short time span. Existing decision making structures were unable to deal with the unanticipated volume of new claims. Under Convention refugee practice, each refugee claim must be carefully and individually processed. Such processing is time consuming and expensive. Backlogs of unprocessed cases built up and were added to continually by new arrivals. On 1 January 1989, when Canada's new refugee determination system came into effect, Canada had some 85,000 unprocessed claims on hand involving over 100,000 people.[30] The backlog in the

23 *Migration News Sheet*, March 1992.

24 *Migration News Sheet*, January 1992, p. 7.

25 *Migration News Sheet*, August 1992, p. 6.

26 US Department of State, Bureau for Refugee Programs, *World Refugee Report*, September 1991.

27 Canada Ministry for Employment and Immigration, Press release June 1992, 92-25, pp. 6-9.

28 House of Commons Debates, 13 November 1991, p. 1089.

29 Director General Enforcement Branch, Employment and Immigration Canada, *Refugee Determination System Monthly Report, December 1991*, p. 3.

30 M. Young, Library of Parliament Research Branch, 'The Convention Refugee Determination Process in Canada: Its Reform', 17 January 1989; J P Blackburn, MP (Chairman), *The Refugee Claimant Backlog Clearance*, Second Report of the Standing Committee on Labour, Employment and Immigration, December 1989.

USA at the end of 1991 was 177,000 cases.[31] *At the same date, Britain had 50,000* undecided cases. The British Home Secretary stated that Britain's backlog was growing at the rate of more than 3,000 cases each month. The average decision time was 16 months and getting worse.[32] Immigration authorities observed that the backlogs were part of the explanation for escalating numbers. Visitors who were not refugees, for example, knew they could buy time in a country - in Canada in 1988 it was five years - by lodging and awaiting a decision on a refugee claim.[33]

2.23 Additional processing and review staff have been required to deal with new and existing claims. The British have recruited 500 more staff to process their refugee applications.[34] Canada's refugee determination body, the Immigration and Review Board, is currently the largest administrative agency in Canada, with a 1991/92 budget of CAN $90 million. Over the past years, additional funds and staff have been allocated to deal with their backlog. CAN $105 million was allocated for backlog clearance in January 1989. This was approximately CAN $1,235 per case. The Canadian Auditor-General found that it had cost about CAN $83 million to process claims between 1 January 1989 and 31 March 1990, at an average direct cost per claim, including both hearings, of $2,600.[35] With the increased funding, additional staff and improved productivity, Canada's backlog in June 1991 was reduced to 13,000 for the pending caseload, and some 10,600 claims at the initial hearing stage.[36]

2.24 The following tables give the numbers of asylum applications lodged over the past decade on-shore in European Community countries, Canada and the USA.

31 *The New York Times*, 19 February 1992, p. A18.

32 Home Secretary Statement, 2 July 1991, in J Fiddick, House of Commons Library Research Division, Background Paper No. 277, 12 November 1991, p. 51.

33 M. Young, op cit; and Immigration and Review Board 1988, p. 3.

34 Home Secretary Statement, 2 July 1991, op cit, p. 5.

35 Law Reform Commission of Canada, *Draft Final Report on the Determination of Refugee Status in Canada: A Review of the Procedure*, March 1992, pp. 7-8.

36 M. Young, Library of Parliament Research Branch, Background Paper, 'Canada's Refugee Status Determination System', January 1989, Revised September 1991, pp. 16-17.

TABLE 2.1

Applications for asylum in European Community countries[37]

	1980	1988	1989	1990[38]	1991
Belgium	2,700	5,100	8,100	12,950	15,220[39]
Denmark	50	4,650	4,600	5,300	n.a.*
Federal Republic of Germany	107,800	103,100	121,300	193,063	256,112[40]
France	13,700	31,600	58,750	56,050	n.a.
Greece	1,800	8,400	3,000	4,400	n.a.
Italy	2,450	1,300	3,350	4,750	31,373
Netherlands	3,200	7,500	13,900	17,600	n.a.
Portugal	n.a.	350	150	100	n.a.
Spain	n.a.	3,300	2,850	6,850	n.a.
United Kingdom	2,350	5,250	16,300[41]	30,000	38,800[42]

* not available

[37] Information is not available for the Republic of Ireland and Luxembourg.

[38] Some of the 1990 figures are provisional estimates.

[39] Figures from *Migration News Sheet*, various issues in 1992.

[40] Figures from *Migration News Sheet*, various issues in 1992.

[41] Unlike the figures for previous years, this figure includes the dependents of the principal applicant. See: Amnesty International, *United Kingdom: Deficient Policy and Practice for the Protection of Asylum Seekers*, (1991) p. 5.

[42] House of Commons Debates, 13 November 1991, p. 1082. This figure does not include dependants. If dependants are counted, the figure is 50,000.

TABLE 2.2[43]

Applications for asylum in Canada

1980	1,505
1981 - 1982	3,582
1982 - 1983	2,807
1983 - 1984	4,283
1984 - 1985	5,101
1985 - 1986	4,099
1986 - 1987	17,130
1987	25,799
1988	34,493
1989	20,267
1990	39,199
1991	30,539

TABLE 2.3[44]

Applications for asylum in the United States of America

1979	5,801
1985	16,622
1987	26,107
1988	60,736
1989	101,679
1990	73,637
1991	not available

[43] Employment and Immigration Canada, *Annual Report* various years. The Committee acknowledges the assistance of Mr Tom Ryan, the Immigration Consul at the Canadian Consulate General in Sydney.

[44] C Robinson, B Frelick, 'United States On-Shore Refugees', *International Journal of Refugee Law*, September 1990, p. 295, and US Department of State, Bureau for Refugee Programs, *World Refugee Report*.

2.25 The Committee examined various overseas control methods and processing systems. It was provided with a significant amount of information, particularly on the Canadian and British arrangements. As the previous tables illustrate, the refugee problem in both those countries is numerically larger than in Australia. Even so, the rate of increase in the number of claimants is comparable to the Australian situation. The Committee found many parallels between the overseas and Australian control models and found useful insights from overseas material for Australia's own reform initiatives. The Canadian and British refugee determination systems are in the process of change. The remainder of this chapter outlines the main features of their systems and, where relevant, their proposed reform measures. Also outlined are some observations regarding the refugee crisis currently faced by many European nations, based on information obtained by the Committee Chairman during a visit to various European nations towards the end of the inquiry.

Britain - refugee procedures

2.26 Britain's on-shore refugee arrangements are set down in the Immigration Rules. The Rules strictly speaking are rules of practice laid down to guide those administering the UK Immigration Act. In practice, the Rules have immediate and binding effect.[45] In addition, there are various policies and established practices concerning refugees which do not form part of the Rules. These policies and practices are well known and are applied consistently. A misapplication of policy, or a failure to take policy into account, or to follow established practices can allow a challenge on Judicial Review.

2.27 The Rules concerning Control on Entry (paragraph 21) state that where a person is a refugee, full account is to be taken of the provisions of the Refugee Convention and Protocol, and that nothing in the Rules is to be construed as requiring action contrary to Britain's Convention obligations. Asylum seekers can be excused from the requirement to have entry clearance and a visa on arrival in the United Kingdom. Border claims must be referred to the Home Office for consideration. The Rules further state that asylum will not be refused if the country to which the person could be returned is one where he/she is unwilling to go because of a well founded fear of persecution for a Convention reason.

2.28 Where a person at the border makes a claim for asylum, or indicates by anything said that he/she might be eligible for asylum, the case must be referred to the Home Office for consideration. Border claimants whose claims are being considered are physically present in the UK, but have not 'entered' in law. They can be detained during the processing of their claim or released on bail and given temporary admission status. Border applicants are examined by a port immigration officer, and in most cases given a standard Asylum Questionnaire to complete and return to the port officer within eight weeks. The completed application form is

45 I A Macdonald and N J Blake, *Macdonald's Immigration Law and Practice*, Butterworths 1991, p. 31.

considered by the Home Office Refugee Unit. If the Home Office is 'minded to refuse' asylum, the applicant is given a full interview by the port officer, and the information derived from this interview and any additional documentation is sent to the Refugee Unit for further consideration.

2.29 Asylum applicants, for example visitors and students, who apply for asylum after entry to the UK, submit their applications to the Home Office. Applicants complete the Asylum Questionnaire. They may be interviewed by an official of the Public Inquiry Office at the Home Office whose report will be sent to the Refugee Unit for examination and determination. Those who qualify as Convention refugees are given asylum status. The Home Office may refuse asylum but grant 'exceptional leave to remain'. This is granted when 'the applicant does not qualify for Convention refugee status but, for a variety of reasons, [the Home Secretary] does not think it right to enforce departure from the UK'. Such leave to remain is granted at the Home Secretary's discretion. The Home Secretary has full discretion to grant entry or stay outside the terms of the Immigration Rules.

2.30 In cases where the applicant is refused asylum and exceptional leave to remain, certain applicants presently will have a right of appeal. Under the present arrangements, those who have a valid visa and who apply for asylum on arrival, and those in the UK who apply for asylum before the expiry of their permits, have a right of appeal against a refusal to grant asylum. Those who arrive without a valid visa or who enter illegally have a right of appeal but this is only able to be exercised from abroad, after they have left or been removed from the UK. In border or illegal entry cases, where the person has no on-shore review right, the Home Office will 'normally' refer the case to the government funded immigration advisory service, the UK Immigrant's Advisory Service (UKIAS). UKIAS is then allowed four weeks, sometimes less, in which to make supportive representations which the Home Office will consider before making a final determination. UKIAS recently was disbanded. A new government funded Refugee Unit is expected to take its place.

2.31 Refugee appeals are presently dealt with in the general immigration appeals system which covers all immigration cases. The appeal is heard at first instance by a single Adjudicator. If dismissed, a further appeal may be made, with leave, to a three member Immigration Appeals Tribunal, but only on the grounds that the Adjudicator has made an error of law. Decisions of the Adjudicator or Tribunal are binding. Immigration decisions, including decisions of an Adjudicator or the Tribunal, are subject to Judicial Review. Applicants require leave to apply for Judicial Review. Leave is granted by a single judge of the High Court who can decide if there is an arguable case by perusing the papers or hearing oral submissions in open court.

2.32 Those granted asylum are initially given four year's extension of stay. At the end of that term, refugees may apply for and invariably are given indefinite leave to remain. Exceptional leave candidates are given 12 months stay, then a further three years stay, and, if renewed a second time, a further three years stay, after which the candidate can apply for residence. Applicants granted exceptional

leave have no automatic right to family reunion. They generally are permitted to sponsor their spouses and immediate family after four years residence, but under 'compelling circumstances' earlier sponsorship of family may be permitted.

The British Asylum Bill

2.33 A British Asylum Bill and revised Immigration Rules were introduced in November 1991 and withdrawn in February 1992 to await the outcome of the then general election. It is expected that an Asylum Bill will be reintroduced and given priority in the 1992 autumn parliamentary term.

2.34 The Bill did not make changes to the form of the primary processing system but it was set to expedite those processes. In addition, new immigration rules specify the matters to be taken into account in assessing the credibility of an asylum applicant.

2.35 Under paragraph 6 of the proposed rules, the Secretary of State was to have regard to the following matters which may lead to the refusal of an application if they reveal factors which cast doubt on the credibility of the applicant:

- that the applicant has failed to apply for asylum forthwith upon arrival in the UK, unless the application is founded on events which have taken place since his arrival in the UK;
- that the applicant has made false representations, either orally or in writing;
- that the applicant has failed to make a prompt and full disclosure of material factors, either orally or in writing or otherwise to assist the Secretary of State to the full in establishing the facts of the case;
- that the applicant has destroyed, damaged or disposed of any passport, other document or ticket relevant to his claim;
- that the applicant has undertaken any activities in the UK before or after lodging his application calculated to enhance his claim to refugee status;
- that the applicant has lodged concurrent or consecutive applications for asylum in the UK or in another country;
- that the applicant has failed to comply with a Notice issued by the Secretary of State requiring the applicant to report to a designated place to be fingerprinted;

- that the applicant had the opportunity before coming to the UK, to move to another part to the country in which the applicant claims to fear persecution which might be safer for him, and to which it would be reasonable to expect him to go; or
- that the applicant had the opportunity before coming to the UK to apply for asylum in a safe third country.

2.36 The proposed Rules also provided for certain cases to be considered, not on the usual case by case basis, but as part of a group application. It is stated:

> Cases will normally be considered on an individual basis but if an applicant is part of a group whose claims are clearly not related to the criteria for refugee status in the Convention and Protocol he may be refused without examination of his individual claim. However, the Secretary of State will have regard to any evidence produced by an individual to show that his claim to refugee status should be distinguished from those of the rest of the group.

2.37 A major change introduced by the Bill (Clause 5 and Schedule 2) was to provide a right to apply for leave to appeal in all cases where a claim for asylum was refused. All asylum applicants would have this right. The main provisions of this proposed 'fast-track' appeals procedure before 'special adjudicators' would work as follows. When an application was refused, the claimant would have two days after receiving notice of the refusal decision to apply to a special adjudicator for leave to appeal. The refusal notice was taken to be received the day after it was posted. The Home Office was required to send all documents in the case to the special adjudicator (not to the applicant) and the adjudicator must determine the application for leave within five days after receiving these case documents. If the applicant was given an appeal right, the appeal must be determined not later than 42 days after leave is granted.

2.38 Those refused leave to appeal or whose substantive appeal was rejected could appeal against those decisions to the Immigration Appeal Tribunal providing the special adjudicator had made an error of law. Again these set short time limits which required applicants to act quickly (within five days after receipt of the special adjudicator's refusal decision) and the Tribunal to determine the appeal within 42 days of the grant of leave to appeal.

2.39 There were a large number of detailed criticisms of these and other aspects of the proposed Asylum Bill and Rules provisions. Critics have included the UNHCR, the Law Society, the Immigration Law Practitioners' Association, the Joint Council for the Welfare of Immigrants, the Bar Council, and Asylum Rights Campaign. These criticisms have focused particularly on the distortion effects which can arise from application of the credibility factors, the leave requirement for first

instance appeals, and the short time frames afforded to claimants wanting to appeal a refusal decision. It is expected that certain of these criticisms will be addressed in the model Bill to be reintroduced in the autumn parliamentary session.

Canada - refugee procedures

2.40 Canada's 1976 Immigration Act included as one of the ten objectives of Canadian immigration policy the need 'to fulfil Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted' (section 3(g)). The 1976 Act includes the Convention definition of a refugee, and established an eight step determination system very similar to the current Australian processing system.

2.41 In this 1976 system, claimants detailed their cases under oath at an examination conducted by a senior immigration officer. The officer was not a decision maker in the case. The transcript of the examination and a copy of the claim were referred to a three member advisory committee. The members of that committee were appointed by the Minister of Employment and Immigration. This Refugee Status Advisory Committee (RSAC) decided cases on the basis of the written transcript. The RSAC's recommendation on a case was reviewed by the Minister, who acted in these matters through delegates. RSAC's rate of acceptance historically was approximately 30 per cent.[46]

2.42 Those accepted as refugees were processed towards permanent residence. Cases which were refused were referred to a Special Review Committee in the Employment and Immigration Commission, which reviewed the files in case there were special humanitarian or compassionate grounds for admission.

2.43 In January 1989, a new refugee determination system was set up (see Bills C-55; C-84).

2.44 The RSAC system and the proposed 1989 processing scheme were extensively analysed. It generally was agreed that the RSAC system could not keep up with the growing numbers of on-shore refugee claims (see Table 2.2). A 1980 Advisory Task Force concluded that the RSAC process, 'with its fragmentation and reliance upon transcripts, was inherently slow'.[47] Other critics drew attention to

46 M Young, Law and Government Division, Library of Parliament Research Branch, *The Convention Refugee Determination Process in Canada: Its Reform*, 1986, revised 1989, p. 3.

47 ibid, p. 5.

the lack of procedural fairness. At no point in the proceedings was the refugee claimant heard in person by the decision maker. One writer noted:

> If claims had remained at the level of a few hundred a year, it [the RSAC system] might have continued, with some changes, to operate effectively.[48]

2.45 The catalyst for change to the RSAC system came in 1985 when a refugee determination case was taken to the Supreme Court. In the *Singh* case[49], counsel for the appellant sought and won, on the basis of the Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms, a decision to grant oral hearings to all refugee claimants.

2.46 An Immigration and Refugee Board (IRB) was established on 1 January 1989. It is an administrative tribunal and consists of an Immigration Appeal Division, formerly the Immigration Appeal Board, and a new Convention Refugee Determination Division. This Division deals exclusively with refugee matters. The system is completely independent of the Employment and Immigration Commission and provides a legislative right to counsel. The number of steps in the refugee system was reduced from eight to three.

2.47 Requests for refugee status can be made at Canadian ports of entry, at any Canada Immigration Centre for those already in Canada, or, for those contravening immigration law, at the beginning of an immigration inquiry.

2.48 At the preliminary stage, senior immigration officers carry out a pre-inquiry review of any humanitarian and compassionate factors on the case which may warrant special consideration. The factors considered are whether:

- it is a person upon whom their government likely will impose severe sanctions on their return home;
- it is a person upon whom others in Canada already are dependent; and
- it is an individual whose personal circumstances in relation to the laws and practices of their country are such that they will suffer unduly on returning home.

2.49 Individuals who meet these criteria can be granted permanent residence on humanitarian and compassionate grounds, and are not required to go through the refugee determination process.

48 ibid, p.4.

49 *Re Singh v Minister of Employment and Immigration*, (1985) ISCR 177.

2.50 The first stage of the refugee process is an inquiry or hearing conducted by an immigration official (an adjudicator) and a member of the Refugee Division of the IRB. This hearing is to assess the claimant's eligibility to be considered as a Convention refugee, and the credible basis of the claim. In Canadian immigration law, those not eligible for consideration as refugees include:

- those with refugee status in another country;
- those coming to Canada from a 'safe third country' (to date no country has been designated as safe);
- previously rejected claimants who have not been out of Canada for more than 90 days; and
- criminals certified to be a danger to the public, security risks, war criminals, and criminals against humanity.

2.51 The credibility inquiry is aimed at establishing whether there is any credible or trustworthy evidence on the claim. Federal Court jurisprudence implies that the inquiry task is not to speculate as to whether the Refugee Division might determine the claimant to be a refugee. Those claimants rejected at this credible basis inquiry, and there are few (only about 5 per cent of claims), in principle may be removed within 72 hours.[50]

2.52 According to the Canadian Law Reform Commission, the great majority of those involved in the refugee determination process considered this initial hearing to be wasteful of time and resources. Most cases are considered to have a credible basis. If a case is challenged on credible basis grounds, both sides automatically are locked into a full scale examination of the merits. Such examinations are time consuming and expensive. Cases have been adjourned repeatedly. The costs of designated counsel and legal aid have been exorbitant, and the procedure is hamstrung by the non-implementation of removals. The Canadian Law Reform Commission, canvassing all of these criticisms, recommended the abolition of the credibility inquiry.[51] In the amended Immigration Act brought before the House of Commons in June 1992, the initial inquiry has been abolished.

2.53 At the next stage of the process, which in the new amendments is the single stage of the process, claimants are given an oral hearing before a two member panel of the IRB's Refugee Division. Only one member of the panel is required to decide in favour of the claimant for refugee status to be confirmed. If the claim is

50 Law Reform Commission of Canada, *The Determination of Refugee Status in Canada: A Review of the Procedure*, Draft Final Report, March 1992, p. 7.

51 ibid, pp. 78-81.

refused, then action is taken to remove the claimant from Canada, providing there are no humanitarian or compassionate grounds which would warrant special consideration.

2.54 Throughout all stages of the refugee determination system, claimants are entitled to appeal negative decisions to the Federal Court of Canada. However, the claimant must obtain leave of a Federal Court judge to initiate such a review , which will consider only questions of law or 'capricious' findings of fact. The Federal Court does not consider the merits of the refugee claims.[52]

2.55 The new Canadian Immigration Act has not made substantial changes to refugee decision making. The amendments are aimed more at fine tuning the system. The proposed single level hearing is said to cut administrative costs and permit the IRB to target its resources more effectively. New procedures have been set down for handling complaints about the IRB and disciplining members. Other adjustments have been made to enhance the quality and consistency of the IRB's decisions. These are too detailed to set down in this report. The Canadian example, though, does show the importance of continual monitoring and adjustment to the refugee determination system.

The situation in Western Europe[53]

2.56 The countries of Western Europe are subject to an in-country refugee crisis of increasing proportions. This crisis has increased in great magnitude in the last two years and is likely to increase exponentially in the future, given the developments in Eastern Europe and the former Yugoslavia. In earlier times, refugees to Europe tended to come from the Third World and from the Middle East In the last two years, Europe has witnessed the additional phenomena of refugees originating from the break up of the Soviet Bloc and the former Yugoslavia Countries such as Czechoslovakia, Poland, and Russia have produced many asylum seekers, with Poland being a major source of refugees for Germany. The formation of the newly independent states of the former Soviet Union has given rise to concerns among many people from those states who feel threatened, particularly if they are going to be minorities within those emerging states. For example, while Russians in the various countries of the former Soviet Union want to leave, they are not necessarily returning to Russia. They are seeking to move to the West, especially Western Europe, through whatever method is available. The Committee Chairman had direct experience of this phenomenon in his recent visit to Latvia and Lithuania

52 I Greene and P Shaffer, 'Leave to Appeal and Leave to Commence Judicial Review in Canada's Refugee Determination System: Is the Process Fair?', *International Journal of Refugee Law*, Volume 4, Number 1, January 1992, p. 71.

53 The following text is based on the Committee Chairman's observations during his visit to various European nations towards the end of the inquiry.

where he met various groups of Russian people who were most concerned to move to Germany or to other countries of Western Europe rather than to return to Russia where the economic circumstances are very bad.

The crisis in Germany

2.57 The country which is bearing by far the biggest brunt of the refugee crisis in Western Europe is Germany. The German situation is complex. Germany has had a virtual open-door policy until very recently, but is increasingly faced with internal political pressures to close its borders. The relevant figures for Germany are as follows. In 1990 Germany accepted about 160,000 refugee claimants; in 1991 Germany accepted about 250,000 refugee claimants; in 1992 the figure is estimated to be around 400,000 refugee claimants. Clearly, Germany is facing a massive crisis with respect to the refugee claimants arriving in the country in an almost uncontrolled fashion.

2.58 Why has Germany got itself into this position? The real cause is Article 16 of the German Constitution which requires the German nation to provide asylum for all those who seek it. This asylum condition in the Constitution has been the source of much angst for all sides of politics in Germany. The problem is compounded by the fact that not only does Germany provide asylum in the sense of actual protection, but it also is required to provide, through local authorities, housing, provision for various types of welfare, and even social security to all asylum claimants. This is proving to be a massive drain on the resources of Germany, with the consequence that all sides of politics in Germany are considering ways and means of reducing the inflow of applicants by restricting access into Germany. For this to be done, however, there would need to be an amendment to the Constitution and/or significant controls on the borders of Germany so that no-one would actually be able to enter the territory of Germany and thereby claim asylum.

2.59 It is not clear how these changes can be achieved in Germany. According to discussions which the Chairman had with a range of parliamentarians and officials involved in the refugee process in Germany, it is extremely difficult to amend Article 16 of the Constitution. Tightening up border procedures is easy in theory, but difficult to implement in practice. For example, German border guards would have to be given the power to turn away people who appear on the border and say 'I am a refugee' or 'I am seeking asylum'. At the moment, many of the people who come across the border specifically make such a claim. Alternatively, they enter through various points in Germany, such as on the relatively unpatrolled border between Germany and Poland. They turn up at police stations and declare that they are refugees and are seeking asylum. Prevention of this occurring creates a large number of political and practical enforcement problems for Germany.

2.60 One way in which Germany has tried to deal with this crisis has been, like Australia, to introduce new, more streamlined procedures. The established procedures in Germany have generally been excessively slow and the new procedures are intended to try to deal with the processing backlog. However, the problem with the new procedures is that they are generally considered to be unrealistic because they only allow very limited periods of time for people to appeal cases where they have been rejected. For example, only two weeks is given for an asylum seeker whose application has been turned down to appeal. In addition, the possibility of further appeals, including appeals to the courts, have been severely restricted. The new law in Germany is intended to try to differentiate between people who are genuine claimants and those who are not.

2.61 While other European nations generally sympathise with the plight of Germany in trying to come to grips with this massive refugee problem, it is clear that an over reaction on the part of Germany, in moving to an unrealistic processing arrangement, can only create further difficulties in the courts. An issue of much concern with respect to this situation is the fact that Germany fails to accept that it already has six million so-called foreigners in the country and that these people should be given an immigration status. Indeed, the main political parties of Germany still persist in the myth that Germany is not an immigration country even though there are six million such people, some of whom have been there for three generations. Many have been living and working and participating in life in Germany but are not German citizens and are not allowed to vote.

2.62 This difficult situation in Germany has been exacerbated by the refusal of the political parties to accept the fact that Germany is, in reality, an immigration country and therefore ought to introduce a reasonable immigration policy to deal with the demands upon it. This point was made by the Committee Chairman in a press statement which he issued in Germany following his various discussions Many of the officials in the refugee offices in Germany made clear their concern that the German Government had to this point failed to give reasonable status to those people who have entered Germany as so-called foreign workers. In particular, Ms Barbara John, Head of the Refugee Berliner Auslanderbeauftrage, and Mr Geiss, Commissioner of the Federal Government for the integration of foreign workers and their families, insisted that the problem of the asylum seekers can only be resolved in the context of what Germany is going to do with the status of the six million pre-existing so-called foreigners.

2.63 This dilemma for Germany is one which is still awaiting resolution. However, whatever one says about the problems confronting Germany, one can only applaud the generally humane approach Germany has used in accepting refugees from Eastern Europe and from the former Yugoslavia.

Distributing the burden in Europe

2.64 Germany's approach is contrasted quite starkly with most of the other Western European countries, the notable exception to this being Sweden. Most of these countries have been extremely slow to respond to the refugee crisis. Some have been excessively tough. Austria, for example, recently closed its borders to refugees from the former Yugoslavia without even giving reasonable notice. The Committee Chairman, while visiting a refugee camp in Hungary, was confronted with about 2,000 people from Bosnia Herzegovina, mostly Muslim, who had been forced out of their villages at the point of a gun without any possessions. These traumatised people had been put on special trains, and had been taken via Vojvodina to Austria. When the train arrived on its border, Austria refused to accept these people as refugees, basing its position on a strictly legal provision from the European Community rules. The legal provision was that refugees can only claim asylum in the first country in which they arrive within Europe.

2.65 This provision has been used by other countries such as the UK and France to refuse entry to refugees from the former Yugoslavia. It has created a complex and confusing situation in Europe. It is not a provision which Germany and Sweden have insisted upon. Both countries have taken refugees and asylum seekers who have travelled through other countries of Europe to reach their borders. The insistence of Austria in rejecting these desperate Bosnian people, who are clearly refugees under any definition of the UNHCR, by using a provision of this kind, has had a two-fold effect. Firstly, it has led to some considerable condemnation of Austria, and indeed that country has re-evaluated its position. Secondly, it has led to a phenomenon where Europe, in response to this criticism, has reopened the issue of the so-called 'first country' principle.

2.66 Clearly this approach cannot be allowed to stand in the current international context. For example, with the crisis in Bosnia Herzegovina, the three neighbouring countries, Hungary, Slovenia and Croatia, have borne the brunt of the refugee demand. These three countries, though, are trying to emerge from a very difficult economic situation where they had Soviet centralised economies. This has been made much more difficult for them because they have had to bear the overwhelming burden of the refugee crisis from the former Yugoslavia. All three countries have called on Europe to relieve the refugee burden by making financial contributions and by accepting significant numbers themselves.

2.67 The European nations, therefore, cannot rely on the principle that the whole burden must be borne by the first country, especially when that country is not in a position to do so, as is the case with war-torn Croatia. Western European nations need to find ways of distributing the burden amongst themselves. Sweden recently complained at a meeting in Geneva concerning the Bosnian refugees that it also has borne a disproportionate burden. Sweden demanded a better sharing principle. Sweden has the moral authority to do this because it has taken

approximately 50,000 refugees from the former Yugoslavia, mostly from the Kosovo region, but also from Croatia and Bosnia Herzegovina. Sweden's position has been based on essentially humanitarian principles, and ought to be congratulated.

2.68 It seems likely that the objections of Sweden and Germany will be heeded and the Europeans will develop a process whereby the burden of these refugees coming from Eastern Europe and from the former Yugoslavia is shared by all of the members of the European Community. Under pressure from the Geneva meeting, a number of Western European countries, including both France and the UK, have agreed to accept a significant proportion of these refugees.

The trauma of the Bosnian refugees

2.69 The dramatic conflict in Bosnia Herzegovina has created circumstances in which a huge number of people have been forced out of their homes. These people clearly constitute refugees under the normal definition given by the UNHCR. Close to 500,000 of these refugees have found their way into Croatia. This newly recognised country itself had more than 400,000 people displaced as a result of the war and the seizing of parts of its territory by the Serbian irregular forces late last year. Of that total, approximately 240,000 people remain as refugees within their own country. They have been forced from their villages and towns, including Vukovar, and are living in hotels and other places within Croatia. In these circumstances, it is a terrible burden for Croatia to be subjected to almost half a million refugees from Bosnia Herzegovina. This has put Croatia into a virtually impossible economic position and has led to a general impoverishment of that small nation. This has occurred in addition to the problems it has with the continuing violence and conflict between itself and the Serbian irregular forces.

2.70 Slovenia has between 70,000 and 80,000 refugees from Bosnia Herzegovina. These people are living in camps spread throughout the country, including several in the area of the capital city, Lubjana. The Committee Chairman visited one such camp in which conditions were quite adequate for the refugees, although there are problems with regard to the provision of resources, including food and medicine. The budget of Slovenia is being increasingly strained by this refugee problem. Slovenia has asked other countries in Europe and in the West generally, including Germany, to take more of these refugees for resettlement. It actively was seeking this result at the Geneva meeting. Slovenia also has asked for initiatives to protect the remaining Muslim population in Bosnia Herzegovina through the creation of safe havens. This proposal from Dr Rupel, the Foreign Minister, is an important element in trying to contain the refugee crises stemming from Bosnia Herzegovina.

2.71 The third country affected by the Bosnian crisis is Hungary. It also has adopted a humanitarian approach in dealing with the crisis in the former Yugoslavia, even though Hungary is itself undergoing difficult economic times. The legislators are making provision for a further emergency budget with respect to the

refugees, even though the 1992 budget was exhausted in June because of the huge influx from Bosnia Herzegovina. The Committee Chairman visited a camp in Nagyatad, and there saw and first heard about the terrible traumas which the Bosnian people have been subjected to. Many people told horror stories of rape, murder and genocide being committed against the Muslim people of Bosnia Herzegovina. This camp in Nagyatad is the one referred to earlier; it was created when 2,000 people were put on cattle trains and moved out towards Austria, there to be rejected and redirected to Hungary. This camp was created overnight and is based on a former Soviet army headquarters. The people there are in cramped conditions, but it is a relatively adequate situation for the time being. However, Hungary will not be able to look after these people for a long period of time As the Committee Chairman said in a statement issued in Budapest on 10 July 1992:

> Hungary now has more than 50,000 refugees from the Yugoslav region and the number is increasing daily ... Hungary needs immediate international assistance to cope with these people, especially since Austria has decided to close its borders to refugees from Bosnia and Croatia. It is not unlikely that further waves of refugees will arrive in the light of the continuing bloody conflict in Bosnia and what appears to be the Serbian Government's policy of pushing these people into Hungary and other surrounding countries.

2.72 The Committee Chairman was assured by Mr Meszaros, the Acting Chairman of the Committee on Refugees and Minorities in the Parliament of Hungary, that withstanding all of the problems which Hungary has had and its desperate need for more international assistance, it would nevertheless continue to provide for these refugees until a solution is found - hopefully a solution which will allow them to return to their homes.

2.73 All three countries, Croatia, Slovenia and Hungary, face the short term problems associated with the provision of food, medical attention and other basic necessities of life for the Bosnian refugees. The refugees themselves face an even more daunting and traumatic situation. They do not know what will happen to them and whether they will be able to return to their homes at any time in the near future. If this does not become possible in the short term, what will be the fate of these people in the medium and long term? The resolution of these questions will be a severe test of Europe's commitment to humanitarian principles. It will also require the setting out of new principles and procedures for the processing of refugees.

2.74 The Europeans, like several other countries where refugees are arriving, are determined to set down procedures which differentiate the genuine refugees, such as the people from Bosnia Herzegovina, from many other persons arriving at their borders and seeking refugee status, who primarily want a better economic and social life. In setting down each procedure for treatment and evaluation of refugee claimants, Australia can learn from the problems and the

experience of the Europeans. It is important that we avoid the extremes of being excessively generous on the one hand and of being excessively restrictive and cold hearted on the other.

Collective problems and solutions

2.75 The Committee is aware that relevant Commonwealth Departments, such as DILGEA and the Attorney-General's Department (Attorney-General's), monitor overseas experiments and experiences in dealing with large scale movements by refugee claimants. In this report, such relevant overseas information is included where appropriate in different sections of the text. In the Committee's view, such monitoring is essential. Australia can learn from the mistakes and the successes of other countries in refugee law making and processing. Refugee control issues are not merely domestic issues. Refugee law is international law. The forum in which we control our on-shore refugee arrangements is an international one. The refugee problem is a world problem. The solution is likely to be arrived at by collective action and co-operation.

Recommendation

2.76 **The Committee recommends that:**

1. **to assist in future decision making regarding Australia's refugee determination system, the Department of Immigration, Local Government and Ethnic Affairs monitor and keep up to date with overseas experiences and developments in relation to refugee law and processing arrangements.**

Chapter Three

AUSTRALIA'S ON-SHORE REFUGEE SYSTEM: GENESIS OF A CRISIS

Introduction

3.1 As noted in Chapter 1, Australia has made a significant contribution to the resettlement of refugees from various regions of the world. Since the Second World War, Australia has responded to a range of international crises by accepting large numbers of refugees for resettlement. Over time, Australia has moved from being a country of resettlement to a country which now receives first asylum claims from refugees.

3.2 To a large extent, Australia's approach to refugee resettlement has reflected the changing world situation in relation to refugees. Prior to the 1970s, Australia focused mainly on the off-shore program as a mechanism for responding to particular waves of refugees. Australia reacted to refugee situations as they arose. However, with the increasing number of refugees world-wide over the last two decades, and a growing incidence of on-shore applications within Australia, the need for a more co-ordinated and responsive policy and administrative framework was recognised. The crisis of numbers facing Australia by the end of the 1980s prompted a particularly rigorous assessment of existing policy and practice.

3.3 Before considering the situation which Australia finds itself in today, it is important to trace something of the history of Australia's commitment to refugee resettlement.

Australia's role in refugee resettlement

3.4 Australia's involvement in refugee resettlement dates back to the 1920s. Prior to the Second World War, Australia admitted approximately 7,000 persons displaced by developments in Germany and German-occupied territories.[1]

3.5 The post World War II period was the most significant for Australia in its emerging role as a major country of refugee resettlement. In 1947, Australia joined the International Refugee Organisation (IRO), which had been established to deal with the refugee crisis resulting from the Second World War. Under Australian

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1 NPC, *Refugee Review*, July 1991, AGPS, Canberra, p. 65.

government agreements with the IRO, 170,700 displaced persons were resettled in Australia, with a further 11,000 arriving as a result of agreements between the IRO and non-government organisations.[2]

3.6 In the three decades which were to follow, Australia continued to respond to the plight of refugees fleeing from various international crises. In 1956/57, Australia accepted 14,000 refugees from the crisis in Hungary. In 1968, Australia accepted 5,000 Czechoslovakian refugees.[3] In the mid-1970s, war time dislocation in South East Asia prompted Australia to accept approximately 130,000 Indo-Chinese refugees for resettlement. This occurred between April 1975 and March 1991.[4] In the same period, entry to Australia on humanitarian grounds was granted to large numbers of people fleeing civil unrest in countries such as Lebanon and Sri Lanka.

Development of Australia's refugee policy

3.7 Australia's commitment to refugee resettlement was evidenced clearly during the 1970s. Conflict in South East Asia brought about a mass exodus of people in Australia's immediate region. The South East Asian refugee crisis acted as an important catalyst for the development of a refugee policy which was distinct from Australia's general immigration policy.

3.8 In 1976, the Senate Standing Committee on Foreign Affairs and Defence, in a report on the plight and circumstances of Vietnamese and other refugees, recommended the development of 'an approved and comprehensive set of policy guidelines together with the necessary administrative machinery to be applied to refugee situations'.[5] The Senate Committee stated:

> ... their absence reduces our practical ability to respond to crises and in turn can become justification for not involving ourselves with particular situations.[6]

2 ibid, p. 66.

3 F. Hawkins, *Critical Years in Immigration:Canada and Australia Compared*, McGill-Queens University Press, 1989, p. 165.

4 UNHCR Resettlement Section, Statistics and Charts Concerning Indo-Chinese in South-East Asia for the Month of March 1991, Table VI, 31 March 1991, cited in NPC, op cit, p. 34.

5 Senate Standing Committee on Foreign Affairs and Defence, *Australia and the Refugee Problem. The Plight and Circumstances of Vietnamese and Other Refugees*, AGPS, Canberra, 1976, p. 89.

6 ibid.

3.9 The Senate Committee was of the view that the development of the guidelines had to be a priority of the Government. It indicated that while the guidelines needed to be formulated within the general context of Australia's overall immigration program, they had to constitute a separate identifiable component which catered specially for the sudden, and sometimes unforseen, migratory movements of people as refugees.[7]

3.10 On 24 May 1977, the then Minister for Immigration, the Hon M J R MacKellar, MP, responded to the calls for a refugee policy by presenting to the Parliament a statement on refugee policy and mechanisms. In that statement, the Minister outlined four principles on which refugee policy would be based:

1. Australia fully recognises its humanitarian commitment and responsibility to admit refugees for resettlement.

2. The decision to accept refugees must always remain with the Government of Australia.

3. Special assistance will often need to be provided for the movement of refugees in designated situations or for their resettlement in Australia.

4. It may not be in the interest of some refugees to settle in Australia. Their interests may be better served by resettlement elsewhere. The Australian Government makes an annual contribution to the UNHCR which is the main body associated with such resettlement.[8]

3.11 These four principles have remained the basis of Australia's refugee policy to date. The National Population Council (NPC), in its 1991 *Refugee Review*, summed up Australia's commitment to refugees by commenting that Australia has established itself as:

> ... a generous country of resettlement, an active participant in determining the international response to the evolving refugee situation, a regular donor to international refugee funds and a compassionate community, as reflected not least in the active support given the network of [non-government organisations] and their involvement in refugee work.[9]

7 ibid.

8 Hon M J R Mackellar, MP, *Refugee Policy and Mechanisms*, Ministerial Statement, Parliamentary Debates (Hansard), House of Representatives, 24 May 1977, p. 1714.

9 NPC, op cit, p. 67.

3.12 The refugees accepted for settlement from outside and inside Australia have been ethnically and culturally diverse (see Tables 3.1 to 3.3). They have advanced to a considerable extent the economic, cultural and political life of Australia.

3.13 However, as stated earlier, the increased pressure of refugee numbers, both inside and outside Australia, has necessitated changes to Australia's arrangements for accepting refugees. These changes, which have been implemented in response to the growing refugee crisis, are discussed in the ensuing chapters of the report. The remainder of this chapter deals with the nature of the crisis which has emerged.

TABLE 3.1[10]

Refugees Arriving In Australia: January 1945 to June 1984
Top 14 Source Nationalities

Citizenship/Nationality	Number	%
Polish	74,793	17.9
Vietnamese	70,492	16.8
Hungarian	26,185	6.3
Latvian	19,421	4.6
Cypriot/Lebanese	17,389	4.2
Czechoslovakian	15,276	3.6
Ukranian	14,464	3.5
White Russian (from China)	13,292	3.2
Kampuchean	11,052	2.6
Lithuanian	9,096	2.4
Laotian	6,519	1.6
Timorese	5,479	1.3
Estonian	5,329	1.3
USSR*	4,791	1.1
	418,870	100.0

* Comprises persons of the Jewish tradition

Note: Estimated figures only. Because of varying policies and interpretations of the definitions of a refugee over a 34 year period, it is not possible to provide figures compiled on the basis of a single statistical definition. As a result, the above figures may not be entirely compatible with some previously published calculation.

10 DILGEA, *Review of Activities to 30 June 1984*, AGPS, Canberra 1984.

TABLE 3.2[11]

Settlers arriving in Australia under the off-shore refugee and humanitarian program, by region of last residence, 1978 to 1990

	1978-79	79/80	80/81	81/82	82/83
UK & IRELAND	6	7	195	56	17
EUROPE	1 302	4 605	5 774	7 176	4 155
ASIA	12 064	15 254	15 767	14 557	12 758
OTHER	78	88	111	128	124
TOTAL	**13 450**	**19 954**	**21 847**	**21 847**	**17 054**

	1983/84	84/85	85/86	86/87
UK & IRELAND	16	17	10	1
NORTHERN EUROPE	1 257	940	770	1183
SOUTHERN EUROPE	1 141	1 261	1 059	1 254
MIDDLE EAST	563	1 326	948	622
NORTH AMERICA	4	11	11	0
CENTRAL & SOUTH AMERICA	837	1 866	1 471	1 755
AFRICA	41	35	87	127
ASIA	10 909	9 339	7 344	6 347
OCEANIA	1	8	0	2
TOTAL	**14 769**	**14 803**	**11 700**	**11 291**

	1988/89	89/90
INDOCHINA	5 930	6 730
EAST EUROPE	1 921	2 200
MIDDLE EAST	950	922
LATIN AMERICA	2 352	2 038
AFRICA	117	102
OTHER	30	8
TOTAL	**11 300**	**12 000**

11 DILGEA, *Reports of Activities*, various, 1978 to 1990; Bureau of Immigration Research, *Immigration Update*, December 1990 to September 1991.

TABLE 3.3[12]

Nationality of cases granted refugee status in Australia from 1978 to June 1990

Total approvals	1288
Vietnam	600
Iran	140
Somalia	70
Afghanistan	30
Ethiopia	30
Sri Lanka	30

Other nationality groups with less than 20 approvals

Bolivia	Indonesia	Romania
Burma	Iraq	South Africa
Cambodia	Kenya	Syria
Chile	Korea	Turkey
Colombia	Laos	Uganda
Czechoslovakia	Pakistan	Uruguay
El Salvador	Palestine	USSR
Ghana	Peru	Yugoslavia
Guatemala	Poland	
Hungary	PRC	

The refugee profile

3.14 From 1975 to 1990, Australia accepted a total of 203,124 persons under its off-shore refugee and humanitarian program. During the 1980s, there was a noticeable decline in the number of persons granted entry under this program, from 21,917 in 1981/82 to 11,948 in 1989/90. Within the program itself, the humanitarian component grew from 1,701 in 1981/82 to 10,411 in 1989/90, while the refugee component decreased from 20,216 in 1981/82 to 1,537 in 1989/90.[13]

12 Evidence, p. 768.

13 NPC, op cit, p. 127.

3.15 The growth in the humanitarian component occurred following the establishment in 1982 of the Special Humanitarian Program (SHP). The SHP was designed to accommodate those persons who did not satisfy the technical requirements for refugee status, as set out in the Convention, but who nevertheless required protection, in that they could point to or feared gross discrimination amounting to substantial violation of their human rights, and, at the same time, had some connection with Australia. The SHP introduced greater flexibility in Australia's response to refugee and refugee-like situations.[14]

3.16 In its 1991 *Refugee Review*, the NPC noted that there have been concerns that the decline in the refugee component of the off-shore program represented a decreased commitment to refugees and a greater commitment to the special humanitarian program at the expense of the refugee component. However, the NPC concluded that the range of factors influencing the level and nature of the intake made it 'erroneous to conclude that the changed ratio between refugees and SHP in Australia's humanitarian programs over the last ten years represents a lessening of commitment by the Government to people in need of resettlement as a durable solution'.[15]

3.17 In particular, the NPC highlighted the changing nature of the refugee program. It noted that, in 1980, Australia was operating a refugee program in designated situations, such as Indo-China, which did not require individual refugee determinations. Further, it indicated that one of Australia's major resettlement programs at the present time is operating from Central America, where people meet the refugee definition other than the technical requirement of being outside their country of origin. Such people are admitted under Australia's 'in-country SHP'.[16]

3.18 The decline in the off-shore program has been accounted for partially by an increase within the on-shore refugee and humanitarian arrangements. From 1978 to 30 June 1990, a total of 1,228 cases (as distinct from persons) were granted refugee status from within Australia.[17]

3.19 By December 1989, Australia had begun experiencing a dramatic shift towards a high number of on-shore applications from persons who entered Australia with valid visitors, student or other visas and, once in Australia, applied for refugee status. The number of on-shore applications for refugee status increased from an average of 332 per annum between 1982 and 1988/89 to a figure of 3370 in 1989/90 and 13,954 in 1990/91 (see Table 3.4).

14 ibid, p. 125.

15 ibid, p. 128.

16 ibid, p. 128.

17 Evidence p. S767.

TABLE 3.4[18]

On-shore applications for refugee status: 1982-1992

1982	-	170
1983	-	183
1984	-	167
1985/86	-	315
1986/87	-	488
1987/88	-	439
1988/89	-	564
1989/90	-	3,370
1990/91	-	13,954
1991/92	-	9,793

Note: Figures for 1982-84 relate only to cases considered by the DORS Committee.

3.20 Two principal factors contributed to the dramatic rise in on-shore applications:

- the presence in Australia of a large number of overseas students, particularly from the PRC, who had arrived to undertake short term English language and other courses, but who had undergone only perfunctory bona fides testing in terms of their genuine intentions to study once in Australia, and eventually to leave Australia; and
- the events in Tiananmen Square in the PRC in June 1989.

3.21 In evidence to the Committee, DILGEA noted:

> The increase in the number of applications for refugee status has been largely the result of PRC nationals applying to remain in Australia following the events of June 1989 in the PRC. Although there has been a significant increase in the number of applications from non-PRC nationals, at 31 October, applications from PRC nationals constituted 72.3 [per cent] (16,287 applications) of the existing backlog.[19]

18 Evidence, pp. S749, S751, and DILGEA, *Determination Of Refugee Status (DORS) Statistical Report*, July 1992.

19 Evidence p. S827.

3.22 While there was a steady increase in refugee applications by PRC nationals in the months immediately following the Tiananmen Square incident, the most dramatic increases in the number of applications occurred in the period August to November 1990 and, in particular, July 1991 (see Table 3.5).

3.23 DILGEA gave the following explanation for the July 1991 increase:

> ... 30 June was the last day on which persons who were in Australia legally and applied for refugee status would have had access to the humanitarian mechanism. Immediately prior to the end of that month there was some misleading publicity on that in the Chinese press, including the statement that, 'After 1 July you will not be able to apply for refugee status'. This provoked a large number of applications, particularly in the last days of June, at regional offices.[20]

3.24 DILGEA also noted that the steady decline in the number of PRC asylum seekers within Australia after July 1991 followed changes in government policy and procedures for checking the bona fides of PRC students prior to their departure from the PRC.[21]

3.25 Putting to one side the immense impact of PRC nationals on the refugee applicant figure, it is also evident that the number of general refugee claimants has increased ten fold over the last three years. DILGEA indicated that this rise can be attributed to two main factors:

- Australia experiencing the effects of the world-wide movement of refugees; and
- changes to the rules for obtaining permanent residence from within Australia, including restrictions placed on illegal entrants wanting to regularise their stay from within Australia.[22]

20 Evidence, p. 1604.

21 Evidence, pp. 1604-1605.

22 Evidence, p. S827.

TABLE 3.5[23]

Applications for refugee status 1989-1992 - PRC Nationals and others

	1989		1990		1991		1992	
	PRC	non-PRC	PRC	non-PRC	PRC	non-PRC	PRC	non-PRC
Jan	4	37	114	237	574	288	133	317
Feb	4	39	183	390	530	249	81	321
Mar	1	46	241	137	517	314	150	308
Apr	1	33	121	127	631	228	78	290
May	0	44	182	282	866	318	66	266
Jun	26	35	336	190	868	258	59	245
Jul	39	35	411	225	3382	378		
Aug	32	57	901	279	729	280		
Sep	15	54	1355	323	686	354		
Oct	34	77	1999	485	207	330		
Nov	10	66	1051	485	265	364		
Dec	58	356	511	354	122	307		
Total	224	879	7405	3514	9377	3668	567	1747

[23] DILGEA, Determination of Refugee Status, *Statistical Report*, Financial Year 1991/92, p. 9; Evidence, p. S751.

3.26 DILGEA stated:

> The limited opportunities to apply to remain in Australia following the enactment of the legislation in December 1989 may have contributed to some degree to the numbers of applications for refugee status. The underlying reason, however, relates to the growing phenomenon of the movement of millions of people around the world who are fleeing poverty and social/economic disruption. Although the impact of mass movements on western countries has been stronger in Europe and North America, its effect is now apparent in Australia.[24]

3.27 The Regional Representative of the UNHCR, in contrast, attributed the increase more directly to administrative changes. He commented:

> The increased numbers in Australia are essentially a phenomenon related to the changes in regulations which did eliminate humanitarian and compassionate consideration as a basis for the grant of an entry permit ... leaving the refugee avenues the only remaining avenue for humanitarian compassionate relief.[25]

3.28 The changes to the humanitarian category are discussed further in Chapter 5. However, it is interesting to note that when the humanitarian stream was combined with the refugee stream at the end of June 1991, there were approximately 4,300 unresolved applications for entry on humanitarian grounds.[26]

Processing of applications

3.29 The sudden and dramatic increase in the number of on-shore refugee applications has placed a considerable strain on the system for processing refugee claims. Figures provided by DILGEA (see Table 3.6) indicate that the 1990 processing rate was insufficient to cope with the existing queue of applicants as well as the significantly higher number of applications received after December 1989. In 1990, only 295 applications were determined to the primary stage. As a result, the case load of applications awaiting determination to the primary stage rose dramatically through 1991 to a peak of 23,066 in December of that year.[27]

[24] Evidence, p. S827.

[25] Evidence, p. 1401.

[26] DILGEA, *Review '91, Annual Report 1990-91*, AGPS, Canberra, p. 56.

[27] DILGEA, *DORS Monthly Report*, April 1992, p. 16.

TABLE 3.6[28]

Applications Determined to the Primary Stage: January 1990 - June 1992*

	1990	1991	1992
January	18	38	448
February	56	38	563
March	22	51	785
April	40	68	730
May	28	46	634
June	19	44	712
July	22	75	
August	11	181	
September	22	290	
October	6	393	
November	25	267	
December	26	240	
	295	1,731	3,872

* Includes cases lapsed or withdrawn

3.30 Since the end of 1991, there has been an increase in the rate of processing primary applications, with figures indicating that 712 cases were either approved, rejected, lapsed or were withdrawn at the primary stage in June 1992, compared to 44 in June 1991. However, at June 1992, the backlog of primary applications awaiting determination remained high, at 21,653.[29]

3.31 As more decisions are being made at the primary stage, this is beginning to have a flow-on effect to the review stage. The number of review applications received has been rising steadily in recent months from 5 in January 1991 to 362 in June 1992.[30] To date, only a small number of cases have completed the review stage. Of the 2,484 review applications received between

28 DILGEA, *DORS Statistical Report*, Financial Year 1991/92, pp. 11-12.

29 ibid, p. 16.

30 ibid, p. 18.

December 1990 and June 1992, only 224 were finalised. Of these, 37 cases either lapsed or were withdrawn. Of the review cases determined, 18 were approved and 169 were rejected.[31]

Processing outcomes

3.32 The Committee was interested in the overall approval rate for applications both at the primary and review stages. The Deputy Regional Representative of the UNHCR indicated that while Australia's approval rate for on-shore refugee applications historically was at the 10 per cent mark, recent advice obtained from DILGEA suggested an approval rate approaching 20 per cent.[32] In response, DILGEA commented that figures for the 1991/92 program year showed an approval rate of 5 per cent at the primary stage and 8 per cent at the review stage. DILGEA warned against drawing any definitive conclusions from these figures because the number of review cases determined was so small.[33] The approval rate is discussed further in Chapter 4.

Resource expenditure

3.33 The high level of costs associated with processing the large number of refugee applicants is one of the concerns prompting traditional countries of refugee resettlement to review their procedures for processing on-shore refugees. In Australia's response to the 1991 UNHCR questionnaire on the implementation of the Convention and Protocol, it was noted that member countries of the Organisation for Economic Co-operation and Development (OECD) are expending massive resources on their asylum systems, even though only a small percentage of claimants are ultimately found to be refugees. It was stated:

> The latest figures indicate that the OECD group is expending around $US5 billion annually, ten times the total budget of the UNHCR, to deal with less than 5 per cent of the global population of refugees and displaced persons. At the same time, the developing world is faced with massive [refugee] numbers and diminishing international assistance.[34]

31 ibid, pp. 18-20.

32 Evidence, p. 1418.

33 Evidence, p. 1603.

34 Evidence, p. S763.

3.34 Recently in Australia it has been necessary to assign additional resources to the refugee determination system in order to clear the backlog of applications which has arisen. DILGEA advised that the extra resources which have been targeted for the determination system and follow-up compliance work will total $8.7 million in 1991/92 and $25.1 million in 1992/93. A significant proportion of these resources will be used to recruit additional processing staff. DILGEA has planned for 158 extra staff for refugee processing and 50 extra staff for compliance work associated with illegal entrants and asylum seekers whose claims have been rejected.[35]

3.35 In reviewing the existing procedures, two important considerations for the Committee were the cost and timeliness of the refugee determination process. The Committee was concerned that Australia's existing determination system was lengthy and convoluted, imposed a heavy financial burden on the Commonwealth, and enabled the lodgement of unmeritorious refugee applications simply as a mechanism to buy time in Australia.

3.36 DILGEA noted in June 1991 that the anticipated cost to the Commonwealth of the then proposed refugee determination system was $1.83 million per 1,000 applicants. At the same time, DILGEA indicated that an alternative model, as suggested by the Administrative Review Council (ARC) (see Chapter 6), would have cost the Commonwealth approximately $2.28 million to $3.81 million per 1,000 applications.[36]

3.37 Factors impacting on the cost of the determination system include the number of stages required to reach a final determination in each case, the amount of documentation which must be prepared for each stage, and the number and seniority of departmental and other officers involved at the various stages of the decision making process. These issues are dealt with in Chapter 6.

3.38 It is important to note that the figures provided to the Committee do not represent the full cost of on-shore refugee processing. The figures do not include a costing for compliance, that is the detention and deportation of unsuccessful claimants, nor the litigation costs associated with any Federal Court challenge.

Compassionate considerations

3.39 The increased costs associated with processing a larger number of on-shore refugee applications is only one area of concern. There is also a human perspective which must be taken into consideration.

35 Evidence, p. 1578.

36 Evidence, p. S637.

3.40 Lengthy queues and processing delays disadvantage those persons, both on-shore and off-shore, who ultimately satisfy the internationally accepted criteria of a refugee and can be granted refugee status. Such persons must wait in the queue alongside all other claimants. For persons who not only fear persecution, as required by the Convention definition of a refugee, but who also have experienced persecution, the uncertainty arising from delays in processing their asylum claims can be particularly distressing.

3.41 Committee members are well aware, from their own case work experience, of the trauma and torture to which some refugees have been subjected. For genuine refugees, the uncertainty of waiting for a decision on their future, particularly if the wait is a long one, adds to the trauma which such people have endured, and delays their adjustment to a new life in Australia.

Political, social and economic considerations

3.42 The present avalanche of on-shore claims also involves significant political costs. These costs arise because of negative assessments formulated about refugee claimants, which spill over into the community perception of refugees. Negative attitudes can affect the whole migration program. Some countries have become so affected by what is colloquially referred to as 'compassion fatigue' that they are inclined to 'batten down their doors' and seek to refuse admission to all. If countries like Australia are to continue sponsoring refugee programs and marketing a migration program, the Australian community needs to be assured of the integrity of the refugee determination process.

3.43 As the number of on-shore applications for refugee status has grown, so too have the concerns about the social and economic impact of accepting a higher number of refugees from within Australia. Previously, when the majority of refugees were accepted through formal off-shore resettlement programs, governments could effectively control the intake of refugees. Even though it was impossible to predict when the next refugee crisis would arise, governments could base their decisions about the number of refugees to be accepted on the capacity of the nation and its economy to absorb those refugees.

3.44 In contrast, the unpredictable nature of on-shore applications for refugee status makes it difficult for immigration authorities and the Government to plan immigration intake levels for future years. In addition, when a greater number of refugees are accepted on-shore, Australia's capacity to respond to the plight of off-shore refugees, particularly those in very trying and difficult conditions in overseas camps, is reduced.

3.45 The unplanned nature of on-shore applications also can give rise to unexpected costs which are borne not just by the Commonwealth, but also by State and local governments. These costs involve responding to unplanned resettlement requirements, including the need for housing, education, employment and social

welfare. The shared cost burden can lead to friction between governments. The decision maker approving refugee claimants is not the decision maker responsible for all the costs of resettlement.

3.46 In addition, while the Australian community for some time has been willing to accept persons in genuine need, there is a growing concern that many of those applying for refugee status within Australia may not be actual refugees, but may be seeking to stay on in Australia to improve their economic prospects and general lifestyle. This belief can create a degree of community antagonism. There is a general consensus that persons should not be able to 'jump' the immigration queue and obtain settlement simply because they have managed to reach Australia.

3.47 In this report, the Committee has focused on reviewing Australia's refugee and humanitarian system to ensure that it caters for the needs of genuine refugees and, at the same time, satisfies the demands and expectations of the Australian community. In the chapters which follow, the Committee has addressed specific procedural aspects of the refugee determination system, as well as some of the broader and more complex policy considerations relating to on-shore applicants for refugee status. The Committee has made a number of recommendations aimed at overcoming the crisis which has emerged in Australia's on-shore refugee and humanitarian system.

Chapter Four

THE LAW AND PRACTICE CONCERNING REFUGEE STATUS

Introduction

4.1 Refugees are unprotected persons, outside their home countries and unable or unwilling to return home because the refugees' civil or political status has put them at risk of serious harm there.

4.2 This general definition of refugees derives from the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol to the Convention. The Convention definition (see paragraph 4.6) is of singular importance. It has been accepted by more than one hundred nations in the only refugee accord of global scope.[1]

4.3 The Convention and Protocol were adopted under the auspices of the United Nations. These agreements revised and consolidated previous international instruments relating to refugees. The Convention set down the definition of a refugee and the basic rights afforded to refugees. It also contains provisions concerning the implementation of the Convention.[2]

4.4 Australia ratified the Convention in 1954 and acceded to the Protocol in 1973. These international treaties bind Australia under international law to comply with treaty obligations but they are not self-executing and the rights conferred by the Convention and Protocol are not directly justiciable or enforceable in Australia domestic law.

4.5 Neither of these international instruments is incorporated into Australian domestic law.[3] However, as a State Party to the Convention, Australia has assumed protective obligations to any person who is a refugee or to whom the status of refugee is accorded.[4] The non-refoulement norm is part of Australian

1 J C Hathaway, *The Law of Refugee Status*, Butterworths 1991, p. v.

2 F Hawkins, op cit, p. 157, and P Hyndman, 'The 1951 Convention Definition of a Refugee: An appraisal with particular reference to the case of Sri Lankan Tamil applicants', *Human Rights Quarterly*, vol. 9, 1987, p. 50.

3 see paragraphs 4.14 to 4.25.

4 *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290.

common law through customary international law.[5] Australia's protective obligations to refugees find qualified expression in the Migration Act and Regulations. Also, Australia voluntarily has assumed responsibility to provide some protection to those who are not Convention refugees but who are in humanitarian need of assistance (see Chapter 5).

The Convention definition of refugee status

4.6 The mandate of the Convention as modified by the Protocol includes any person who:

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear is unwilling to return to it.

4.7 As Professor Hyndman (Faculty of Law, University of NSW) noted:

> The determination of refugee status is generally considered to be declaratory and not constitutive. The legal effect of a decision as to refugee status is merely formal recognition that the criteria for refugee status are satisfied. The decision does not itself confer that status.[6]

4.8 There are five essential elements to the Convention refugee definition.

4.9 First, the Convention includes only those persons who have left their countries of nationality or, in the case of stateless persons, their countries of habitual residence. It is not necessary that the person originally departed because of a fear of persecution. A person can become a refugee, referred to as a *refugee sur place*, by reason of events occurring after the person's departure from the home country.

5 Evidence, p. S759.

6 P Hyndman, 'Refugees Under International Law with Reference to the Concept of Asylum', (1986), 60, *Australian Law Journal*, p. 151.

4.10 Secondly, the refugee claimant must be genuinely at risk. The person must subjectively fear persecution and must demonstrate objectively that the fear is well-founded. This facet of the definition has been closely analysed and tested in the Courts, most relevantly in recent case law in Australia, Britain, Canada and the USA.

4.11 Thirdly, the refugee claimant must fear persecution. The term 'persecution' is not defined. The UNHCR, in its *Handbook on Procedures and Criteria for Determining Refugee Status*, suggests that a threat to life or freedom for the relevant Convention reasons will always qualify as 'persecution'. However, the term can also encompass other substantial violations of human rights such as the right to earn a livelihood or practise religion. In *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 87 ALR 412, the High Court considered the definition of 'persecution'. Chan's exile to another part of China was taken to be a serious invasion of freedom and constituted persecution within the Convention. Mason C J defined persecution as 'some serious punishment or penalty or some significant detriment or disadvantage' which the applicant will suffer if he returns (p. 417). McHugh J (at p. 449) spoke in terms of 'selective harassment,' stating:

> As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class she is being persecuted.[7]

4.12 Fourthly, the risk faced by the refugee must be for reasons specified in the Convention. Convention protection is given only to persons in fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. This formulation does not necessarily reflect the circumstances of today's refugees. Many of them are not in danger because of their political or religious convictions. Rather, they are fleeing from generalised violence, internal armed conflicts or severely adverse social, economic or political conditions.[8] As James Hathaway observed:

> This [the Convention definition] means that most Third World refugees remain *de facto* excluded, as their flight is more often prompted by national disaster, war, or broadly based political and economic turmoil than by 'persecution', at least as that term is understood in the

7 Note that there is no requirement that a Convention refugee be individually targeted for persecution. See: J Crawford and P Hyndman, 'Three Heresies in the Application of the Refugee Convention', *International Journal of Refugee Law*, Vol. 1, No. 2, 1988.

8 S F Martin, 'Humanitarian Admissions: A Gap in US Immigration Policy', in *In Defence of the Alien*, Proceedings of the 1988 US Annual National Legal Conference on Immigration and Refugee Policy, p. 66.

> Western context. While these phenomena undoubtedly may give rise to genuine fear and hence to the need to seek haven away from one's home, refugees whose flight is not motivated by persecution rooted in civil or political status are excluded from the rights regime established by the Convention.[9]

4.13 Finally, the Convention definition ensures that there must be a genuine need for, and legitimate claim to, protection. The cessation clauses of the Convention, Articles I C(2) and (3), state that refugee status is lost if the refugee can reclaim the protection of his/her own country, or has secured an alternative form of enduring protection. The non-refoulement protection may not be claimed by a refugee 'whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.'[10] The Convention's exclusion clauses also mean that those who have committed serious crimes against humanity, or a serious non-political crime when outside the country of refuge and prior to admission to that country, are not entitled to claim international protection.[11]

Incorporation of the Convention definition into the Migration Act

4.14 The Committee considered the issue of incorporating the Convention definition of a refugee and Convention obligations and arrangements into domestic law via the Migration Act. The advice given to the Committee was that the Convention was not incorporated as yet into Australian domestic law.[12] The Committee is aware that the High Court presently is considering whether the Convention has been incorporated indirectly. This argument has been advanced in a case brought by certain Cambodian refugee claimants detained at Port Hedland, who are challenging the present detention arrangements for certain designated refugee claimants. On the understanding that incorporation is not effected, the Government announced in June 1990 its intention to incorporate relevant provisions of the Convention/Protocol. In the Australian response to the 1991 UNHCR questionnaire, such incorporation was said 'to provide determination of refugee

9 J C Hathaway, op cit, pp. 10-11; see also: G Coles 'Approaching the Refugee Problem Today' in G Loescher and L Monahan, *Refugees and International Relations*, Clarendon Press, 1990, p. 374.

10 Convention Article 33(2).

11 Article 1 F (a) (b) (c) and Annex vi.

12 Evidence, p. S759.

status with a sound basis in domestic law'.[13] The Migration Act has been amended four times since the June 1990 announcement but the Government has yet to include provisions incorporating the Convention.

4.15 A vexed question associated with incorporation is what Convention provisions and arrangements ought to be included in the statutory scheme. Should the Convention definition be adopted, or some modification of it be included, in the Migration Act?

4.16 The Government initially proposed elaborating key definitions such as 'persecution' and 'well-founded fear' in the Act.[14] Later, it appeared to favour retaining the text of the Convention definition, stating to the UNHCR:

> The Convention and Protocol continue to provide a sound framework for the determination of refugee status and the protection of refugees. These instruments have adapted well over the last 40 years to the demands of new refugee situations. We believe the refugee definition contained in these instruments continues to be appropriate and are concerned that it is under challenge in some quarters as too restrictive, or as inadequate to deal with contemporary movements.[15]

4.17 Attorney-General's gave an additional reason for retaining the Convention definition in any statutory scheme. It stated:

> .. often, by creating a new definition it takes on a life of its own and you end up with perhaps a different meaning ... our assessment of perhaps staying with the Convention language and not trying to rewrite it or provide new tests is most satisfactory.[16]

13 Evidence, p. S759.

14 Evidence, p. S759.

15 Evidence, p. S762.

16 Evidence, p. 1527.

4.18 DILGEA restated the difficulty of legislating on these matters when it commented:

> The fact is that the Convention is a very mature document, and the key words and phrases within the Convention have had an abundance of interpretations by the courts and various countries and in scholarly literature. It is not easy to reduce that discussion to a couple of quick interpretations which will be satisfactory in all circumstances. There is a real danger of fettering the discretion of the decision maker in an unhelpful way if you tend to be too prescriptive.[17]

4.19 The UNHCR, in a paper presented to the Immigration Policies and Law Seminar in Sydney in February 1988, recommended that, if the legislative path is followed, the following provisions be included as a minimum:

> definition of the term 'refugee', employing the universally accepted criteria in Art 1A(2) of the 1951 Convention or a definition which may be considered to more accurately reflect the nature of present-day refugee situations, such as the definition in the [Organisation of African Unity] Refugee Convention or the Cartagena Declaration. The definition should also encompass the circumstances under which refugee status terminates or in which the benefits of refugee status may be denied, as provided in the cessation and exclusion provisions, Article 1E and 1F, respectively, of the 1951 Convention.[18]

4.20 Attorney-General's rejects the suggestion to incorporate the Convention cessation or exclusion provisions in domestic legislation. This last objection is not made in principle, but the inclusion is said to be unnecessary, and would undesirably complicate any proposed legislative scheme.[19]

17 In camera evidence, 15 June 1992, p. 123.

18 B Donkoh, 'A Legal Framework for the Protection of Refugees in Australia', Paper presented to Immigration Policies and Law Seminar, University of Technology Sydney, February 1988, p. 22.

19 Evidence, pp. S893-S894.

4.21 The statutory scheme proposed by Attorney-General's would include the Convention definition and certain processing principles including:

- that applicants shall apply for refugee status within 21 days of entry to Australia. The only late applications excepted from the above to be those based on changed circumstances since arrival in Australia or special exceptional personal circumstances relating to the applicant;
- the natural justice requirements;
- the applicant's right of access to information detrimental to the application be limited to that information not exempt from disclosure under the *Freedom of Information Act 1982*. This provides protection for information relevant to defence, security or international relations;
- the applicant be obliged to make a truthful disclosure of all matters relevant to the application. Where a person has given false or misleading information or has wilfully failed to provide relevant information or has destroyed relevant documents without good reason, the Committee may draw an adverse reference as to the applicant's credibility.[20]

4.22 Under the scheme suggested by Attorney-General's, the Migration Act would state that a positive determination of refugee status would not lead automatically or immediately to the grant of permanent residence status. Immigration status and entitlements would be determined separately. Additionally, the proposed statutory provisions would state that persons found not to be refugees and not otherwise determined to be eligible to remain in Australia should be deported.[21]

4.23 One effect of incorporation would be to strengthen the view of the courts that refugee status determinations are decisions taken under an enactment. Such decisions are eligible for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act). However, as DILGEA and Attorney-General's pointed out to the Committee, the courts already take the view that refugee decisions are judicially reviewable, either as decisions under an enactment or as conduct preparatory to making a decision under an enactment. Statutory incorporation of the Convention would not enhance or increase the scope of judicial review. However, incorporation would make the Convention enforceable in Australian domestic law.

20 Evidence, pp. S890-S895.

21 Evidence, pp. S890-S895.

4.24 The Committee found that the question of incorporation was a complex one. There is not just the question of whether to incorporate, but also, as evidenced in the present High Court challenge, whether or not the Convention in fact is incorporated. The Committee heard competing arguments concerning what or how much of the Convention to incorporate, and whether the Convention refugee definition ought to be modified. There was no clear indication given to the Committee concerning the possible consequence of incorporation. The Committee was concerned that even if incorporation does not expand the ground for judicial review, it could open up other grounds for litigation as the Convention became directly justiciable. At its penultimate hearing before the Committee, DILGEA indicated that the June 1990 decision to incorporate the Convention appeared to have been shelved. DILGEA stated that it knew 'of no intention at this stage ... to pursue the issue of incorporation in the present plan of legislation'.[22] In other evidence, DILGEA assured the Committee:

> a key objective of the Government is to seek to keep out of the courts these decisions, which are very expensive.[23] ... We are looking to regulate in the area of procedure, timetables and the like so as to ensure that the courts have a clear understanding of what is the administrative decision making framework determined by the government.[24]

Conclusions

4.25 The Committee supports the objective of reducing and limiting court challenges in relation to refugee determinations. In this regard, there was a view among Committee members that the Convention should not be justiciable directly. The Committee, however, notes that the High Court is considering this matter in the case of the Cambodian claimants detained at Port Hedland. Any further consideration of this issue must await the High Court's decision.

Application of the Convention definition

4.26 The Convention definition of 'refugee' is not easy to apply. Refugee claimants must show that they are refugees, as defined in the Convention. The phrase a 'well founded fear of persecution' dominates eligibility for Convention protection. The Convention is concerned with a prospective assessment of risk, yet the Convention itself and the UNHCR guidelines on the Convention do not advance an understanding of the circumstances in which the legitimacy of a claimant's

22 In camera evidence, 15 June 1992, p. 116.

23 Evidence, p. 1612.

24 Evidence, p. 1593.

professed need for protection ought to be recognised. Clearly, a 'well founded fear' is one 'supported by an objective situation' but the claimant's fear is rooted in subjectivity. The Convention definition requires consideration not only of the subjective questions whether the particular applicant has a fear, but also of the objective question whether the fear is well-founded'.[25]

4.27 The purpose of the Convention does not extend to allaying fears which are not objectively justified.[26]

Meaning of 'well-founded fear'

4.28 Courts in Western Europe, North America and Australia have considered the measure of fear which a refugee claimant must show in order to establish the 'well-founded fear of persecution.' The issue before the United States Supreme Court (in *Immigration and Naturalisation Service v Cardoza-Fonseca*, 467 US 407 (U.S.S.C., 1987), the House of Lords (in *R v Secretary of State for the Home Department, ex p Sivakumaran*, [1988] AC 958;) the Canadian Supreme Court (In *Joseph Adjei v Minister of Employment and Immigration* (1989) 79mmLR (2d) 169 (FCA) and the Australian High Court (in *Chan*) was whether the objective fear requirement needed to be established on the balance of probabilities.

4.29 In the case of *I.N.S. v Cardoza-Fonseca*, the United States Supreme Court rejected the traditional 'balance of probabilities' standard in favour of a more generous 'reasonable possibility' test:

> There is simply no room in the United Nations definition for concluding that because an applicant has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening ....[A] moderate interpretation of the 'well-founded fear' standard would indicate that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.[27]

25 Wilcox J in Extempore Reasons for Judgement, *Periannan v MIEA* (unreported, 28 July 1987).

26 per Lord Keith in *R v Secretary of State for the Home Department, ex parte Sivakumaran* [1988] AC985.

27 at 435 per Stevens J; see also M Gibney, 'A 'Well-Founded Fear' of Persecution' (1988) 10(1) *Human Rights Quarterly* 109.

4.30 This progressive interpretation of the substantive threshold was considered by the House of Lords in the *Sivakumaran* case. However, as James Hathaway noted, the British case was argued in a different context. The House of Lords was considering a Court of Appeal decision which had endorsed the entirely subjective state of fear and had effectively eroded the objective nature of the 'well-founded fear' test.[28]

4.31 The House of Lords insisted on the primacy of the objective foundation of a claim to refugee status. Lord Keith of Kinkel quoted with approval the test adopted by the United States Supreme Court, but went on to posit an arguably more restrictive standard of determination:

> In my opinion the requirement that an applicant's fear of persecution should be well founded means that there has to be demonstrated a reasonable degree of likelihood that he will be persecuted for a Convention reason if returned to his own country.[29]

4.32 In their concurring judgements, both Lord Templeman and Lord Goff of Chieveley replaced the notion of 'likelihood' with a test which inquires whether there is evidence of a 'real and substantial danger of persecution'.[30] Overall, the House of Lords standard appears to be more exacting than the American 'reasonable possibility' test.[31]

4.33 The Australian and Canadian cases have taken up compromise positions between the American and British decisions. The Canadian Court adopted a 'reasonable chance' standard. Justice MacGuigan expressly disapproved the House of Lords terminology, stating that the inclusion of the word 'substantial' was 'too ambiguous to be accepted in a Canadian context. It seems to go beyond...'good grounds'...and even to suggest probability'[32] The Canadian law has chosen to follow the more liberal American trend.[33]

28 J C Hathaway, op cit, p. 78.

29 ex parte *Sivakumaran.*

30 The addition of the word 'substantial' in Lord Goff's judgement is generally taken as meaning only to eliminate minimal possibilities of persecution.

31 J C Hathaway, op cit, p 78; See: Macdonald and Blake, *Macdonald's Immigration Law and Practice*, Butterworths 1991, p. 292.

32 (1989) 79mmLR (2d) 169 (FCA) at 173-4.

33 J C Hathaway, op cit, p. 79.

4.34 The Australian High Court used the phrase a 'real chance' of persecution. Commenting on the shades of meaning in the American and British cases, the Chief Justice stated:

> I do not detect any significant difference in the various expressions... But I prefer the expression 'a real chance' because it clearly conveys the notion of a substantial as distinct from a remote chance, of persecution occurring...[34]

4.35 The Australian decision is generally taken to line up on the spectrum rather closer to the House of Lords' authority. The phrase 'a real chance' is one suggested by Atle Grahl-Madsen in an authoritative text on the Convention. As Justice Toohey pointed out in his judgement:

> The test suggested by Grahl-Madsen 'a real chance', gives effect to the language of the Convention and to its humanitarian intendment. It does not weigh the prospects of persecution but, equally, it discounts what is remote or insubstantial. It is a test that can be comprehended and applied. That is not to say that the application will be easy in all cases; clearly, it will not. It is inevitable that difficult judgements will have to be made from time to time'.[35]

4.36 The American, British, Canadian and Australian cases agree in substance that the objective requirement need not be established on the balance of probabilities. Lord Keith in *Sivakumaran* and Justice McHugh in *Chan* explicitly approved Justice Stevens' dictum in *Cardoza-Fonseca* that a one in ten chance of being persecuted could amount to a reasonable possibility of persecution Commentators have tended to play down the ten per cent reference because of their concern that decision makers may be inclined to follow it by setting 'precise though

34 *Chan*, (1989) 87 ALR 412 at 418.

35 ibid, at 432. Note: Atle Grahl-Madsen, *The Status of Refugees in International Law*, (1966, 1972) Leyden, A.W. Sijthoff.

arbitrary percentage risk thresholds' short of the probability point as the minimum standard for refugee protection.[36] James Hathaway has suggested:

> Mr Justice Stevens' reference to the sufficiency of a 10 per cent chance of persecution should be viewed simply as an exhortation to abandon the rigidity of the 'balance of probabilities' test, and not as an invitation to define new, equally, rigid standards of attainment.[37]

4.37 The effect of these cases is that if an investigation of the refugee claim shows that persecution might take place then the claimant's fear is 'well founded'. Judges in the cases analysed considered that there was no significant difference between describing the test as a 'real or substantial risk', 'a real chance', 'a reasonable possibility', 'substantial grounds for thinking' or a 'serious possibility.' The cases respect 'the Convention's commitment to anchor protection decisions in objectively observable risks and the need simultaneously to avoid the establishment of an inappropriately high threshold of concern.[38]

4.38 The UNHCR was represented in the *Cardoza-Fonseca* and *Sivakumaran* cases. It had argued against the imposition of the 'clear probability' standard in the 'well-founded fear of persecution' test. In evidence to the Committee, the Deputy Regional Representative of the UNHCR stated:

> You may be aware that the *Chan* case relied on precedents in other countries. Our office filed an amicus brief before the Supreme Court in the United States which overturned the likelihood test for a well-founded fear test, the real chance test, which was cited in *Chan*. So our office has already spoken before the courts of other countries as to the standard to be applied. The *Chan* test is indeed the standard that the United Nations is promoting. *I* make reference to it as a standard consonant with our views and the actual definition of a refugee. In no way is it an expansion. It is simply the correct interpretation, as we see it.[39]

36 J C Hathaway, op cit, p. 80.

37 ibid.

38 ibid, pp. 79-80.

39 Evidence, p. 1431.

4.39 Attorney-General's concurred by stating:

> I think our assessment is that, from a strictly legal point of view, the various judgements in that case represent quite reasonable attempts to interpret the refugee definition ... there is nothing in that case that causes us particular concern ... the High Court's interpretation seems to us to accord with what we had been interpreting the definition as for some time.[40]

4.40 In fact, on 26 May 1988, Attorney-General's provided advice to DILGEA on the refugee definition in terms remarkably similar to the High Court judgements.[41]

Effects of the *Chan* decision

4.41 The Committee heard evidence of DILGEA's initial disquiet at the implications of the *Chan* decision on the management of the migration program. Their disquiet has been echoed in a paper by Dr Robert Birrell on the problems of immigration control in liberal democracies.[42] The Committee also was concerned at the potential impact of this decision.

4.42 The Committee investigated the post-*Chan* processing and review of refugee claims, in an attempt to ascertain the effect the decision has had on the on-shore refugee program. Such an investigation parallels American studies on the effects of the *Cardoza-Fonseca* decision.[43] Such an examination has proved difficult.

4.43 It is clear to the Committee that it is impossible, at this stage, to ascertain whether or not the *Chan* decision has resulted in more refugee claims being approved. The number of cases processed in 1991 is very small and the cases processed are in no sense representative of the full case load sample. DILGEA has concentrated on eliminating cases which are abusive or manifestly unfounded claims and also has allocated processing priority to cases where applicants have been tortured or traumatised in their home countries or are in custody here awaiting a decision. DILGEA recorded that such cases 'skew the case load in terms of our

40 Evidence, pp. 1509-1511.

41 Evidence, pp. S887-S889.

42 Dr R Birrell, 'Problems of Immigration Control in Liberal Democracies: The Australian Experience', unpublished paper, Australian-American Immigration Project. University of Texas, April 1991.

43 see Footnote 54.

processing'.[44] It was difficult to obtain any clear indicators of an increase in the number of refugee applications being approved at a primary or the review stage or to ascertain whether any increase is as a result of the liberalised *Chan* test.

The approval rate

4.44 There was a certain amount of confusion in the processed approval figures which were provided to the Committee. The Committee heard evidence from the Deputy Regional Representative of the UNHCR that the approval rate historically (that is: pre *Chan*) for refugee claims in Australia was ten per cent.[45] DILGEA's approval rate figure for those years was recorded as between five and 15 per cent.[46] According to the UNHCR representative, he was 'informally advised by the Department that the tracking towards acceptance is now exceeding ten per cent, approaching 20 per cent'.[47] If this figure is correct, there has been an increase in the refugee approval rates, an increase which reflects the impact of the *Chan* case. DILGEA, commenting on the UNHCR evidence concerning the near 20 per cent figure, stated that it was unable to confirm that figure, but if it was a true figure, the numbers were so small at the moment that 'it was probably a short term phenomenon, driven perhaps more by the way the process was batched more than anything else'.[48]

4.45 In a supplementary submission dated 6 September 1991, DILGEA recorded that since 10 December 1990, 500 refugee applications had been determined at the primary stage. Of these, 44 had been approved (that is, if one discounts the 215 of these applications which had lapsed or were withdrawn, approximately 20 per cent).[49] DILGEA explained the large numbers of applications which had lapsed or were withdrawn as being mostly those applicants who had left Australia or had applied and had obtained resident status under the Migration Act as it was prior to 19 December 1989, or had taken up the four year PRC permit.[50]

44 Evidence, p. 1469.

45 Evidence, p. 1419.

46 Evidence, p. 1477.

47 Evidence, p. 1419.

48 Evidence, p. 1469.

49 Evidence, p. S704.

50 Evidence, p. 1636.

4.46 In evidence on 24 October 1991, DILGEA gave a new figure for primary decision approvals. By then, 573 refugee claims had been processed to the primary stage and only 3 per cent of that number had been approved.[51] This percentage is, of course, lower than the pre-*Chan* approval figures but it appears to have been calculated by reference to the full case load, including those cases which were withdrawn or had lapsed. In November 1991, nine cases were approved, 248 were rejected and 10 were withdrawn or had lapsed. In December 1991, 14 cases were approved, 220 were rejected and six cases had lapsed or were withdrawn.[52]

4.47 The later figures do not show any increase in the proportion approved for refugee status. According to DILGEA:

> It is far too soon to make any conclusions as to what the impact of *Chan* will be given the usual speed with which cases are determined, go through review and are considered by the courts. In terms of what the impact of judicial review will be under the *Chan* test on the number of decisions that we are now taking we simply do not know. It will be some years, given the usual pattern.[53]

Conclusions

4.48 In the Committee's view it is not appropriate to allow years to elapse before assessing the impact of the *Chan* case. If there is to be a 20 per cent or more increase in approval rates in this post-*Chan* refugee case load, this represents more than 4,000 applicants added here to the migration program. It represents 4,000 or more fewer refugee cases which can be taken up from abroad.

4.49 In the Committee's view, the potential impact of the *Chan* decision on the migration program derives not from the liberalised standard of proof, the 'real chance' test, adopted by the High Court. Indeed, as noted previously, the advice of Attorney-General's prior to *Chan* was that the 'real chance' test was the required test in Convention refugee cases (see paragraphs 4.39 to 4.40). The impact of *Chan* is likely to be felt because of the dictum on persecution given in that case. This aspect of the *Chan* judgements has so far received little attention.

4.50 In the Committee's view, the broad statements concerning persecution, such as McHugh J. stating that it was 'selective harassment' or 'threatening with harm', create real difficulties for DILGEA officers who are required to determine refugee applications. The High Court statements concerning persecution appear unnecessarily and unhelpfully broad.

51 Evidence, p. 1471.

52 DILGEA, *DORS Monthly Report*, April 1992.

53 Evidence, p. 1632.

4.51 The significance of the *Chan* dictum on persecution (see paragraph 4.11) can be seen clearly when the effects of the *Chan* case are contrasted with the effects of the *Cardoza-Fonseca* decision. Following *Cardoza-Fonseca*, commentators observed that the Immigration and Naturalisation Service (INS) still retained considerable scope for refusing refugee claims. It was anticipated, and an analysis of cases coming before the Board of Immigration Appeals confirmed, that most refugee refusals now are based on credibility grounds, and on restrictive interpretations of what is meant by 'persecution'.[54] In Australia, if the High Court's tests for persecution are followed, there is little scope for refusals on 'persecution' grounds.

4.52 In the Committee's view, issues of persecution require political judgement, not a legal solution.

4.53 The basis for refugee refusals in Australia after *Chan* is likely to be the credibility grounds. This not only limits the capacity of the Government to refuse refugee applications, it also has implications for the form of the determination and adjudication process. In particular, it may require all applicants to be interviewed so that their credibility is tested by an interviewing officer who is the decision maker in the case.

4.54 The Committee considered whether to recommend that the Convention definition of refugee be rewritten or explained in legislation so as to deal with problems produced by the *Chan* case. There was a view in the Committee that the test for well-founded fear of persecution ought to be redefined to reflect the definition given by Lord Keith of Kinkel in the *Sivakumaran* case (see paragraph 4.30). There was broad consensus in the Committee that the term 'persecution' be explained to include a tighter, more appropriate definition than the suggestions given in the *Chan* case (see paragraph 4.11). The Committee, on balance, decided against recommending any immediate changes to the refugee definition to take account of the *Chan* decision. In arriving at that decision, the Committee had regard to the evidence of Attorney-General's that the determining authorities have been able to use the *Chan* definition without a great deal of difficulty. Also relevant was the further advice of Attorney-General's that:

> ... often, by creating a new definition it takes on a life of its own and you end up with perhaps a different meaning ... our assessment of perhaps staying with the Convention language and not trying to rewrite it or provide new tests is most satisfactory.[55]

4.55 However, the Committee was not prepared to accept the view of Attorney-General's that the *Chan* case is a decision that one does not need to 'worry too much about'.[56] The Committee had in mind DILGEA's experience in dealing with case law which opened up the humanitarian stream and would not wish that this example be repeated for refugee cases.

Recommendation

4.56 **The Committee recommends that:**

2. there be a thorough investigation into the consequences of the decision in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 87 ALR 412, and that this investigation of processing primary decisions and the review of refugee claims be undertaken after a reasonable number of claims have been processed or a reasonable period of time has elapsed.

Post-*Chan* decisions in the Federal Court

4.57 In its analysis of the effects of the *Chan* decision, the Committee also examined refugee cases filed and recently litigated in the Federal Court. Due to the delays attendant upon litigation, these cases include refugee applications decided by the Minister before and after the *Chan* decision.

4.58 The High Court's judgement in the *Chan* case was given on 12 September 1989. The number of refugee cases filed in the Federal Court from 1990 to the present, and the outcome in such cases, is enumerated at Table 4.1.

54 Note the following commentaries on the effects of the *Cardoza-Fonseca* case: H A Jays, '*Immigration and Naturalisation Service v Cardoza-Fonseca*: The Illusion of a Liberal Standard in Asylum Adjudication', *Wisconsin International Law Journal*, vol. 7, no. 1, p. 231; D Anker, '*INS v Cardoza-Fonseca*, One Year Later: Discretion, Credibility and Political Opinion', in *The Defence of the Alien*, p. 120; A C Helton, '*INS v Cardoza-Fonseca*: The Decision and its Implications', *New York University Review of Law and Social Change*, vol. 16, no. 35, 1987, p. 35; T A Aleinikoff, 'The Meaning of 'Persecution' in United States Asylum Law, *International Journal of Refugee Law* vol. 3, no. 1, Jan 1991, p. 5.

55 Evidence, p. 1527.

56 Evidence, p. 1509.

TABLE 4.1

Refugee applications to the Federal Court: 1990 to present

	90-91	91-present
Applications	16	6
Applicant successful	5	0
Minister successful	2	0
Applicant withdrew	1	0
Minister withdrew	5	0
No result to date	3	6

Cases where either the applicant was succesful or the Minister had undertaken to reconsider a decision and residence has subsequently been refused are:

90-91	91-present
2	0

4.59 It should be noted that of these 1990-91 cases, six reconsiderations have yet to be finalised by the RSRC, and two have been granted permanent residence. DILGEA was unable to provide figures on the number of refugee applications filed and litigated in the Federal Court prior to 1990, so no useful comparison can be made of the pre-*Chan* and post-*Chan* terms.

4.60 Attorney-General's noted that since *Chan* 'there have not been any further High Court or significant Federal Court decisions that have turned on the definition of refugee'.[57] It concluded that the determining authorities 'have been able to use [the *Chan* definition] without a great deal of difficulty'.[58] An example of the application of the 'real chance' test was given in *Sutharshan Atputharajah* (unreported, 10 April 1990), in which Justice French upheld the Minister's refusal of refugee status to a Sri Lankan Tamil who had escaped forcible recruitment to the Eelam People's Liberation Front, a Tamil resistance organisation. The Minister's refusal was founded on information that the Eelam People's Front was 'on the wane' and unlikely to be able to hunt out the applicant on his return. There was said to be no 'real chance' of persecution if he was returned.

57 *Evidence, p. 1509.*

58 *Evidence, p. 1509.*

4.61 In fact, the Federal Court has recently considered aspects of the refugee definition in the decisions *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 24 ALD 671 (Full Court) and *Heshmati v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 24 ALD 685 (Full Court). These cases raise important substantive and procedural questions concerning refugee applications and were considered in some detail by the Committee. Both cases had many elements of fact and law in common and were heard together by Justice Lockhart and, on appeal, by the full Federal Court. The applicants were Iranian nationals who arrived in Melbourne in September 1989. They sought, and in *Somaghi's* case obtained, entry by using fraudulent identity papers. Both men were detained pending a decision on their applications for refugee status. Their applications were considered by the Determination of Refugee Status (DORS) Committee and were unanimously rejected. A delegate of the Minister confirmed the DORS recommendation and refused Somaghi's residence and Heshamti's entry applications. Following those refusals, the applicants sent a joint letter to the Iranian Embassy in Canberra, with copies to DILGEA and the DORS secretariat. The letter contained statements critical of the Iranian regime. The DORS Committee agreed to reconsider the two cases. It did so principally to deal with the issue of whether, even if the applicants were not refugees on leaving Iran or arriving in Australia, they had, by writing the letter to the Iranian Embassy become, refugees *sur place*. The DORS Committee and the Minister's delegate considered these new refugee *sur place* applications but confirmed their earlier rejections. The Minister's delegate referred to the applicants' 'lack of credibility and profile', commenting that the letter was sent to the Iranian Embassy 'for the sole or dominant purpose of enhancing the claims' of the applicants.

4.62 One argument on appeal was that, in rejecting the applicants as refugees *sur place*, the Minister had erred in law in construing the then paragraph 6A(1)(e) of the Migration Act as it picks up the terms of the Convention.

4.63 Justice Lockhart's treatment of this appeal ground is, in the Committee's view, worth quoting in full. Justice Lockhart stated:

> There is some conflict of opinion as to whether an applicant for refugee status who has deliberately created circumstances in the country of residence exclusively for the purpose of subsequently justifying a claim for refugee status is entitled to be treated as a refugee sur place and this division of opinion is referred to in some of the material before the decision-makers in this case. I cannot accept that a person who has deliberately created the circumstances to which I have just referred is entitled to recognition as a refugee *sur place*, for to accept it would be to place in the hands of the applicant for refugee status means of unilaterally determining in the country of residence his status as a refugee and deny to the sovereign state of his residence the right to determine his refugee status. The true position is in my view as is

stated in para 96 of the United Nations Handbook. It is this position which was adopted by the decision makers in this case. The view was taken that, after examining the relevant circumstances surrounding the sending of the letter by the applicant to the Iranian Embassy in Canberra and the other persons and bodies previously mentioned on 6 December 1989, the applicant had done this for the purpose of creating the circumstances which might endanger him in Iran ... .

4.64 Justice Lockhart continued:

> ... That a person can acquire refugee status **sur place** is plain enough because if a person was not a refugee when he arrived in the country of residence, but events occurred there or in his place of origin which gave rise to a real or well-founded fear of persecution upon his returning to the country of origin, his status as a refugee may arise notwithstanding that the only relevant events that gave rise to it are those which occurred after he left his country origin. Those events may result solely from his own actions such as expressing his political views in his country of residence. It is true that the expression of those views may in some cases justify a well-founded fear of persecution if he should return to his country of origin; but I am not persuaded as presently advised that a person whose sole ground for refugee status consists of his own actions in his country of residence designed solely to establish the circumstances that may give rise to his persecution if he should return to the country of origin is necessarily a refugee *sur place*.

4.65 In the Full Federal Court hearing, Justice Gummow, dealing with this same appeal ground as a supplementary issue, cited the text of Justice Lockhart's judgement and concurred that there was no error of law in the refusal decisions in the above interpretation of the Convention.

4.66 In the full Federal Court, the Minister's refusal decisions were, by majority, overturned, as Justice Gummow pointed out, on the 'limited issue' of procedural fairness. The Court found that the applicants ought to have been given an opportunity to answer the proposed finding of their lack of good faith in sending the letter to the Iranian Embassy. Justice Keely, in dissent, stated that to ask the applicants about their motive in sending the letter was to 'over-judicialize the inquiry.'

4.67 The *Somaghi* and *Heshmati* cases are important. The Court endorsed that part of the Minister's decision which related to the substantive interpretation on 'refugees *sur place*' under the Convention. The credibility focus is underscored in these refugee cases. At the same time, the majority in the Full Federal Court reiterated its concern for procedural fairness to be shown in refugee cases.

Procedural fairness in refugee cases

4.68 In evidence to the Committee, Attorney-General's stated:

> The fact that there is a considerable judicial involvement in refugee decision making stems not from problems of the refugee definition or the convention obligations, rather it represents part of the new administrative law, if you like - the development of natural justice and the principles governing it - over a whole range of government decision making.[59]

4.69 The term 'natural justice', or as it is now termed 'procedural fairness', refers to the basic principle that administrators should follow fair procedures when making decisions. Under these principles, if individuals most affected by the decision are not given an opportunity to provide information to the decision maker or to answer certain adverse matters which the decision maker proposes to take into account, the decision is more likely to be, at law, a bad one. The ambit of the rules of procedural fairness are neither fixed nor certain.[60] The application of the rules may vary from case to case. As Justice Kitto observed in one such administrative law case, 'What is fair on a given situation depends upon the circumstances'.[61] These circumstances can include matters the decision maker is bound to take into account, and also to matters adverse to the interests of the person in question which the decision maker proposes to take into account.

4.70 There is no specific requirement in Australia that refugee cases be given particular scrutiny by a decision maker. This contrasts with the United Kingdom, where, in the House of Lords, Lord Bridge observed that refugee cases require the

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59 Evidence, p. 1513.

60 see Jenkinson J, *Somaghi* at p. 348.

61 *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 504.

'most anxious scrutiny' at the administrative level. According to Lord Bridge, the reviewing court:

> must be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of that decision must surely call for the most anxious scrutiny.[62]

4.71 As a result of domestic law requirements on procedural fairness, natural justice requirements have been built into the refugee processing and determination system (see Chapter 6).

The Convention and the right of asylum

4.72 It is well established under international law that states have sovereignty over their borders and may determine who may enter and remain in the state and the conditions of their entry or stay. Persons do not have a right to enter a state, unless the person is a national of that state. This rule applies to refugees as well as other migrants. Asylum is 'a discretionary right of status[63] which a state may grant or withhold.

4.73 The term asylum has no universally accepted meaning. In the refugee context it is used to describe admission to a state. A distinction is made in this context between admission granted as an emergency measure to afford the refugee temporary refugee and admission to a permanent right to settle.

4.74 There is, in international law, no clear or explicit right to asylum granted to refugees.[64] The Universal Declaration of Human Rights (Article 14) comes closest, proclaiming the right of 'everyone to seek and enjoy in other countries asylum from persecution.' The Convention and Protocol make little reference to asylum and do not impose any obligation on signatory states to grant asylum to refugees.

62 *R v Secretary of State for the Home Department ex parte Bugdaycay* (1987) AC514, 531 (Lord Bridge; and to similar effect, Lord Templeman at 537).

63 McDonald and Blake, *Macdonald's Immigration Law and Practice*, 1991, p. 288.

64 P Hyndman, op.cit, p. 152.

4.75 Even though refugees have no right of entry to or no right to obtain residence in another country, the Convention does provide them protection. The protection is afforded by the conjunction of Articles 31, 32 and 33.

4.76 Where a refugee is lawfully in the territory of a contracting state, Article 32 provides that they can only be expelled on grounds of national security or public order. If such an expulsion does take place, this Article requires that the expulsion decision is reached in accordance with due process of law and allowance made for a reasonable period to elapse during which the refugee might seek lawful admission to another country.[65]

4.77 Article 32 concerns refugees lawfully in the territory of a Contracting State. Article 31 states that even if refugees have entered a country illegally, Contracting States should not impose penalties upon them on account of their illegal entry or presence, provided that they report to authorities without delay and show good cause for their illegal entry or presence. Article 33, the non-refoulement provision, provides protection against expulsion if it will result in a refugee being returned to a country where she/he fears persecution for a Convention reason. This protection is likewise given regardless of the immigration status of the refugee.

4.78 Article 33 states:

1. No Contracting State shall expel or return *('refouler')* a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee who there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

4.79 The principle of *non-refoulement* when taken with the Article 31 obligation, requires States to receive and examine requests for asylum irrespective of the legal or illegal status of the asylum seeker. These provisions recognise that fact that the circumstances compelling refugees to leave their countries of origin may render it impossible for them to comply with the immigration requirements of the

65 P Hyndman, op.cit. p. 153.; Macdonald and Blake, op cit p. 299.

country of asylum. As the then UNHCR protection officer in Australia, Ms Bemma Donkoh observed:

> Given the fact that the act of formal recognition of refugee status is of declaratory, rather than constitutive effect, adherence to the non-refoulement principle requires the existence of a procedure for identifying persons as refugees based on the mere fact of their physical presence in the country of asylum.[66]

4.80 The obligations established by the Convention also necessitate the existence of formal procedures for the examination of asylum applications and the determination of refugee status. On this issue, Amnesty have stated that:

> It is essential that such procedures are capable of identifying all those who fall within the terms of the 1951 UN Convention, or would otherwise be at risk of human rights violations if returned to the country from which they have fled. Recognising that this is by no means a mechanical and routine process, and mindful of the grave consequences of error, the international community has established a comprehensive range of minimum standards to be met by such procedures.[67]

4.81 The Committee has addressed the important issue of refugee determination procedures in Chapter 6 of this report.

The expulsion, deportation or removal of refugees from Australia

4.82 The Convention does not prevent all expulsions, removals or deportations of refugees from Australia. The refugee expulsion which is forbidden by the Convention is a removal which will result in the return of a refugee to a country of feared persecution. In addition, as noted, certain refugees who are a danger to national security or to the community are excluded from the non-refoulement protection (Articles 32, 33(2)).

4.83 There is no specific mention of the non-refoulement principle in Australian domestic law. Even so, Australia accepts itself as bound to comply with this provision of the Convention.

66 B Donkoh, op cit, p. 6.

67 Amnesty International (British Section), 'A Report on the United Kingdom: Deficient Policy and Practice for the Protection of Asylum Seekers', May 1991, p. 4.

4.84 Non-citizens may be liable for expulsion from Australia in the following circumstances:

- removal after failing to obtain entry at the frontier;
- deportation as an illegal entrant;
- deportation (of non-citizen residents) on the grounds of their criminal convictions, the national security or national interest; and
- extradition from Australia.

Extradition

4.85 Taking these circumstances in reverse order, the processing and determination of all requests for the surrender of fugitive criminals is governed by the *Extradition Act 1988* and treaties and arrangements between Australia and other countries on extradition relations. Under the Extradition Act and treaties, no person may be extradited from Australia if the person establishes that:

(a) the offence for which extradition is sought is a political offence;

(b) the surrender is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality or political opinions; or

(c) on surrender to the requesting country the person may be prejudiced at his or her trial or punished, detained or restricted in his or her personal liberty by reason of race, religion, nationality or political opinions.

4.86 The local court at first instance determines whether any of the above grounds exist. Appeals lie to the Federal Court in respect of the decision of the magistrate on the issue. In Australia's answer to the UNHCR 1991 questionnaire, it was noted:

> Notwithstanding that the courts (including the ultimate appellate court) may determine that the grounds do not exist, the Attorney-General may still decline to extradite if he is of the opinion that the offence is a political one or that the race, religion, nationality or political opinion issues may be relevant.[68]

68 Evidence, p. S776.

Criminal/security deportations

4.87 The removal of non-citizen residents, who may or may not be refugees, on criminal, national interest or security grounds is dealt with in sections 55, 56 and 57 of the Migration Act. Under section 55 of the Migration Act, the Minister may order the deportation of a non-citizen convicted in Australia of an offence for which the person was sentenced to death or to imprisonment for life or for a period of not less than one year, providing the offence was committed within ten years of the person becoming a permanent resident. Persons facing deportation under this section can seek a review on the merits of the decision to the Administrative Appeals Tribunal (AAT), which has recommendatory powers in respect of the deportation decision. Security deportation decisions, which are very rare, can be reviewed by the Security Appeals Tribunal.[69]

4.88 Cases involving refugees deported or extradited pursuant to these provisions are rare. In one reported case, the applicant, Ceskovic, was a refugee who had been convicted in Australia of malicious shooting with intent to do grievous bodily harm. He had a 'demonstrated' propensity to become involved in disputes which led to violence. He had twice shot other persons, one fatally. The Federal Court upheld the deportation decision.[70] DILGEA's database does not collect data on the extradition or deportation of those claiming to be refugees.[71]

Deportation of illegal entrants

4.89 Due process of law is observed in the extradition of fugitive criminals or the deportation of criminal and national security residents. Such processes allow for full ventilation and consideration of any refugee claim in a review hearing. There is presently no review for illegal entrants who offend against immigration law.

69 Part IV, *Australian Security Intelligence Organisation Act 1979.*

70 *Ceskovic v MIEA* 27 ALR 423. The decision did not expressly claim the exemption to Article 33(2), but this exemption would apply to the Ceskovic case. See also: *Re Vasquez v MIEA* (1989) 20 ALD 33 in which a Cuban refugee, a paranoid schizophrenic, convicted of a number of assaults, including serious assaults on his wife and mother-in-law was found by the AAT to constitute a danger to the Australian community and was therefore not covered by the Convention's general prohibition against returning refugees.

71 Evidence, p. S777.

4.90 The deportation of illegal entrants is governed by the operation of sections 59 and 60 of the Migration Act:

Mandatory deportation of illegal entrants

59. (1) An illegal entrant is liable to deportation if the period of grace for the illegal entrant has ended.

(2) Where the Minister, after following the prescribed procedures, is satisfied that a person is, under subsection (1), liable to deportation, the Minister shall, in writing, order the deportation of the person.

(3) A deportation order made under this section may not be revoked.

(4) A deportation order made under this section in relation to a person shall be taken to revoke any deportation order made under section 60 in relation to the person.

Deportation of illegal entrants

60. (1) The Minister may, after considering the prescribed matters and no other matters, order the deportation of a person who is an illegal entrant under any provision of this Act.

(2) In spite of any other provision of this Act, a deportation order made under this section shall not be executed before the period of grace for the person has ended.

4.91 These deportation provisions were considered in part by the Committee in its report on illegal entrants. Illegal entrants have only a limited capacity to regularise their immigration status within Australia. It will be seen that a deportation order made under section 60 cannot be executed before the period of grace has ended (ie. before 28 days, not counting excluded days, from when the person became an illegal entrant). Such a deportation order can be revoked.[72] A section 59 deportation order, which the Minister, after following prescribed procedures, must sign if the period of grace has ended, is not revokable. It is this component of the deportation provisions which poses a risk to refugees.

72 section 63(1); regulation 180 prescribes as one of the factors to be considered by the Minister in ordering revocation of a deportation order '(b) whether the person has been granted refugee status or territorial asylum'. Note: this does not include deportees who may have qualified to stay on humanitarian grounds.

4.92 If a section 59 deportation order is signed, it cannot be revoked and must be executed. If such an order was signed in respect of a person who was or was found to be a refugee, the order must still be executed. DILGEA, in private session with the Committee on this question, suggested that the refugee who must be deported could be taken to a neighbouring, friendly state (Norfolk Island, New Zealand perhaps) so as to execute and thereby cancel the deportation order. The refugee could then be returned to Australia. Even if such arrangements were possible or practicable, the Committee is concerned at the brinkmanship involved.

4.93 In reply to the UNHCR question, 'Are refugees formally protected, through legislative enactment or administrative regulations from forcible return to territories where their lives or freedom may be endangered', Australia's answer was that 'there are provisions in the Migration Act and Regulations which provide refugees with *a degree of protection* [Committee's emphasis] against deportation'.[73]

4.94 This qualified protection is provided by regulations 178 and 179. These regulations set down the prescribed procedures to be followed by the Minister before signing a deportation order under section 59 and the prescribed matters to be considered by the Minister before signing a section 60 deportation order. One of the prescribed matters to be considered by the Minister (section 60) is whether the person has been granted, or is an applicant to be granted refugee status or territorial asylum (regulation 179(c)). The prescribed procedures to be followed (section 59) include:

> (a) to ascertain whether the person has been granted, or is an applicant to be granted, refugee status or territorial asylum;
>
> (b) to find out from the person whether the person has applied to be granted refugee status or territorial asylum ... (regulation 179).

4.95 Undoubtedly, regulation 178 does provide an important safeguard for refugees. In its present form it requires that a question about refugee applications be personally asked of the deportee. It is therefore considerably safer than the amendment gazetted on 2 August 1990 and in force for a period of one week, namely:

> *14. Regulation 178 (Prescribed procedures-subsection 59(2) of the Act)*
>
> *14.1 After paragraph (a) insert the following paragraph:*
>
> *(b) to find out whether the person has applied to be granted refugee status or territorial asylum;'.*

73 Evidence, p. S778.

4.96 The legal protection in regulation 178 can be and almost certainly is abused by illegals who are not refugees. Such illegals may seek to delay their deportation by lodging unmeritorious refugee applications. Such action is to be deplored. The Committee heard no evidence of the extent of such abuses and the Committee notes that there are various factors discouraging such practice, notably, the projected time limits within which to lodge a refugee application, the detention arrangements for deportees, the liability of detainees to pay fees representing their cost per day in detention, and the strictures against granting an entry permit to those deported from Australia who owe amounts to the Commonwealth in respect of their deportation or detention costs.[74]

Conclusions

4.97 The Committee is concerned that the deportation provisions may limit the protection against refoulement for refugees and is also concerned at the potential abuse of the regulation 178 protections by illegal entrants seeking by whatever means to delay their departure.

Recommendation

4.98 **The Committee recommends that**

> **3. the Department of Immigration, Local Government and Ethnic Affairs monitor the workings of the regulation 177 and regulation 178 safeguards and keep statistics and details on:**
>
> - **the number of deportees granted refugee status;**
> - **the number of deportees lodging refugee applications only when asked, pursuant to regulation 178(c), if they have lodged refugee applications; and**
> - **the time such applicants take to lodge their refugee application, the outcome of such application, and if the refugee application is unsuccessful, the delay and additional expenses incurred in their deportations.**
>
> **Such details should be submitted to this Committee at the end of 12 months so that the Committee can consider afresh the terms of the safeguard in regulation 178.**

74 section 45; see: Joint Standing Committee on Migration Regulations, *Illegal Entrants in Australia - Balancing Control and Compassion*, September 1990, AGPS, Canberra.

Refugees: the form of protection

4.99 Under the Convention, there are certain benefits which ought to come to refugees within the territories of Contracting States. The Convention requires that refugees be granted the 'most favourable treatment accorded to nationals of a foreign country' as regards trade union membership (Article 15), entry to wage earning employment (Article 17), self employment (Article 18), and membership of the liberal professions (Article 19). They should be given 'treatment as favourable as possible' as regards housing (Article 21), and education (Article 22), and approximately the same treatment as nationals with respect to public relief and assistance (Article 23), and labour legislation and social security (Article 24). Their freedom of movement within the country of asylum is guaranteed by Article 26.[75]

4.100 There is no Convention requirement that refugees be given permanent resident status under a State's domestic immigration law, but Article 34 requires Contracting States 'as far as possible' to 'facilitate the assimilation and naturalisation of refugees.' As most States require non-citizens to be permanent residents for a number of years before they are eligible for the grant of citizenship, Article 34 may require States to facilitate the grant of resident status to refugees.

4.101 In fact, the immigration status given to refugees varies within the different Contracting States. In Canada, for example, refugees generally are eligible to apply for and obtain permanent residence. However, those who already have residence in Canada, or residence in another country where they are recognised as refugees, or who are citizens or permanent residents in a country other than the one where they face persecution, are not entitled to apply for residence as refugees in Canada. Of those refugees eligible to apply for residence, there are some, namely those who present a criminal, security or medical risk, who can be denied residence status. Refugees denied residence continue to be protected against *refoulement*.[76] In Britain, by contrast, refugees are initially given temporary stay - one year on the first instance, three years on the next renewal. They qualify for resident status after four years temporary stay,[77] and for citizenship after five years lawful residence within the UK.[78]

4.102 In the past, Australia granted refugees immediate resident status (section 6A(1)) Migration Act). This policy was modified in the regulatory changes introduced on 19 December 1989 and, following a Ministerial announcement in June 1990, new regulations were introduced which gave refugees four years temporary stay. The Minister has stated that they will have the option of obtaining permanent residence at the end of the four years, subject to the availability of places

75 Macdonald and Blake, op cit, p. 299.

76 Canada's Response to the UNHCR 1991 Questionnaire, Part 2, question 4, p. 8.

77 Macdonald and Blake, op cit, p. 312.

78 *British Nationality Act 1981*, Schedule 1, paragraph 1(2).

in the refugee program. At present, following the repeal of regulation 119I on 17 September 1991, it is not possible for refugees to apply for a permanent entry permit on refugee grounds.

Refugee permanent residence from December 1989

4.103 In order to understand the changes in policy on granting immediate permanent residence to refugees, it is necessary to document the regulation changes since December 1989.

4.104 From 19 December 1989 to 27 June 1990, refugees were given a choice of four temporary entry permit types, termed Refugee A, B, C and D temporary entry permits. It was a complicated, highly convoluted scheme designed to limit the numbers of refugees given immediate permanent residence and to authorise the continued stay in Australia of those considered to have a refugee 'claim of substance' but who were awaiting final processing of their claims.

4.105 The Refugee A temporary entry permit gave the holder eligibility to qualify for a Refugee Permanent Entry Permit After Entry. It was given to refugees where:

> the Minister is satisfied that permanent settlement in Australia is the appropriate durable solution for the applicant and settlement of the applicant in Australia would not be contrary to the interests of Australia (regulation 116).

4.106 The Refugee B temporary entry permit gave temporary stay to refugees whose 'permanent settlement in Australia [was] not the appropriate durable solution for the applicant or [was] contrary to the interests of Australia' (regulation 117). The regulation referred in terms to refugees who did not wish to remain permanently in Australia, and those presumably 'controversial' cases where no other country had been found which would accept the applicant for resettlement.

4.107 Refugee C (regulation 118) and D (regulation 119) temporary entry permits were effectively processing permits regularising the stay of refugee applicants who were considered to have 'claims of substance.'

4.108 This regulatory scheme was amended on 27 June 1990 and 12 July 1990. Regulation 116 (Refugee A) was repealed on 27 June 1990. Regulation 118 (Refugee C) and regulation 119 (Refugee D) were repealed on 12 July 1990, and regulation 117 (Refugee B) was amended substantially on the last occasion. From 12 July 1990 to 27 February 1991, regulation 117 was termed the

Refugee (restricted) visa or entry permit. The terms of that permit, which replaced Refugee A, B C and D, were as follows:

> *Refugee (restricted) visa or entry permit*
>
> *117. (1) The following criteria are prescribed in relation to a refugee (restricted visa or entry permit:*
>
> *(a) the applicant is present in Australia on the day of the application;*
>
> *(b) the applicant has been granted refugee status by the Minister;*
>
> *(c) the applicant has undergone:*
>
> *(i) a medical examination carried out be a medical officer of the Australian Government Health Service; and*
>
> *(ii) a chest X-ray examination conducted by a medical practitioner who qualified as a radiologist in Australia;*
>
> *(2) A refugee (restricted) visa or entry permit is not valid for a period exceeding 4 years.*

4.109 This permit gave refugees temporary stay not exceeding four years. On 1 August 1990, another refugee permit was added. The refugee temporary entry permit (regulation 119I) was for refugees whom the Minister considered, in the national interest, should be given the permit. This permit gave holders eligibility to qualify for the refugee (permanent) entry permit (142A). Regulation 117 was repealed subsequently by Statutory Rule No. 25 of 1991, and from 27 February 1991 was replaced by regulation 117A, the domestic protection (temporary) entry permit. Regulation 119I, the refugee (temporary) entry permit was repealed on 19 September 1991. From that date, no refugees could apply for the refugee (temporary) entry permit. The refugee (temporary) entry permit is a necessary precondition to qualify for the refugee (permanent) entry permit. Refugees holding domestic protection (temporary) entry permits presently are ineligible for the grant of a refugee (permanent) entry permit.

4.110 Further changes were made to these arrangements by the *Migration Amendment Act No. 2 1992.* Under this Act, the Minister is not required to consider applications for refugee status from applicants who are holders of a permanent entry permit, or an entry visa not subject to any limitation as to the time the holder is authorised to remain in Australia, or a four year PRC temporary entry permit (section 22AD(2)). These provisions make clear that the refugee stream is restricted

to those who need protection. If persons have permanent residence or the four years protection afforded by the PRC permit, the Minister is not required to consider or grant the persons refugee status during the terms of their permit.

Community comment on the domestic protection (temporary) entry permit

4.111 The Committee heard evidence from a number of organisations concerned about the introduction of and the terms of the domestic protection (temporary) entry permit. Community criticism of that permit focused on the following issues:

- the uncertainties of the new regime where a final immigration decision on refugee cases is deferred for four years;
- the effect which a grant of temporary immigration status has, or will have, on refugees; and
- concern that the procedures and criteria to be adopted to convert domestic protection (temporary) entry permit holders into permanent residents at the end of four years were not yet determined.

Temporary asylum

4.112 It was argued that victims of persecution need long term stability to allow them to rebuild their lives and that the uncertainty introduced by allowing only the grant of a temporary entry permit imposes additional strain, trauma and insecurity. RCOA stated:

> refugees deserve a chance to start their lives over, with a clear and unambiguous indication of their status and opportunities.[79]

4.113 RCOA suggested that access to permanent residence remains a possibility in specially deserving cases, for example:

- where a person has suffered torture or serious trauma, and is deemed likely to suffer extreme psychological hardship if admitted on a temporary entry permit for a period of four years;
- where a person has existing strong family ties in Australia; and

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[79] Evidence, p. S267.

- where the situation from which an applicant fled appears unlikely to improve in the ensuing four years.[80]

4.114 The Human Rights Commission (HRC) noted in its submission:

> Refugees who have suffered serious trauma as a result of severe persecution have a particular need for assured continuity of protection. This is particularly the case for survivors of torture or other forms of cruel, inhumane or degrading treatment.[81]

4.115 HRC echoed RCOA's request for the provision of permanent residence in appropriate cases.[82]

4.116 The Legal Aid Commission of New South Wales reinforced the negative effect which delays in determination of status and the grant of temporary permits can have on refugees:

> This office sees many cases where the present delay of 1-3 years in finalisation of refugee applications takes a heavy emotional and psychological toll on people already damaged by horrendous experiences in their home country ... The NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors often asserts that effective therapy and rehabilitation of such people cannot commence until their safety and security is assured, that is, until permanent residency is granted.[83]

80 Evidence, p. S267.

81 Evidence, p. S307.

82 Evidence, p. S307.

83 Evidence, p. S249.

4.117 The Victorian Immigration Advice and Rights Centre stated:

> Four year temporary permits wreak havoc on the lives of genuine refugees who want to put the past behind them and get on with their lives ... The detrimental effects of unalloyed fears about a person's own security or that of family members is well documented. It is manifest in a variety of neuroses and nervous conditions that cannot but affect the type of contribution such refugees-in-waiting are able to make to life in Australia.[84]

4.118 The Australian Migration Counselling Services (AMCS) stated:

> The changes put these people in a limbo for four years in which they can never be certain that whatever they do to better themselves and their families in that time in term of education and work will eventually bear fruit. As far as work is concerned, many will confront employers who will choose not to recruit or promote them in the knowledge that their permanent stay is not guaranteed.
>
> Furthermore, people who have endured the personal tribulations which bring them within the legal definition of 'refugee' will generally speaking, already be in a psychologically stressed state as a result of their past ordeals. A policy which says 'yes, we accept that you are genuinely a refugee but we are only going to let you stay here for four years, for the time being' can only serve to aggravate that psychological stress, not ameliorate it.[85]

4.119 AMCS argued that the policy of a four year temporary entry permit despoiled Australia's proud record in refugee settlement and was fundamentally inhumane on the personal level. It was proposed that those applicants who could prove a legitimate entitlement to refugee status or stay on strong humanitarian grounds should be granted permanent residence.[86]

84 Evidence, p. S575.

85 Evidence, p. S586.

86 Evidence, p. S587.

4.120 AMCS stated that a four year temporary entry permit was an appropriate response for cases 'in which the applicant is not able to substantiate a genuine entitlement to refugee status or stay on strong humanitarian grounds but whose claims in that regard cannot readily be dismissed as lacking in foundation'.[87]

Procedures for determining permanent entry

4.121 In its submission dated 2 January 1991, DILGEA stated that, if at the end of 4 years protection is still required, the holder of the domestic protection (temporary) entry permit will be able to apply for permanent residence under the migration program, subject to availability of places. If insufficient places exist under the program a further temporary entry permit will be provided if there is an ongoing need for protection.[88]

4.122 RCOA noted the non-existence, at present, of procedures for determining on what basis persons holding existing domestic protection (temporary) entry permits will be able to apply for further temporary entry permits, or for permanent residence. According to RCOA, the Minister has stated that refugees granted a domestic protection (temporary) entry permit will not have to go through a second assessment of their refugee status before a further temporary entry permit is granted.[89]

4.123 The Legal Aid Commission of New South Wales also was concerned that it was unclear what would happen at the end of the four year period, and specifically by what means the human rights situation in the refugee's country of origin was to be assessed to determine whether ongoing protection is required. The Commission argued that a fair and proper assessment of individual cases would require a full reassessment by the DORS Committee, ie. a rerun of the original process to determine the refugee's status. Significant commitment in resources on DILGEA's part would be required, yet the absence of a full reassessment may preclude justice being done and refugees being returned before it was safe for them to do so.[90]

87 Evidence, p. S587.

88 Evidence, p. S537.

89 Evidence, p. S267.

90 Evidence, p. S249.

4.124 DILGEA, in response to a question at a recent Senate Estimates Committee hearing, made the following observation:

> I think it is fair to say that the existing processes for decision making would be applied at the time when the assessment needed to be done towards the expiry of the four-year period. The Department has not yet finalised administrative processes for determining that issue at this stage.[91]

Conclusions

4.125 The Committee accepts the need to move away from the old system in which on-shore refugees were automatically given permanent residence. This change was forced upon the Government by the unprecedented rise in on-shore claims and the continuing unpredictability of on-shore refugee numbers Australia has on-going commitments to resettle off-shore refugee applicants. In June 1989, for example, Australia agreed to resettle 11,000 Indo-Chinese refugees over three years under the Comprehensive Plan of Action. If such commitments are to be honoured, and if the Government is to retain control over refugee program numbers it necessitates placing on-shore refugees in a residence queue. The four year term given to refugees allows the Government to plan ahead and to ensure, as far as possible and consistent with the Convention, that there are places available for those waiting in the queue at the end of the four year term.

4.126 Although the Committee endorses the grant of initial temporary stay to on-shore refugees, it is concerned about the frequency of changes to refugee regulations and the attendant confusion about the immigration status of refugees applying within Australia. Confusion has been engendered by frequent changes to the regulations, by varying the names of refugee permits, and by the policy changes which have produced the present regulatory incongruity. At present, the regulations include a refugee permanent entry permit, but no holder of a domestic protection (temporary) entry permit can qualify for it (see paragraph 4.100). Such disorder can and does cause real anxiety to genuine refugees, and encourages unmeritorious claimants to apply and await further policy changes.

4.127 The Committee's further concern is with the inflexibility of the present refugee residence queue arrangements. In the Committee's view, there are some few refugees, notably torture and trauma victims, who ought not to be required to wait out their full four year temporary permit term if places in the refugee program are

91 Senate Estimates Committee D, 12 September 1991, p. 203.

immediately available or become available at some earlier time within the four years. Such refugees not only need to be given protection, they also need to feel protected.[92]

4.128 The Committee is of the view that these few cases could be accommodated within the present legal framework. The Committee would not support a return to the 'Refugee A', 'Refugee B' style arrangements in which refugees applied for a particular permit so as to be eligible for immediate residence. Such applications would need to be processed and refusals would be open for challenge in the Federal Court. The Committee's proposal, by contrast, would work by reference to the Minister's residual discretion powers derived from section 115 of the Migration Act. Under section 115:

> *S115(s) ' Where the Minister thinks that it is in the public interest to do so, the Minister may:*
>
> *(a) set aside a decision affirmed, varied or made by a review officer ... and*
>
> *(b) substitute for the reviewed decision:*
>
> *(i) the decision sought by the applicant in the primary application; or*
> *(ii) another decision in terms to which the applicant agrees.*

4.129 These provisions would seem to be sufficiently flexible to allow the Minister to overturn a decision granting a four year domestic protection (temporary) entry permit and substitute a decision granting permanent residence on refugee grounds.

Recommendations

4.130 **The Committee, while endorsing the principle of granting initial four year temporary stay to refugees, recommends that:**

> **4. the guidelines to the review body for refugee determinations (at present the Refugee Status Review Committee, but from 1993 the Refugee Review Tribunal) be amplified to include guidelines for that body to recommend that the Minister for Immigration, Local Government and Ethnic Affairs grant permanent residence to certain exceptional refugees as described in recommendation 5;**

92 see Evidence, p. S781. Some evidence of the need which refugees have for security of residence is evidenced by the numbers of refugees who apply for Australian citizenship. 'A majority' apparently apply 'as soon as they are eligible to do so'.

> **5. *the refugee cases recommended to the Minister should be* restricted to those refugees who satisfy all of the following, namely that they have been tortured and traumatised and appear to have a therapeutic need to be granted the security of immediate permanent residence; and**
>
> **6. the Minister's residual discretion under section 115 of the *Migration Act 1958* be the mechanism for granting immediate permanent residence to a few exceptional refugees, as or as soon as there are places available within the refugee program.**

Chapter Five

THE LAW AND PRACTICE CONCERNING HUMANITARIAN STATUS

Introduction

5.1 In addition to its responsibility for refugees arising from the Refugee Convention and Protocol, Australia has for some time voluntarily permitted some of those in humanitarian need to migrate to Australia, or, if already in Australia, to obtain permanent residence. In this regard, Australia has followed the tradition of countries such as the UK, the USA and Canada, which also have provisions for granting entry and/or stay, including temporary stay, on humanitarian grounds.

5.2 Like other countries, Australia has found the humanitarian section to be a particularly vexed part of the migration program. The principal difficulty has been in establishing a definition for humanitarian entry which is sufficiently flexible to provide access to the varied case load of those in actual humanitarian need, but which is not so broad as to enable all those who are simply faced with hard times to apply and qualify for stay on humanitarian grounds. To open up the humanitarian class is to lose control of the migration program.

5.3 Over the past decade, a significant increase in on-shore applications for humanitarian entry has led to ongoing analysis and review of the humanitarian provisions of the migration program. In response, changes have been implemented, in terms of both the legal and administrative framework. The humanitarian provisions have remained the subject of continuing community debate.

Off-shore humanitarian program

5.4 Before proceeding to an analysis of the on-shore arrangements, it is important to understand that Australia has in place an active off-shore humanitarian program, which includes the following components:

> the in-country special humanitarian program, for people who have suffered persecution and gross violation of human rights in their country of nationality or usual residence and who have not been able to leave that country to seek refuge elsewhere;

- the global special humanitarian program, for those people who, regardless of their country of origin, are outside their country of nationality or country of usual residence, have close ties with Australia but are ineligible for refugee or migrant entry to Australia, have experienced or fear gross discrimination amounting to substantial violation of their human rights, and for whom third country resettlement is an appropriate solution;

- the Lebanese concession, for people who have been seriously and directly affected by the conflict in Lebanon;

- the concession for citizens of the former Union of Soviet Socialist Republics temporarily resident in Italy who had experienced discrimination in the USSR because of their ethnic affiliation or ancestry; and

- the Yugoslav concession, for people who have been seriously and directly affected by the conflict in Yugoslavia.

5.5 A principal aim of the humanitarian program has been to provide assistance to those in genuine humanitarian need. The Committee expects that priority in the program should be given to those in greatest humanitarian need. An important issue for the Committee in relation to the humanitarian provisions was that an increased rate of acceptance of on-shore applications reduced the capacity to provide assistance to those most in need in the off-shore program.

On-shore humanitarian program

5.6 The on-shore humanitarian program mirrors the off-shore arrangements. The on-shore program includes a general humanitarian category. There are also on-shore concessionary arrangements for specific national groups, which have included Lebanese (regulation 119F), Sri Lankan (regulation 119G), Yugoslavian (regulation 118) and Iraqi or Kuwaiti nationals (regulation 119K). In addition, a special four year temporary entry permit has been created for citizens of the PRC in Australia on 20 June 1989 (regulation 119H).

5.7 The off-shore humanitarian program is a migration program. Those in genuine humanitarian need, with appropriate Australian connections, obtain permanent residence permits on arrival. Successful on-shore humanitarian claimants were also given permanent residence in the past, but under arrangements announced on 27 June 1990, those within Australia with a recognised humanitarian claim to protection now receive short-term stay. Individuals qualifying within the general, on-shore humanitarian category can expect to be given an initial four year temporary entry permit and may ultimately qualify for permanent residence. Those within the concessionary arrangements for specific national groups are given short term permits, generally three to six months, which may be extended.

Class concessionary categories - short-term stay

5.8 The temporary extensions of stay granted to Lebanese, Kuwaiti and Iraqi nationals have now expired, for the Lebanese on 30 November 1991, for Iraqis and Kuwaitis on 31 October 1991. Given the relative calm in these countries, these concessions have not been extended. The Yugoslavian and Sri Lankan concessions were extended recently to 31 January 1993 and 31 October 1992 respectively. PRC nationals received temporary entry permits which expire on 30 June 1994. Their situation, which is to be distinguished from other concessionary categories, is discussed in Chapter 8.

5.9 Several European nations, as well as Canada and the USA, presently grant temporary safe haven to particular classes in humanitarian need. The United States *Immigration Act 1990*, for example, allows certain aliens in the USA whose countries are experiencing civil strife to be given temporary protection. Temporary protected status is applied to certain eligible Salvadorians who applied during 1991[1] and Kuwaitis, Liberians, Somalians and Lebanese. Those eligible must have been continuously present in the USA since 27 March 1992, have no felony conviction or more than two misdemeanour convictions.[2] This arrangement has legislative force. The principal executive, discretionary mechanism by which the USA has permitted temporary refuge is via extended voluntary departure arrangements Groups such as Ethiopians (who arrived before 30 June 1990), Poles, Afghans and, on a case by case basis, certain Lebanese have been protected against deportation during terms of extended voluntary departure. Beneficiaries of extended voluntary departure usually are able to obtain work permits, but generally are not eligible for State welfare benefits. They cannot bring out their families to the USA, and no matter how long they remain in the USA, there is no provision for them to adjust their status, unless they meet other criteria.[3]

5.10 Class concessionary arrangements have been used, to date, for national groups affected by war or widespread civil disorder. These groups typically do not fall within the refugee definition because they face discrimination or persecution not for a Convention reason, but as a result of civil war or disorder. In the Committee's view, the concession also could be utilised to protect those unable to return to their homes because a major national disaster has caused widespread destruction to life and property in or near their homes. In evidence to the Committee, Mr David Bitel stated that victims in Australia of the Mt Pinatubo eruption or the Bangladesh floods were unable to obtain extensions of stay during the term of the disaster under

1 56 Fed Reg 618, 623 (1991) to be codified at 8 CFR 240.42 and amendment by HR 2332

2 INS Wire 4 April 1991, cited in *Georgetown Immigration Law Journal*, vol.5, Summer 1991, Executive Developments, p. 532.

3 D Gallagher, et al, 'Temporary Safe Haven: The Need for North American-European Responses', in G Loescher and L Monahan, op cit, p. 347.

the rules for visitor extensions.[4] Such victims are more appropriately easily and expeditiously protected within a humanitarian category. In the Committee's view, they are best accommodated within a class concessionary arrangement of limited duration.

Conclusions

5.11 The Committee endorses the principle of providing short-term extensions of stay to particular ethnic or nationality groups in present humanitarian need. Such a policy allows the government to respond appropriately to provide protection for classes in need, while ensuring that such protection is given for the term of the international conflict or disaster and not beyond it.

5.12 The conclusion of the Persian Gulf conflict, for example, has allowed Iraqis or Kuwaitis with short-term stay permits to return home. There is no longer any need for them to be given refuge in Australia.

5.13 This form of protection is well suited to those situations where international efforts are being directed at relief of the disaster or resolution of the civil strife. If, as often happens, such efforts are successful, the protected nationals can safely return to their homes and families. Such arrangements are consistent with the UNHCR policy of facilitating repatriation of refugees to their homes in conditions of security.

5.14 The group concessionary arrangement has administrative advantages. It allows DILGEA to speedily process entry permit applications from intended claimants. Generally applicants can satisfy the substantive criteria by simply showing that they are citizens of Lebanon, Sri Lanka or Iraq, for example, and that they were present in Australia on an appropriate date. It is possible to check if these substantive criteria are satisfied simply by checking the applicant's passport. There is no need to undertake any time consuming evaluation of humanitarian need. These claimants are given short term protection and kept out of the growing refugee or general humanitarian claimant's queue.

5.15 The Committee, however, is eager to ensure that the classes which benefit from the short-term extensions of stay are appropriately defined. If it is anticipated that the permit will be required for short, limited extensions of stay, for example less than one year, it makes good administrative sense to target the group in Australia by its citizenship. The citizenship can be easily and speedily verified and the entry permit granted. Given the limited extension of stay, it is not so significant if certain of those citizens are uninvolved in or would be largely unaffected by the natural disaster or the civil strife in their country of citizenship. However, if repeated extensions of temporary stay are likely to be given, or if, as with the PRC citizens, a four year temporary entry permit is conferred, then it is important that the extension of stay is given to those who actually need it. In such cases there

[4] Evidence, pp. 1250-1255.

should be careful consideration given to the terms of the qualifying criteria. Particular citizenship criteria may be too broad a qualification. All citizens of that country would be included, even those who were not born in that country, who have limited family or no residence links with the country of their citizenship, but who have acquired that citizenship by descent. The Committee is aware that applications for PRC permits have been made by claimants who are PRC citizens by descent and who have never set foot in the PRC.

5.16 The Committee notes that in Statutory Rule Number 125, gazetted on 14 May 1992, the Government amended the PRC temporary entry permit provision to address this problem. The new regulation requires that the person be identified on entry as a citizen of the PRC and satisfy the Minister that he/she is not entitled to reside in a place outside the PRC, or is not a citizen of a country other than the PRC (regulation 119H).

5.17 In the Committee's view, it is appropriate to require that claimants for ongoing temporary protection establish that not only are they citizens of the country affected by the civil strife or the natural disaster, but also that their homes, livelihood or families are in areas affected by the conflict or the disaster, or that they would be required to return to areas affected by the conflict or disaster if returned home. Facts concerning the applicant's residence can be evaluated quite simply and expeditiously so that the Government does not lose the administrative benefits of the class concessionary approach.

Recommendations

5.18 The Committee recommends that:

7. the policy of giving short term extensions of temporary stay to particular groups in humanitarian need be continued;

8. short term extensions of stay not only should be given to individuals in a class or group affected by civil disorder, but also should be considered for individuals in groups whose homes or livelihoods have been affected adversely by a major natural disaster;

9. for the purposes of granting short term extensions of temporary stay, the geographical area which is affected by the civil disorder or natural disaster, and from which the particular groups in humanitarian need originate, can be either a nation state or parts of a nation state; and

10. **in cases where an extension or repeated extensions of stay in excess of one year have been given, before any further permit extension is granted, the applicants ought to be expected to show not only that they are citizens of the country affected by the civil strife or natural disaster, but additionally that their homes, livelihood or families are in areas affected by the conflict or disaster, or that they would be required to return to the area affected by the disorder or disaster if returned home.**

General on-shore humanitarian program

5.19 The remaining text of this chapter is concerned with the general, on-shore humanitarian program. In order to understand the form of the general program and difficulties associated with it, it is necessary to trace something of its history.

Prior to 19 December 1989

5.20 Prior to 1981, the Migration Act provided a very broad undefined discretion to the Minister to grant permanent residence to people who were in Australia. In 1981, the Migration Act was amended by the addition of section 6A, which regulated the grant of residence status in Australia by defining the criteria justifying a Ministerial grant of such permanent entry permits.

5.21 Under paragraphs (a) to (e) of section 6A(1), an entry permit could not be granted to a non-citizen after entry into Australia unless one or more conditions were fulfilled. These conditions included that the person:

> (e) was the holder of a temporary entry permit which was in force and there were strong compassionate or humanitarian grounds for the grant of an entry permit.

5.22 Paragraph 6A(1)(e) provided administrators with discretion to deal with cases which were outside the family, refugee or economic categories for obtaining permanent entry permits after entry, which were set down in sections 6A(1)(a) to 6A(1)(d). Section 6A(1)(e) referred to strong compassionate or humanitarian grounds. In the integrated departmental instructions manual dealing

with section 6A(1) cases, the following distinction was drawn between compassionate and humanitarian grounds:

> Broadly ... strong compassionate grounds relate to severe misfortune and sufferings which individuals experience in their personal lives as a result of unusual or distressing circumstances personal to them. Humanitarian grounds, on the other hand, relate to an individual being disadvantaged as a result of membership of some group or class which is being treated differently by the state in the applicant's country of origin or last permanent residence.

5.23 In a paper presented to an administrative law forum in April 1991, DILGEA's Director of Asylum Policy, Dr Evan Arthur, stated that there was originally no intention to include a provision such as 6A(1)(e) in the Migration Act, because the purpose of section 6A(1) as a whole was to restrict the grant of residence status to those persons who met defined criteria. Dr Arthur also noted that initially tight guidelines were formulated to assist administrators in their interpretation of the phrase 'compassionate or humanitarian grounds'. Dr Arthur stated:

> Six of these guidelines dealt with what one may regard as personal or family related factors, such as a death of a relative or the initiation of a de facto relationship with an Australian resident or citizen. Two guidelines dealt with what the Department categorised as humanitarian factors. These were the occurrence of a natural disaster in the country of origin or the outbreak of 'war or political turbulence' after departure of the applicant. In 1983 a ninth guideline was added. This referred to 'gross and discriminatory denial of fundamental freedoms and basic human rights' on return to a country of origin.[5]

5.24 Compassionate grounds became identified with the family reunion elements of migration policy, while humanitarian grounds became linked with criteria for overseas refugee and humanitarian resettlement programs. Dr Arthur

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5 Dr Evan Arthur, 'The Impact of Administrative Law on Humanitarian Decision-Making', p. 2, presented to the 1991 Administrative Law Forum, Royal Australian Institute of Public Administration (ACT Division) and the Australian Institute of Administrative Law, Canberra, 29-30 April 1991.

indicated that, immediately prior to the introduction of the revised Migration Act and Regulations:

> the core criterion for demonstrating the existence of 'strong humanitarian grounds' was that the applicants had experienced or had a sound basis for expecting substantial violations of their human rights in their country of origin.[6]

Judicial interpretation

5.25 DILGEA originally envisaged that only a very few approvals would be made under section 6A(1)(e) each year.[7] This hope was not realised. The difficulty with the scheme, which became increasingly apparent, was that the Migration Act simply stated that 'strong humanitarian grounds' must be shown. The policy which sought to define and restrict the application of the strong humanitarian grounds did not have legal force. At times, according to the Federal Court, policy was applied so as to be inconsistent with the broad legal entitlement in S6A(1)(e) of the Migration Act. A number of administrative law decisions effectively rewrote the policy underpinning the section.[8]

5.26 In 1986, Burchett J of the Federal Court, in *Sinnathamby and Others v The Minister for Immigration and Ethnic Affairs*, 66 ALR, 60, ruled that 'section 6A(1)(e) does not require an applicant to suffer uniquely'. Citing the example of Jews in Nazi Germany or dissidents in Stalinist Russia, it was held that the fact that an applicant was not likely to suffer greater hardship than other residents of a particular country could not be used to conclude that strong compassionate or humanitarian grounds for the grant of an entry permit did not exist. This decision was confirmed by Wilcox J in *Pesava v The Minister for Immigration, Local Government and Ethnic Affairs* (1989 ALD 95), French J in *Damouni v the Minister of State for Immigration, Local Government and Ethnic Affairs* (1989) 18 ALD 425, and Hill J in *Dahlan v the Minister for Immigration, Local Government and Ethnic Affairs* (NG 278/686 of 1989).

5.27 In 1989, a series of significant decisions was handed down by the Federal Court. French J in *Damouni* indicated that there was little valid distinction between compassionate and humanitarian grounds for granting an entry permit under s6A(1)(e). Yet, according to Dr Arthur, this distinction was fundamental to

6 ibid, p. 3.

7 ibid, p. 2.

8 The cases are detailed in Dr Arthur's paper. This report draws on the information contained in that paper.

departmental decision making. French J's conclusion was confirmed by Ryan J in *Subramani v The Minister for Immigration, Local Government and Ethnic Affairs* (VG 80 of 1989) and Hill J in *Dahlan*.

5.28 Other rulings which affected DILGEA's administration of the provision included:

- Hill J in *Dahlan* ruling that it was an error in applying s6A(1)(e) to employ the standards of humanity and compassion existing in the country of origin of an applicant rather than Australian standards; and
- Hill J, again in *Dahlan*, when he distinguished the degree of hardship necessary to excite a strong humanitarian response, the test to make out a claim on 'compassionate or humanitarian grounds', from the necessary, well-founded fear of persecution test to establish a claim to refugee status.

5.29 According to Dr Arthur, this last finding 'effectively ruled unlawful the then central departmental criterion for establishing humanitarian grounds, which was that the applicant had a fear of 'substantial violations of human rights".[9] In *Dahlan*'s case, DILGEA had accepted that Dahlan, an Indonesian journalist, would be likely to be arrested in the future if he returned home. DILGEA based its refusal to grant residence on its finding that Dahlan would not face 'heightened hostility' if he was returned there. Dr Arthur argues that, following the Federal Court's interpretation of 'strong compassionate or humanitarian grounds', DILGEA's only criterion for determination was too broad. It simply required applicants 'to show that if they were forced to leave Australia they would face a situation which would evoke strong feelings of pity or compassion in an ordinary member of the Australian public'.[10]

5.30 The two major concerns for DILGEA regarding the humanitarian provisions thus became:

- the increasing number of applications; and
- the increased level and form of intervention by the courts.

9 ibid, p. 5.

10 ibid.

5.31 For DILGEA, the challenge in humanitarian decision-making became the establishment of a structure which would:

- meet the consent of the Australian public to ensure that people in Australia are not returned to unacceptable treatment in their own country; and
- not produce a numerical outcome which would exceed what the public is prepared to accept.[11]

5.32 In the Committee's view, a further challenge was to establish a definition which was sufficiently precise so as not to encourage applications from persons who simply would face difficult times if required to leave Australia.

5.33 Dr Arthur argued that the criteria in section 6A(1)(e), as interpreted by the Federal Court, could not meet such requirements.[12]

5.34 DILGEA, commenting on the Minister's residual discretion to permit stay on humanitarian grounds, stated:

> Ministerial discretion was removed not so much by the Act in 1989 but by the increasing intervention of the courts and the interpretation of Ministerial powers under the old provisions.[13]

5.35 The Committee obtained statistical data from DILGEA in order to understand the profile and ascertain the numbers in the humanitarian stream. However, the data provided did not allow the Committee to chart the development or to describe the on-shore humanitarian class over recent years. DILGEA's figures prior to December 1989 do not differentiate the strong compassionate from the strong humanitarian claimants. The figures are for both compassionate and humanitarian claims and, therefore, include de facto spouses and close family claimants, as well as the broadly political humanitarian cases. The Committee has included some discussion of these figures, even though they are of limited use in pinpointing humanitarian cases.

5.36 The figures do show that from 1979 the numbers of people applying for residence from within Australia increased dramatically. There were 8,000 residence applications lodged in Australia in 1979/80 and over 35,000 in 1989/90. The numbers of compassionate/humanitarian cases also increased steadily over this time. Due in large part to the numbers of PRC humanitarian applications, compassionate/humanitarian cases became the largest category within the residence

11 ibid, p. 15.

12 ibid.

13 Evidence, p. 1354.

application pool. In 1982, for example, spouse and close family applicants comprised 70 per cent and compassionate/humanitarian 10 per cent of the total number of residence applications. In 1988/89, the compassionate/humanitarian group was approximately 30 per cent, and in 1989/90 was 50 per cent, of all residence applications lodged.[14]

5.37 From May 1989, the numbers of compassionate/humanitarian applications increased dramatically. There were approximately 1,000 such applications made in November 1989, and over 8,000 made during December 1989.[15] These last were almost certainly timed to avoid the heralded restrictive legislation set to commence on 19 December 1989. There were a further 271 humanitarian applications lodged between 19 December 1989 and 20 February 1990.

5.38 Some idea of the humanitarian profile is given in the statistical data on the residence application backlog. On 9 February 1990, there were 32,329 persons with residence applications awaiting processing. Of these, 10,928 were compassionate and humanitarian cases.[16] DILGEA's analysis of these cases is provided at Table 5.1

5.39 More than 50 per cent of the applicants in Table 5.1 were illegal at the time of application, most of them for more than three months. This reflects the PRC component, which comprised a large number of persons overstaying their visas.

5.40 More than half the 1989 compassionate/humanitarian backlog were PRC citizens. Table 5.2 indicates the citizenship of the applicants in the compassionate/humanitarian category as at February 1990.

14 DILGEA, Regional Operations Branch, *Residence Update*, Issue 90/5, September 1990, p. 5.

15 ibid, p. 2.

16 DILGEA, Regional Office, Special Report, *Grant of Residence Status*, February 1990, pp. 2 and 5.

TABLE 5.1[17]

Applications For Residence Awaiting Processing: Compassionate And Humanitarian Cases

February 1990

Refugee	24
Special Humanitarian	1466
Territorial asylum	4
Homosexual	221
Other compassionate	4093
PRC National	5120
Total	10,928

TABLE 5.2[18]

Compassionate/humanitarian applications for residence by nationality: February 1990

PRC	5517
South Korea	1005
Britain	254
Sri Lanka	260
Tonga	636
Fiji	688
Other	2568
Total	10928

17 ibid, p. 2.

18 ibid, p. 5.

Post 19 December 1989

5.41 When the amended Migration Act and Regulations came into operation on 19 December 1989, section 6A(1) was repealed and replaced by section 47(1). To a large extent, section 47(1) restated section 6(A)(1) as it was prior to 19 December 1989. The basis for obtaining residence remained as before, with the criteria being spouse, refugee, close family, economic, or strong compassionate and humanitarian grounds. However, the mechanism for obtaining residence was changed. Section 47 (1), in combination with the regulations was set up to require all temporary entry permit holders to acquire relevant extended eligibility temporary entry permits in order to be eligible for a residence permit. The qualifying criteria for such permits were drawn more restrictively than the bald qualifying ground for residence set down in section 47 (1). For example, although section 47 allowed spouse of Australian citizens or permanent residents to obtain permanent entry permits after entry, in the first draft of the regulations such spouse on visitor's permits could not qualify for a spouse extended eligibility temporary entry permit, and therefore were ineligible for the spouse permanent entry permit.

5.42 A similar mechanism was adopted for the humanitarian resident permit. Section 47 (1) stated that residence could be obtained on strong humanitarian grounds. Regulation 141 set down the criteria for obtaining the necessary humanitarian eligibility permit. The criteria, though, were drawn so as to restrict those qualifying for eligibility. The circumstances which constituted the strong humanitarian grounds necessary to gain entry, such as a substantial political upheaval or major natural disaster, must have occurred after the applicant's arrival in Australia, and were required to be gazetted by the Minister.

5.43 Dr Arthur commented in his paper:

> In some ways [regulation 141] displayed the opposite fault to section 6A(1)(e) as interpreted by the courts. It was so concerned to set up a system which could not produce unacceptable numerical outcomes that it may not have been able to offer a credible guarantee of protection to a wide enough group of applicants.[19]

5.44 Forms were printed to allow applications under regulation 141. In the period from 19 December 1989 to 10 December 1990, DILGEA estimates that 5,000 applications were lodged for the grant of resident status on humanitarian grounds. DILGEA's data base indicates that 4,906 applications were lodged in the period from 19 December 1989 to 30 June 1990, with 111 applications lodged in the 1990/91

19 Dr Evan Arthur, op cit, pp. 15-16.

financial year.[20] However, none of these applicants could qualify for the grant of an eligibility permit, because the Minister did not gazette any circumstances justifying humanitarian stay, as required in the regulations.

5.45 Regulation 141 was repealed on 12 July 1990 by Statutory Rule Number 237. Between 19 December 1989 and 12 July 1990, an application for humanitarian entry could be lodged, even though, without the gazettal of humanitarian circumstances, it was not possible for any applicants to qualify for an entry permit. After 12 July 1990, it was no longer possible to make an application for residence on humanitarian grounds.

5.46 Two weeks earlier, on 27 June 1990, the Minister issued a press release foreshadowing changes to 'refugee and humanitarian policies'.[21] The new arrangements were to be effective from 'a date in August'. However, they were not put into effect formally until 10 December 1990. The machinery for their operation was not set up until some time later.

Revised arrangements

5.47 The new on-shore humanitarian arrangements, as foreshadowed in the Minister's press release, were to be as follows:

- persons identified in the refugee determination process as facing a grave and individualised threat to their lives, but who did not meet the technical definition of refugee in Convention would be eligible for the grant of a temporary entry permit. The criteria for that permit would include:
  - possibility of settlement elsewhere;
  - reference to the national interest; and
  - likely duration of the persecution from which the person is being protected;
- a holder of such a permit would be eligible to apply, as such, for a permanent entry permit. The criteria would include:
  - continued need for protection;
  - being the holder of a humanitarian temporary entry permit for at least four years; and

20 Evidence, p. 809.

21 Ministerial Press Statement 43/90, 27 June 1990.

  - subject to places being available in the migration program;
- such a person would also be eligible to apply for permanent residence at any time on non-humanitarian grounds, including marriage and occupation;
- the Government would retain the capacity to respond to situations of a humanitarian nature on a class basis (by way of special regulations);
- holders of temporary entry permits would have access to return visas, which would not be valid for a visit to the country of persecution. A visit to the country of persecution would also be a ground of cancellation of an entry permit; and
- people unable to obtain permanent residence but with a continuing need for protection beyond four years would be able to apply for further temporary entry permits.[22]

5.48 On 26 October 1990, two months after the intended introduction of revised humanitarian regulations, the Minister announced that the new system for the determination of refugee/humanitarian claims would come into operation on 10 December 1990.[23] Under the new arrangements, the Minister can permit humanitarian claimants to remain by using the Minister's residual discretionary power under section 115 of the Migration Act to overturn a review officer's decision and grant an entry permit. Such decisions are taken by the Minister personally. A set of non-binding policy guidelines set down the circumstances in which the RSRC may wish to recommend to the Minister the grant of an entry permit on humanitarian grounds.

5.49 The humanitarian guidelines were announced by the Minister on 15 March 1991.[24] In his press statement at the time, the Minister noted that the humanitarian category is intended to incorporate a wider group of people than those that fall within the Convention definition of a refugee. The guidelines state:

- it is in the public interest of Australia as a humane and generous society to ensure that persons who cannot meet the technical definition of a refugee are nevertheless not returned to their country of origin if there is a reasonable likelihood of their facing a significant, individualised threat to their personal security on return;

22 Ministerial Press Statement 43/90, 27 June 1990.

23 Ministerial Press Statement 55/90, 26 October 1990.

24 Ministerial Press Statement 15/91, 15 March 1991.

- it is also in the public interest to ensure that protection offered on humanitarian grounds, which is not the result of any international obligation but is rather a positive, discretionary humanitarian act, is offered only to individuals with a genuine, ongoing need;

- as a discretionary measure, grant of stay on humanitarian ground must be limited to exceptional cases presenting features of threat to personal security and intense personal hardship;

- it would be inappropriate as part of the refugee status determination procedure to address cases of a compassionate nature, such as family difficulties, economic hardship or medical problems, not involving serious violation of human rights as a result of political factors in a country of return;

- it is not intended to address broad situations of differentiation between particular groups or elements of society within other countries;

- these provisions are intended to cover only individuals whose particular circumstances and personal characteristics provide them with a sound basis for expecting to face a significant threat to personal security on return as a result of targeted actions by persons in the country of return;

- in order to ensure that remedies offered under this process are limited to persons in genuine need, it would not be appropriate to consider on humanitarian grounds any person who:

  - has a safe third country in which to reside and that country would accept the person;

  - could substantially alleviate perceived risk by relocation to a region of safety within the country of origin;

  - is seeking residence in Australia principally to secure better social, economic or educational opportunities, or a more stable environment in which to live.

5.50 Under the regulations, only certain refugee claimants are eligible to be assessed as humanitarian cases. The humanitarian arrangements are not accessible to border claimants or illegal entrants. DILGEA explained these omissions to the Committee by stating:

> The Government has taken the view and maintained it thus far that in respect of people who turn up on our shores uninvited, it has an obligation only in terms of the UN Convention and will apply that protection to the letter. It is not obliged to go further.[25]

5.51 An additional reason for excluding illegal entrants and prohibited or border entrants relates to the on-shore control model. The 1989 amendments gave no right of review to illegal entrants refused entry permits within Australia. When the Committee canvassed with DILGEA the possibility of permitting Khmer border applicants access to the humanitarian discretion, DILGEA stated:

> Technically, one problem with regard to the mechanism we are using is that you would have to give prohibited entrants the right of review of an entry permit or visa decision. This would give them a right which is not normally accorded to illegal entrants. It would be problematical, given the overall structure of the Act, whereby a person who is legally in Australia and applies for a permit or benefit while legally in Australia gets a review right. If he applies after that period he does not get a review right. That is a deliberate intention on the part of the Parliament to encourage people to apply while they are here legally. ... You would have to weigh that as a factor.[26]

5.52 DILGEA explained that certain transitional arrangements were implemented to deal fairly with illegal entrants awaiting processing of their refugee applications, and to permit them to access the humanitarian program. Illegal entrants were permitted to apply for review of a decision refusing them a refugee permit, providing the application for a domestic protection (temporary) entry permit was lodged before 1 July 1991.[27] The Minister, under section 115, has the power to grant illegal entrants with this review right a temporary entry permit on humanitarian grounds. This transitional concession was not extended to unprocessed border claimants.

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25 Evidence, p. 1340.

26 Evidence, p. 1345.

27 Evidence, p. 1338.

5.53 The Committee heard evidence that, in June 1991, there was a rush of applications for a domestic protection (temporary) entry permit by claimants wanting to access the Minister's humanitarian discretion. Under section 34 of the Migration Act, applicants must apply for entry permits, such as the domestic protection (temporary) entry permit, on approved forms. There apparently was a shortage of such application forms and a number of applicants were turned away from DILGEA offices which had run out of the forms.[28] Some hundreds of claimants were said to be left waiting to lodge their forms at close of business on 30 June 1989 in the Melbourne office of DILGEA. The Committee was concerned to obtain an assurance from DILGEA that applicants who failed to obtain and lodge forms would not be disadvantaged by this. In the event, the Government gazetted regulation 22D on 17 September 1991, which deemed applications for refugee status lodged before 1 July 1991 to have effect additionally as applications for a domestic protection (temporary) entry permit. Illegal entrants in the refugee processing queue before 1 July 1991 thereby were granted access to the Minister's humanitarian discretion.

5.54 According to DILGEA, the procedures for obtaining stay on discretionary humanitarian grounds are 'elaborate' and 'in many ways an artificial process'.[29] Those refugee applications eligible for humanitarian discretion are considered both as refugee and potential humanitarian cases. The first level case officer may form a judgement that a case is a humanitarian case and not a refugee case. The case officer can arrange to have the case 'fast-tracked', but the person must be refused refugee status, be denied a domestic protection (temporary) entry permit and then proceed to the second tier of decision making to get access to the Minister's discretion.

5.55 The decision to recommend and refer a case as a deserving humanitarian one is currently a decision of the RSRC or a senior delegate. The senior delegate is the review authority under the existing processing scheme (see Chapter 6).

5.56 The Minister, in exercising the humanitarian discretion, can make a decision under section 115 of the Migration Act to overturn the review decision if the Minister considers it is in the public interest to do so. There is no requirement for the Minister to make a decision. The Minister can accept the recommendation, reject the recommendation or do nothing. It is a non-enforceable discretion.[30]

28 Evidence, p. 1263.

29 Evidence, p. 1336.

30 Evidence, p. 1337.

5.57 In regard to the above, DILGEA noted:

> ... the person in Australia claiming refugee status does not have an option of humanitarian status, the Minister has an option to grant it. It is not an entitlement; it is a Ministerial discretion; it is an act of grace on the part of the Minister.[31]

5.58 Explaining the reasoning behind the Government's adoption of a discretionary system, DILGEA commented that the existing process relies on a non-compellable power of the Minister which is not subject to review by the Federal Court, but rather, is subject to scrutiny by the Parliament. DILGEA stated:

> [The Government] wants the flexibility to be able to say, 'We are not going to bother with this', or, 'We are going to admit this'. It wants total freedom in this area.[32]

Recent developments

5.59 On 15 July 1992, the Minister announced the establishment of an independent Refugee Review Tribunal to consider appeals on refugee determinations. The RRT will replace the RSRC from 1 July 1993. Details of the RRT are discussed further in Chapter 6.

5.60 Following the Minister's announcement, it was not immediately clear what the arrangements regarding consideration of humanitarian cases would be under the RRT. When questioned on 21 July 1992 about the intended course of action in relation to humanitarian claims, DILGEA responded that the issue is far from resolved. DILGEA stated:

> This is a matter on which the Minister undoubtedly will take a decision in due course ... .[33]

31 Evidence, p. 1344.

32 Evidence, p. 1337.

33 In camera evidence, 21 July 1992, p. 282.

Community comment

5.61 Community comment on the present humanitarian arrangements generally focused on four major areas of concern.

5.62 First, it was suggested that the test for humanitarian entry is too strict. There was concern that, because the humanitarian guidelines require the threat to personal security to be 'as a result of targeted actions' the criteria for humanitarian entry is narrower than the Convention definition of refugee.[34]

5.63 Amnesty International Australia (AIA) commented:

> The new provision ... introduces the requirement that 'the threat to personal security has to be *individualised*. AIA's understanding is that this new requirement makes the humanitarian provision narrower than the Convention definition itself.[35]

5.64 This view was supported by the Legal Aid Commission of New South Wales, which advocated a return to the pre-19 December 1989 law and policy relating to protection on humanitarian grounds.[36]

5.65 In addition, Dr Dennis Shoesmith, representing the Darwin Citizens for Support of Cambodian Boat People, commented:

> ... the criteria should allow for consideration of such general life-threatening conditions as civil war, famine, or the hostile or repressive policies of home governments. The Refugee Status Review Committee's terms of reference should allow it to take into account more general factors which present a general threat to personal security or would entail severe personal hardship.[37]

34 Evidence, pp. S252, S576, S599, S620, S670.

35 Evidence, p. S620.

36 Evidence, p. S599.

37 Evidence, p. S823.

5.66 Using the Cambodian boat people as an example, Dr Shoesmith stated:

> The claim for asylum by the Cambodians who fled to Australia by boat ... must be assessed in terms of their likely reception if they are forced to return to Cambodia. It must also be assessed according to the likelihood of their exposure to guerrilla warfare in a particularly savage conflict and the risk that they will be subjected to persecution by the Khmer Rouge. The threat to specific categories of boat people should be assessed (young men liable to be sent untrained to the battlefront, individuals afraid of racial persecution). In other words, the humanitarian criteria for temporary asylum should permit applicants to put the case that they are individually at risk because they belong to certain categories or groups of persons or because of the prevalent dangers confronting any person returning to their place of origin.[38]

5.67 The second area of concern was that the humanitarian entry processes are not sufficiently differentiated from the refugee determination procedures. It was argued that the location of humanitarian entry provisions within the refugee process forces people to apply for refugee status when they are probably aware that they ineligible. The Darwin Community Legal Service stated:

> ... the problem that we face is that these regulations expect people to try to force themselves into the refugee status, knowing that they cannot meet that definition, in the hope that at the end of that process they will then get an appropriate recommendation for the Minister to exercise his section 115 discretion. That seems to me to be the wrong way to go about it.[39]

5.68 The third area of concern was that the humanitarian class was too restrictive in scope. It was argued that border claimants and illegal entrants should not be precluded from the humanitarian entry processes. Highlighting the situation

38 Evidence, p. S823.

39 Evidence, p. 994.

of border claimants, the Legal Aid Commission of New South Wales commented:

> The exclusion from protection on humanitarian grounds of people who were unable to obtain valid travel documents in their home country (and therefore do not 'enter' or become illegal) ... ignores the fact that such inability is completely consistent with the existence of danger in the home country.[40]

5.69 As noted at paragraph 5.10, it also was argued that there currently is no means by which individuals affected by natural disasters in their country of origin or residence could be accommodated for permanent or temporary stay.[41]

5.70 The fourth area of concern was that the actual process for consideration of humanitarian cases is complicated and convoluted.[42] Under the existing procedures, a person cannot be considered for humanitarian entry until an application for refugee status is rejected. The Minister's section 115 powers can only be engaged after a review officer has rejected an entry permit application.

5.71 The Committee in its deliberations addressed all of these community concerns.

Committee's concerns

5.72 The Committee's recommendations in respect of refugee and humanitarian processing are set down in Chapter 6. The remaining text in this chapter details the Committee's concerns about the present humanitarian processing arrangements.

5.73 The Committee's first concern about existing arrangements is that the humanitarian profile is not sufficiently differentiated from the Convention refugee category. The humanitarian guideline requires that individuals establish a 'sound basis' for expecting a significant, individualised threat to their personal security on return. This requirement, in effect, restates the Convention refugee definition. In fact, not only is it restated, but it is arguably more circumscribed that the refugee test. The 'sound basis' test for humanitarians is stricter than the 'real chance' test for refugees. Refugees, unlike humanitarian claimants, do not have to show that they are targeted for persecution or discrimination.[43] Such overlap between the two definitions can cause real legal difficulties. The Committee notes that one of the

40 Evidence, p. S598.

41 Evidence, pp. 1250-1255.

42 Evidence, p. 994.

43 J Crawford and P Hyndman, op cit.

concerns of Hill J. in *Dahlan's* case related to this semantic confusion between humanitarian and refugee profiles. In that case, the Minister's representative defined 'strong humanitarian grounds' as 'a well-founded fear for a treatment which is less than persecution'. By 'less than persecution', the Minister's representative meant being 'severely discriminated against, you can be put into prison, your life is in danger'. Hill J concluded that although this definition was ascribed to the humanitarian program, it was, in fact, a Convention refugee test.

5.74 In relation to the present arrangements, the Committee endorses the principle that the humanitarian definition be carefully and restrictively defined. However, the definition should not simply restate the refugee test. To do so is to cause difficulty for the RSRC which makes recommendations on humanitarian cases, and for the RRT, which, the Committee has recommended, should make such recommendations in the future (see recommendation ...). In its present formulation, it is difficult to see how humanitarian claimants could fail the less restrictive Convention refugee test. On this point, the Committee notes the evidence of Attorney-General's, which stated:

> Certainly in some areas of the Department it was felt that the criteria for judging humanitarian was, in fact, tougher than the test for refugee. ... It seemed to us that people who could meet the test for refugee would not meet the test for humanitarian. It seemed to be an inconsistent test as far as we were concerned.[44]

5.75 There is a further reason to differentiate the humanitarian and refugee profiles. It is proposed that the Minister will grant humanitarian cases a domestic protection (temporary) entry permit, the same permit class given to refugees. The Minister, under section 115, can grant such a permit even if the claimant fails to satisfy the criteria for that permit class. One criteria for the domestic protection (temporary) entry permit (regulation 117A) is that 'the applicant is determined by the Minister to have refugee status'.

5.76 Humanitarian claimants, of course, have failed to obtain recognition as refugees. Nevertheless, if the humanitarian guidelines prescribe a test that is in fact a refugee test, and the Minister grants a permit that requires the person to be a refugee, there could be actual or contrived confusion over the person's status. Such questions might in future arise if a humanitarian domestic protection (temporary) entry permit holder was given residence and was subsequently the subject of criminal deportation proceedings in which the person sought to claim Convention protection against refoulement. The Committee is of the view that a clear distinction should be made both in the definition of the two classes and the permit protection afforded to the two classes to prevent such problems.

44 Evidence, pp. 1544-1545.

Conclusions

5.77 The recent history relevant to the law and practice concerning humanitarian entry provides decision makers with some important lessons. It is evident from the range of court cases which have been decided in relation to the humanitarian provisions that the opportunity for Federal Court intervention is enhanced where loose statutory definitions, accompanied by imprecise policy guidelines, form the basis of decision making processes. The continuing backlog of applications in the humanitarian Grant of Residence Status category reflects the difficulties faced by DILGEA as a direct consequence of court intervention in decision making processes. It is evident that the humanitarian procedures were confined to the purview of the Minister, under the non-enforceable, non-reviewable section 115 powers, principally to overcome the wide interpretation given to the humanitarian provisions by the Federal Court.

5.78 The Committee does not consider that the criteria for humanitarian entry are too strict, as some have suggested. It is firmly of the view that criteria should be drawn with great precision and care so as to avoid liberal interpretations of general policy principles by the Federal Court. The Committee is mindful of the difficulties which arose in the management of the humanitarian arrangements in the period prior to December 1989. It also is well aware of the potential for ever increasing numbers to apply in some catch-all category of humanitarian need. In this regard, the Committee considers that, under the present arrangements, codification of procedures, with an emphasis on careful drafting, is vital to ensure that departments maintain control over decision making, and are not forced to abdicate that responsibility to the courts.

5.79 The Committee notes that the refugee and humanitarian streams were joined to prevent persons making separate refugee and humanitarian applications at the same time or when refused one or the other permit. Such duplicitous applications add unnecessarily to already long queues. While there were sound reasons for structuring the humanitarian provisions in their present form, the combining of the two programs will almost certainly contribute further to the increasing numbers of refugee status applications. Such applications are made not because the person believes he or she is a refugee, but because this is the mechanism to apply for consideration as a humanitarian case. The overall effect is that the processing of refugee applications is delayed by those who may well realise that they are ineligible for the grant of refugee status, but who nevertheless lodge an application simply to gain access to the Minister's humanitarian consideration after the review stage. Committee members know from experience how many immigrants are convinced that if they could only access the Minister directly on their case, they would be permitted to stay.

5.80 The Committee concurs with the view expressed in the guidelines on humanitarian entry that it is in the interest of Australia, as a humane and generous society, to offer protection to individuals with a genuine and ongoing need. However, neither the public interest nor the interest of genuine claimants is served by unmeritorious applications which cause delays in the processing system.

5.81 Under the existing arrangements, the Committee is concerned that:

- the refugee and humanitarian streams are not sufficiently differentiated; and
- the existing determination process encourages unmeritorious applications simply to get access to the Minister under section 115.

5.82 While the combining of the refugee and humanitarian streams solves the problem of duplicitous applications, it gives rise under the present processing and review arrangements to the problem of having in place an overly expensive and exacting process for scrutiny of humanitarian cases. To overcome this problem, the Committee deliberated on various proposals, including separation of the humanitarian and refugee categories, the fast-tracking of humanitarian cases, or alternatively the introduction of leave provisions for the right of review to the RSRC.

5.83 The Committee is firmly of the view that the refugee and humanitarian streams should not be separated, because of the difficulties of duplicitous applications. However, the Committee considers that to facilitate future decision making in this regard, monitoring of the case load is required by DILGEA to determine:

- the number of cases which are purely humanitarian in nature; and
- the number of cases which may have some merit in terms of refugee status, but which are largely of humanitarian concern, for example claims relating to civil disturbances.

5.84 Further conclusions and recommendations on the combined refugee and humanitarian system, taking into account recent developments, are contained in Chapter 6, which deals specifically with the processing and review arrangements for grant of refugee status and grant of entry on humanitarian grounds.

Recommendation

5.85 The Committee recommends that:

11. to facilitate future decision making about Australia's combined on-shore refugee and humanitarian arrangements, the Department of Immigration, Local Government and Ethnic Affairs monitor the case profiles within the present refugee backlog so as to determine the proportion of cases which are more appropriately humanitarian claims rather than refugee claims.

Chapter Six

THE REFUGEE AND HUMANITARIAN DETERMINATION PROCESS

Introduction

6.1 Australia is facing a major challenge with respect to its refugee determination process. It must preserve the capacity to provide protection for genuine refugees, and at the same time preserve the integrity of its asylum procedures from ineligible refugee applicants.

6.2 DILGEA considers that the solution to this challenge is to develop a determination system which is able to deal expeditiously with the caseload pressure now being experienced, while still according full procedural fairness to applicants.[1]

6.3 If refugee applications are not processed expeditiously, those non-residents who are ineligible for refugee status are encouraged to apply simply to buy time in Australia. If asylum applications are not processed fairly and carefully, genuine refugees may fall through the protective net and may be returned to a country where they will face persecution.

6.4 The refugee and humanitarian determination process has undergone considerable review and revision since 1989. Some of the changes have been implemented during the course of the Committee's inquiry. The most recent changes were announced on 12 February 1992, 5 May 1992 and 15 July 1992.

UNHCR requirements

6.5 Before examining the various developments in Australia's refugee determination process over the last decade, culminating in the February, May and July 1992 announcements, it is important to recognise that Australia's approach to refugee determination has been and continues to be influenced by the requirements of international agreements to which Australia is a signatory. In particular, under the Refugee Convention and Protocol, Australia has an obligation to examine case by case claims from people at its frontiers or temporarily in Australia who are seeking to enter or remain on the basis of a claimed fear of persecution in their country of nationality or habitual residence.

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1 Evidence, p. S517.

6.6 While the Convention provides a definition of a refugee against which each applicant can be assessed, it does not outline the procedures for determination of refugee status which should be adopted by countries. The UNHCR has stated:

> It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own. His application should therefore be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs.[2]

6.7 As procedures vary considerably in different countries, the UNHCR has determined that certain basic procedural requirements should be followed for refugee applicants. These requirements are:

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

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

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

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

2 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, January 1988, p. 45.

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

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

(vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established that his request is clearly abusive. He also should be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.[3]

6.8 The UNHCR also has concluded that an examiner should:

- ensure that the applicant presents his case as fully as possible and with all the available evidence; and
- assess the applicant's credibility and evaluate the evidence, if necessary giving the applicant the benefit of the doubt, in order to establish the objective and subjective elements of the case.[4]

6.9 Those evaluating refugee procedures have an additional factor to consider, namely the special difficulties which refugee cases present to fact finders. Refugee decisions rely largely on the credibility of claimants. Applicants are usually the only witnesses to the events which are the basis of their refugee claims. Their story may be exaggerated. They may be unable to relate properly incidents of past trauma or abuse. Refugee applicants almost certainly are required to communicate their stories through an interpreter. It can require skilful interviewing to discover, understand and evaluate an applicant's testimony and perceptions.

6.10 In addition, as the ultimate issue in refugee cases is the reasonableness of the claimant's fear of future persecution, refugee decision makers require information regarding conditions in an applicant's country. On occasions, the information can be highly specific, for example the membership and tactics of small political groups, or a country's laws concerning such things as homosexuality, military service, or the observance of certain religious customs. Common sources of such information include Amnesty publications, United States State Department

3 ibid, p. 46.

4 ibid, p. 49.

country reports and briefings from Australia's Department of Foreign Affairs and Trade. In this regard, Canada, for example, has established a documentation centre to collect, research and make avaiable country information for use in refugee decision making.

Procedures prior to 10 December 1990

6.11 Australia's refugee determination procedures in general have accorded with its obligations under the Convention and Protocol, and with UNHCR requirements. The determination system in place between 1977 and 10 December 1990 was as follows:

- all applicants for refugee status were required to complete a comprehensive application form and submit any relevant documentary material;
- usually an officer from the DORS secretariat then interviewed the applicant;
- the application and interview record were assessed by the DORS Committee, comprising one representative each from DILGEA (Chair), Attorney-General's, the Department of Foreign Affairs and Trade, and the Department of Prime Minister and Cabinet, with a representative of the UNHCR attending in a non-voting advisory capacity;
- negative assessments by the DORS Committee were forwarded to the applicant for comment, in accordance with principles of natural justice;
- after evaluating any response, a final recommendation of the DORS Committee was passed to a delegate of the Minister for decision.[5]

6.12 While there was no formal right of review of negative decisions by the Delegate, from time to time the DORS Committee reconsidered claims on the basis of new and substantive information which was not before it at the time of first consideration.[6] In addition, while the DORS Committee was not charged directly with considering humanitarian cases, it became a practice of that Committee to make recommendations that deserving cases be granted residence on humanitarian grounds, even though those cases failed to meet the Convention refugee criteria.

5 Evidence, p. S534.

6 Evidence, p. S534.

6.13 In an academic critique of the refugee status decision making systems in various countries, Guy Goodwin-Gill (a former UNHCR representative in Australia) was quoted concerning the Australian system.[7] Goodwin-Gill noted that the Australian system generally worked well. He stated that DORS Committee decisions 'generally have been equitable - not over restrictive against all applicants and not biased in favour of certain nationalities and against others'. However, Goodwin-Gill indicated that the system had 'a number of structural and procedural defects ... that create the potential for decision making error'. He noted that:

- restriction of membership on the DORS Committee to central government officials lessens its independence;
- DORS Committee expertise is limited due to the fact that members receive no training and serve only part time; and
- the inability of DORS Committee members to question applicants directly or judge demeanour impairs assessment of claims because it forces them to rely on transcripts prepared by immigration officers who generally are inexperienced.

Reviews of procedures

6.14 During the 1980s, Australia's procedures for assessing on-shore applications for refugee status came under consideration in reports of the HRC, the ARC, and the Committee to Advise on Australia's Immigration Policies (CAAIP).

6.15 In 1985, the HRC reported to the Attorney-General on Human Rights and the *Migration Act 1958*. The HRC recommended that the DORS Committee have an independent Chair, and that consideration be given to providing for appeal from decisions of the Minister.[8]

6.16 The CAAIP, in its 1988 report, recommended that a Commissioner for Refugees be established to replace the DORS Committee. Under the CAAIP proposal, the Commissioner, assisted by a secretariat, was to have determinative powers in assessing claims. There was to be no opportunity for merits review of the Commissioner's decisions. The only review available would have been by leave to the full Federal Court on points of law.[9]

7 C L Avery, 'Refugee Status Decision Making: The Systems of Ten Countries', *Stanford Journal of International Law*, vol. 19, Summer 1983, p. 249.

8 Human Rights Commission, *Human Rights and the Migration Act 1958*, Report No. 13, AGPS, Canberra, 1986.

9 Committee to Advise on Australia's Immigration Policies, *Immigration - A Commitment to Australia*, AGPS, Canberra, 1988, p. 116.

6.17 In 1986, the ARC reported to the Attorney-General on the review of migration decisions.[10] The ARC indicated that refugee status decisions were different in some respects from other administrative decisions due to:

- the obligations imposed on Australia under international treaties to which Australia is a signatory; and
- the desperate nature of the decisions involved, where it could well be a matter of life or death.

6.18 The ARC concluded that because decisions such as the refusal of refugee status are of such significance to an applicant, and the consequences of wrong decisions so potentially severe, they should be subject to merits review. The ARC stated:

> ... while the current practice of the DORS Committee of reconsidering its advice at the request of the Minister or an applicant for refugee status is a desirable one in the absence of a system of external appeals, reconsideration by that Committee is not an adequate alternative to review on the merits by an independent tribunal. ... the [DORS] Committee cannot be said to provide an independent review of its own primary decisions.[11]

6.19 The ARC argued for merits review to be available to all on-shore refugee applicants, including those people who had arrived in but had not necessarily entered Australia. It was of the view that their illegal or undocumented status should not be a relevant consideration.

6.20 A two stage review process by the Administrative Appeals Tribunal (AAT) was recommended in the ARC report. In order to guard against the possibility of applicants bringing review proceedings primarily to prolong their stay in Australia, it was proposed that the first stage be a 'leave to appeal' stage, instead of the normal right of review direct to the AAT.

6.21 Subsequently, in two letters to the Attorney-General dated 18 June 1990 and 16 August 1990, the ARC recommended that:

- primary decisions should be made within DILGEA at a reasonably senior level;
- there should be speedy and informal merits review by a panel modelled on the DORS Committee, with an independent Chair;
- there should be an opportunity for independent external review by a specially constituted AAT, albeit subject to a fairly rigorous leave requirement to be determined on the papers;
- there should be strict time limits for each stage of the process, with primary and informal merits review completed within six months, and full AAT review where applicable within nine months; and
- the Minister should have the power to exclude cases from external review by certificate tabled in the Parliament.[12]

6.22 In evidence to the Committee, the ARC noted:

> ... our model would have involved a quick primary decision-making process to filter out the obvious cases - the hopeless and the obviously genuine ones - followed by a more exhaustive primary decision-making process for the cases in the middle ... It was our hope that by putting in place the highest quality primary decision-making process possible you would deter unnecessary appeals to a greater degree.[13]

6.23 These alternative models were rejected by the Government. DILGEA advised the Committee that the ARC model was estimated to cost between $2.28 million and $3.81 million per 1,000 refugee applications.[14]

Catalyst for change

6.24 These reports on the refugee determination process were issued in the context of the increasing number of on-shore refugee applications, which placed pressure on the existing processing arrangements. DILGEA noted that the DORS procedures were designed to accommodate and process a caseload of some 500 applications. As the number of applications for refugee status began to rise sharply

10 Administrative Review Council, *Review of Migration Decisions*, Report No. 25, AGPS, Canberra, 1986.

11 Ibid, p. 90.

12 Letters of Advice 1 and 2, *ARC 15th Annual Report 1990/91*, AGPS, Canberra 1991, pp. 77-89.

13 Evidence, pp. 1360-1361.

14 Evidence, p.S637.

from December 1989 (refer tables Chapter 3), and went significantly above 500 cases per annum, it became evident that the existing processing system was unable to handle the larger number of applications.

Revised procedures

6.25 On 26 June 1990, the Government established an Interdepartmental Working Group to develop a streamlined refugee determination model which would ensure the speedy settlement of on-shore refugee status claims. The new procedures, which were announced by the Minister on 26 October 1990 and which came into effect on 10 December 1990, included three stages:

- a primary stage for applications to be assessed and decisions taken quickly on the grant of refugee status;
- a review stage, consisting of an examination of negative assessment by the RSRC and a determination by a senior delegate who is the review authority in the scheme; and
- Ministerial discretion to grant temporary stay on humanitarian grounds where the applicant fails to win refugee status but the Minister is of the view that there is a compelling case for humanitarian stay (humanitarian claims are discussed in detail in Chapter 5).

6.26 DILGEA advised that this Working Group model was expected to cost the Commonwealth approximately $1.83 million per 1,000 applications.[15]

6.27 Additional processing measures were announced by the Minister on 12 February 1992.[16] These are outlined at paragraph 6.31. The new procedures are intended to allow complete processing of applications from border claimants and arrested illegal entrants within two months.[17] For other on-shore refugee claimants, it is intended that the procedures will provide a six month process for the primary stage, and three months for the review stage.[18]

15 Evidence, p. S637.

16 Ministerial Press Statement 12/92, 12 February 1992.

17 ibid and Evidence, p. 1578.

18 Evidence, p. 1490.

Primary decision stage: 10 December 1990 to February 1992

6.28 Under the processing arrangements in place between 10 December 1990 and February 1992, at least 10 separate procedural steps were undertaken before a refugee application was submitted for a primary decision. These steps included the following:

- receipt of application and checking against the departmental data base;
- a registration check, involving the input of the applicant's details on the departmental data base, creation of a separate file for each applicant, acknowledgment of the application, and circulation of the application to UNHCR;
- preliminary assessment by a case officer, involving the identification of priority cases for fast tracking, and seeking information from overseas posts;
- in some cases, approving permission to work;
- interview with the applicant, which was fully documented;
- preparation of a statement of reasons, which may have required clearance with the Legal Branch, and which was required to be signed by the Delegate and then forwarded to the applicant;
- processing of any Freedom of Information claims which were made;
- a further registration check;
- preparation of minutes; and
- referral of assessment to the applicant and UNHCR for comment.

6.29 In the initial version of the processing system, applicants and the UNHCR were given 21 days to comment on a negative assessment by the case officer. When comments were received, they may have necessitated further investigation by the case officer. When such further investigation was completed, the case officer prepared a submission to the Delegate, documenting the case officer's findings, any comments from the applicant or UNHCR, and the case officer's recommendation.

6.30 The final step of the primary decision stage prior to February 1992 was the decision by the delegate, made on the basis of the case officer's assessment and the comments by the applicant and UNHCR on that assessment. The delegate documented his or her findings. In the case of a negative assessment, a statement of reasons was prepared for the applicant.

Primary decision stage: from February 1992

6.31 Under the new refugee determination procedures announced by the Minister on 12 February 1992, the primary decision stage has been streamlined There is no longer a separation between the case officer and primary decision delegate. As noted by DILGEA in evidence to the Committee, from February 1992 the person who interviews the claimant is also the person responsible for assessing and deciding on the case.[19]

6.32 Decision makers at the primary stage are to be at the administrative officer class 6 level. They are to receive extensive training in law, case management and positive interview techniques.[20] These case officers are supervised closely by senior managers who mentor and monitor their decision making.

6.33 The primary decision stage is crucial in refugee processing. In the present system, the case officer is the only person to see and evaluate the applicant. The case officer's assessment is relied upon by decision makers at the current review stage.

6.34 In his February 1992 announcement, the Minister also foreshadowed a package of regulations intended to give greater control over the primary decision stage of refugee processing. These include:

- imposing binding time limits on the period after arrival in Australia when applications for refugee status must be lodged;
- imposing binding time limits on responses to correspondence and lodgement of review applications;
- requiring applicants to advance all details relevant to a claim at the application stage;
- restricting repeat applications; and
- requiring accurate details of change of address for the purpose of serving directions and correspondence.[21]

19 Evidence, pp. 1615-1616.

20 Evidence, p. 1618.

6.35 The proposed regulation requiring applicants to advance all details at the application stage represents a modification of the previous application and natural justice consultation arrangements. The primary level natural justice provisions included extensive consultations with applicants. Experience showed that this extended the investigation stage, delaying decision making, as applicants provided more and more case details on each consultation.

6.36 All applicants now will be interviewed. The interview provides the occasion for ascertaining case details, and assessing case merits and the credibility of the applicant. Under the announced arrangements, the application and assessment procedures are joined. As DILGEA noted:

> It brings the process from application ... and assessment to decision.[22]

6.37 Applicants will be given the opportunity at the interview and afterwards to respond to adverse material. This is in accordance with natural justice principles. Regulations will set down time limits for responding to adverse material and lodging review applications. DILGEA informed the Committee that the model which has been adopted can be flexible. DILGEA noted that if the applicant needs further time to get evidence to satisfy an interviewing officer on some point, the processing mechanisms could be 'stalled while better information is sought and a better judgement established'.[23]

6.38 Under the new arrangements, the processing of border claimants and illegal entrants in detention is to be expedited considerably. As noted by the Minister, increased efficiency will derive from a changed approach. Instead of waiting for claimants to lodge lengthy and comprehensive applications, DILGEA is to actively investigate refugee claims.[24] In this regard, it is worth noting that recent long delays in processing Cambodian border claimants occurred because of delays in lodging their refugee applications.

21 Ministerial Press Statement 12/92, 12 February 1992.

22 Evidence, p. 1615.

23 Evidence, p. 1617.

24 Ministerial Press Statement 12/92, 12 February 1992.

6.39 The new procedures for border claimants and detained illegal entrants include:

- scheduling a claimant for interview with a DORS official within days of the border claimant or detained illegal indicating an intention to apply for refugee status;
- requiring the claimant to fill out a brief one page statement that he/she wishes to apply for refugee status, rather than requiring the usual multi-page form to be completed;
- exploring all aspects of the refugee claim at the interview; and
- providing applicants with a statement of reasons for negative decisions and a specified time in which to apply for review.[25]

6.40 Prior to the introduction of these measures, DILGEA told the Committee:

> ... the essential difference in procedure is that we will allow persons who are in the community ... to come to us with the written details of their claims. For border claimants, we will go to them and interview them to extract the claims.[26]

Review stage since 10 December 1990

6.41 Under the review system which has been in place since 10 December 1990, but which is to be replaced as of 1 July 1993, an applicant who has been notified of a primary decision denying him or her refugee status has 28 days within which to apply to the RSRC for review of the refusal decision. The RSRC is comprised of one representative each from DILGEA (Chair), Attorney-General's and the Department of Foreign Affairs and Trade, as well as one community representative nominated by RCOA. In addition, an UNHCR representative attends in an advisory capacity. The departmental representatives on the RSRC are all senior officers within their respective departments.

25 Evidence, pp. S813-S814.

26 Evidence, p. 1608.

6.42 As at May 1992, the following steps were involved in the review of an application by the RSRC:

- an application for review is received and a registration check is carried out;
- all papers are circulated to RSRC members;
- the case officer can be called on to make a presentation to the RSRC on his or her detailed assessment, except in relation to manifestly unfounded cases, for which no case officer is in attendance;
- minutes of proceedings are prepared and the findings of the RSRC are documented;
- a negative assessment by the RSRC is referred to the applicant for comment within 21 days;
- a submission to the delegate is prepared by the RSRC, documenting the RSRC's recommendation and the applicant's comments; and
- in the case of a negative recommendation for refugee status, the RSRC can make a recommendation direct to the Minister for granting entry on humanitarian grounds.

6.43 After the RSRC's consideration of the review application, a senior delegate of the Minister, who is the review authority in the processing scheme, makes the final decision on whether the applicant is a refugee and whether to grant a domestic protection (temporary) entry permit. The delegate bases his or her decision on the RSRC's recommendation and the applicant's comments on the findings of the RSRC. The delegate's decision is documented and forwarded to the applicant. While this is generally the final point of the process, the Minister may consider granting entry on humanitarian grounds under the Minister's section 115 discretionary powers.

Refugee Review Tribunal

6.44 On 15 July 1992, the Minister announced that a new independent Refugee Review Tribunal would be established, with a commencement date of 1 July 1993. The RRT will replace the RSRC. According to the Minister:

> It is now timely to put the review of refugee decisions on the same footing as the review of other migration decisions, through access to an appeals Tribunal.[27]

6.45 The RRT will provide hearings for refugee applicants, assess applications on their merits, and have the power to decide appeals. It is expected to operate on a non-adversarial basis, along guidelines similar to those of the existing Immigration Review Tribunal. The new system will have a statutory base, and its procedures will be set out in regulations.[28]

6.46 The RRT is to sit as single member panels, and is to offer a hearing to all applicants, in camera if necessary. It is anticipated that lawyers and other representatives may be present as advisers. Members of the RRT are to be appointed by the Governor-General on the recommendation of the Minister, after consultation with the Attorney-General.[29]

6.47 The grounds on which rejected applicants will be able to appeal to the courts is to be defined in the new legislation. In this regard, the Minister noted that the AD(JR) Act will no longer apply to Migration Act decisions. A right to apply to the Federal Court for review, based on specific grounds, will be provided in the Migration Act. The Minister indicated that the grounds of judicial review would be settled with the Attorney-General, but are expected to include grounds such as:

- that procedures which were required by the Migration Act to be observed in connection with the making of a decision were not observed (thereby replacing the ground that the rules of natural justice were not observed);
- fraud and actual bias;
- an improper exercise of power, such as exercising a personal discretionary power at the direction of another person or following policy without regard to the merits of a particular case; and

27 *Ministerial Press Statement 35/92, 15 July 1992.*

28 ibid.

29 ibid.

- there was an error of law, where the error involved a wrong interpretation of the applicable law or an incorrect application of the law to the fact.[30]

6.48 Until the new refugee review system begins to operate, the RSRC will continue in its present form. DILGEA expects that appropriate transitional arrangements will be put in place so that people are not disadvantaged by transition from one system to another. However, as at 21 July 1992, DILGEA was unable to advise the Committee of those arrangements, as the detail was yet to be determined.[31]

6.49 Commenting on the reasons for changing to the RRT, DILGEA stated:

> ... the Tribunal will do exactly the same job but will be seen to be more transparent and fairer than the RSRC, which in the minds of our critics is not transparent and not fair. ... The public perception of the unfairness of the RSRC is, presumably, based on the idea that this is a committee of bureaucrats.[32]

6.50 DILGEA also noted that the RRT will overcome another main criticism of the RSRC, which is that the RSRC is not determinative, but only makes recommendations, with the actual decisions being made by a delegate of the Minister.[33] In addition, DILGEA indicated that the RRT is expected to be less expensive than the RSRC, with the estimated 1993/94 costs for the RSRC being $51.51 million, compared to the estimated RRT costs of $26.36 million.[34]

6.51 Summarising the various changes which have been implemented and announced with regard to the refugee determination system, the Minister indicated that the new system would have the following features:

- a statutory base;
- time limits for the lodgement of applications and subsequent processing;
- quick assessment by DILGEA of all new applications; and

30 ibid.

31 In camera evidence, 21 July 1992, p. 300.

32 In camera evidence, 21 July 1992, pp. 300-301.

33 In camera evidence, 21 July 1992, p. 301.

34 Evidence, p. S984.

- in the case of a negative decision by DILGEA, access to merits review by the RRT.[35]

6.52 The Minister commented:

> In this way, we will have a credible and independent determination system, which should help keep to a minimum appeals to the courts.[36]

Inquiry evidence

6.53 Much of the inquiry evidence concerning refugee processing was received by the Committee prior to the Minister's announcements on 12 February 1992 and 15 July 1992 regarding changes to the refugee determination process. These new measures have been directed at a number of the concerns raised during the inquiry. Even so, the Committee took into consideration all the evidence it had received. At the time when the evidence was received, many of the concerns canvassed in submissions and at public hearings accorded with concerns felt by the Committee. As the recent changes which have been implemented relate to the evidence received by the Committee, it is important to record that evidence, in order to fully understand the basis for those changes. Recommendations made by the Committee on the basis of this evidence are found at the end of this chapter.

Timeliness of procedures

6.54 One issue of fundamental concern during the inquiry was the length of time taken to process applications for refugee status. In July 1991, DILGEA commented:

> ... there are many more people in the system now who are using the system as a means of staying in Australia. In fact, we know that a number of agents are advising people to simply lodge an application for refugee status because the process is currently a long one. The number of people in the pool awaiting determination includes people who are there with no substantive claim at all; they are simply there to buy time.[37]

35 Ministerial Press Statement 35/92, 15 July 1992.

36 ibid.

37 Evidence, p. 1297.

6.55 On 24 October 1991, DILGEA stated:

> The problem with the process at the moment is that it takes too long. That in itself is an incentive to get into the process.[38]

6.56 RCOA indicated that it can take 18 months to two years for DILGEA to process each case in detail. RCOA commented:

> Almost all the time that our clients wait on a decision is time spent simply because, with the present resources and the present mode of operation, it takes that long for the Immigration Department to get through the cases in the detail which it seeks to do.[39]

6.57 The need for a rapid processing system was emphasised on a number of occasions, particularly to discourage manifestly unfounded or abusive claims. AIA, for example, stated:

> The only joy in giving priority to manifestly unfounded claims is that hopefully it discourages some further abusive claims, because people know that they will be out of the system within three months and that the promises of these ads in the paper that they can stay for years and years are empty.[40]

Time limits on applications

6.58 A second issue which generated comment during the inquiry was the question of whether time limits on the lodgement of applications for refugee status would assist in overcoming the problem of manifestly unfounded or abusive claims.

38 Evidence, p. 1490.

39 Evidence, p. 1553.

40 Evidence, p. 1145.

6.59 Attorney-General's indicated that there is scope for applying time limits which would require people to make their claim to refugee status at a particular time. It commented:

> We are suggesting that you could have procedures in place which in a sense say that, if you are in a country and you wish to make a refugee claim, you must make it within so many days of your arrival. If there is some incident in your country which gives rise to that fear of persecution, you must make it within a certain period after that particular event.[41]

6.60 The UNHCR noted that the alacrity with which persons bring their claims forward is already a consideration in the determination process. However, it argued that, regardless of the time when an application is lodged, natural justice and due process require all claims to be examined. Using the example of a person who suddenly claims refugee status when he or she is about to be deported, the UNHCR stated:

> One cannot categorically say that because of the lack of timeliness in the situation ... the claim should be dismissed, because there is the possibility, however remote, that you may be looking at a real refugee. We wish to avoid the consequence of a summary disposition of a claim that could result in that refugee being persecuted.[42]

6.61 In a similar vein, Professor Hyndman (Faculty of Law, University of New South Wales) noted:

> ... if there is a possibility that it is a genuine claim, you really have to look at it because the consequences to the individual of a mistake are so great.[43]

Natural justice

6.62 A third issue explored during the inquiry was whether the natural justice elements initially included within the refugee determination process were necessary and appropriate.

41 Evidence, p. 1517.

42 Evidence, p. 1418.

43 Evidence, p. 1450.

6.63 In this regard, the UNHCR endorsed Australia's then procedural approach, commenting:

> The procedural frameworks that do exist now in Australia actually are commendable in that they provide for the basic internationally recognised minimum standards in terms of due process or natural justice in the determination of a refugee claim.[44]

6.64 Similarly, Attorney-General's, when questioned on whether the natural justice provisions are too generous in relation to refugee claimants, stated:

> It is the opinion of the Department that the new procedures do not go overboard in this respect.[45]

6.65 Other evidence was focused on the specific requirement of natural justice, and how these are interpreted by the courts. Professor Hyndman noted:

> When the courts look at natural justice claims or objections on the basis of natural justice issues they do not just look at one part of the procedure but the whole procedure to see whether natural justice has in fact been afforded to the applicant at some stage; it does not have to be afforded at a particular point. If the review committee does not actually see the applicant in person and the applicant feels they have got a natural justice claim, the court will not just look at the review committee's procedures but at the whole thing from the very moment of the submission of the application all the way through the process. If in the whole process an applicant has been given natural justice - a fair opportunity to present their case, to deal with any adverse information that is personal to the applicant and so forth - it does not matter that in one particular part they have not actually been heard. Natural justice does not always require that a person be interviewed or heard orally.[46]

44 Evidence, p. 1399.

45 Evidence, p. 1543.

46 Evidence, p. 1443.

6.66 Professor Hyndman's observations generally accord with the Committee's understanding of natural justice requirements. In the original processing structure, with its elaborate consultation process, DILGEA appeared unnerved by the prospect of court intervention on procedural fairness matters. The Committee recognises DILGEA's difficulty in predicting the appropriate fair procedure in each and every case. The dissenting views expressed by the judges in the *Somaghi* and *Heshmati* cases (see paragraph 4.61) provide examples of DILGEA's difficulties in this regard.

Independent review

6.67 A further issue raised in evidence to the inquiry related to the independence of the process for review of decisions on grant of refugee status. Attorney-General's indicated that because, under the RSRC model, the final decisions are made by delegates within DILGEA, there are perceptual problems about the fairness of the system. Difficulties can arise as a result of these public perceptions that 'it is all being done within the system'.[47] Attorney-General's commented:

> The reason that there is an encouragement, and there has been for many years an encouragement, for greater litigation in the immigration areas than in many other areas of Commonwealth administration is the absence of independent external review.[48]

6.68 While noting that the RSRC has been a very useful process for ensuring that the final delegate's decision takes into account a range of important considerations, Attorney-General's argued that it would be a better system if immigration decision making was modelled on the principles which have applied throughout the rest of the Commonwealth's public administration over the last decade. Attorney-General's stated:

> Our Department has argued consistently for years that immigration decision making would be substantially improved if there was the discipline and the public scrutiny imposed by external review. The [Immigration Review Tribunal] brought that process to a part of immigration decision making in 1989.[49]

47 In camera evidence, 15 June 1992, p. 50.

48 In camera evidence, 15 June 1992, p. 50.

49 In camera evidence, 15 June 1992, p. 51.

6.69 Attorney-General's indicated that when a domestic review jurisdiction is introduced, there can be an initial flurry of Federal review cases. Once the principles are established, they are applied by decision makers, and the likelihood of judicial challenge is substantially reduced. Attorney-General's commented:

> If you want to reduce the propensity for challenge, a substantial benefit can be obtained by having an independent decision making process.[50]

6.70 In a similar vein, RCOA commented that there is obvious merit in favouring an independent review mechanism such as that which operates in a number of countries, including New Zealand and Canada. RCOA stated:

> The present close attachment of the RSRC to the Department of Immigration is, in effect, a prima facie denial of one of the two main components of natural justice, namely that the decision should be without bias. Once an organisation has made a decision, there is the natural tendency to defend that decision. Thus, review of the decision should be independent of the original decision maker.[51]

Country information

6.71 A further concern raised in evidence to the Committee related to the quality of information available to DILGEA regarding events and circumstances in particular countries. Australian Lawyers for Refugees Incorporated (ALRI) indicated that in some cases the information held by DILGEA on particular countries was out of date and incomplete. ALRI noted that a great deal of information which should have been on DILGEA's country files, and which was available publicly from various tertiary institutions, was not held by DILGEA, and thus was not available to delegates when they made their primary decisions on particular refugee applications.[52]

50 In camera evidence, 15 June 1992, p. 51.

51 Exhibit 2, p. 11.

52 In camera evidence, 21 July 1992, p. 178.

6.72 When questioned about its country files, and the data available to it, DILGEA stated:

> At this stage they are still fairly limited, in the sense that what we call a documentation centre is still in its formative stages.[53]

Access to judicial review

6.73 Another matter considered during the course of the inquiry was whether access to judicial review of refugee determinations should be restricted by introducing a leave requirement. In this regard, the Committee noted that there is a leave requirement for Judicial Review to the English Divisional Court, and that in Canada judicial review or appeal on matters arising from the determination of refugee claims can be had only on leave of a judge of their Federal Court. The Committee also noted that in its Draft Final Report on Determination of Refugee Status in Canada, dated 5 March 1992, the Law Reform Commission of Canada not only recommended the retention of this leave requirement, but also recommended that on applications for leave, the judge considering the application should be empowered to deny leave if he or she is of the opinion that no substantial miscarriage of justice has occurred as a result of the alleged errors in respect to which leave is being sought.[54]

6.74 The Committee questioned refugee organisations on whether similar leave provisions would be appropriate in Australia. ALRI commented that such procedures would be quite appropriate.[55] RCOA stated:

> ... we do not believe that there should be limits to access judicial review on the various heads of review as they are outlined in the Administrative Decisions (Judicial Review) Act.[56]

53 In camera evidence, 21 July 1992, p. 347.

54 Law Reform Commission of Canada, *Draft Final Report on Determination of Refugee Status in Canada*, 5 March 1992, pp. 126-129.

55 In camera evidence, 21 July 1992, p. 199.

56 In camera evidence, 21 July 1992, p. 239.

Community comment on new procedures

6.75 As the announcement of further changes to the refugee determination process occurred late in the Committee's inquiry, only limited community comment on these changes was received before the tabling of this report. On changes to the primary stage, RCOA stated:

> ... we agree with and endorse any attempts to speed up the process so that people are not left waiting for two years for a decision, especially in a case where people are in detention.[57]

6.76 RCOA indicated that some of the report writing from an interviewing officer to a case officer to a delegate could be eliminated without a reduction in fairness. However, with greater responsibility and authority to be given to case officers, RCOA emphasised the need for high calibre training of such officers.[58]

6.77 RCOA also commented on internal controls applicable under the new procedures. It stated:

> Under the present system, because case officers have to refer the matter to the Minister's delegate, who must also make comments on it to the case officer, that provides a kind of quality control check built into the system. The new procedures would remove that. It would be a concern to the Refugee Council if that meant that some of the people who at present merely write assessments were making decisions with relatively little supervision or check within the Department.[59]

6.78 As for the announcement regarding the establishment of the RRT, RCOA welcomed in principle the introduction of an independent appeal mechanism for asylum claims.[60] However, RCOA expressed reservations about the use of a single adjudicator, indicating that much depended on the calibre of persons chosen. RCOA argued that, for borderline claims, there should be one or two other adjudicators.[61]

57 Evidence, p. 1553.

58 Evidence, p. 1553.

59 Evidence, p. 1554.

60 In camera evidence, 21 July 1992, pp. 218, 254.

61 In camera evidence, 21 July 1992, p. 255.

6.79 In general, RCOA was supportive of the decision to codify procedures. RCOA stated:

> That is obviously preferable because changes to policy are easier to keep track of if there are regulations or if there is legislation in place. It certainly makes it much clearer to people in the Department, and also to those persons making applications if they know exactly what their rights are.[62]

Conclusions

6.80 Most of the evidence to the inquiry supported the establishment of a simpler and speedier processing system. There was a strong view that lengthy delays in processing refugee applications not only disadvantage persons who satisfy the Convention definition of a refugee, by prolonging uncertainty within their lives, but also provide an incentive for those who do not have a legitimate refugee claim to make an application as a mechanism for extending their stay in Australia.

6.81 The Committee notes the recent changes to the on-shore refugee determination system, as announced on 12 February 1992. These changes are directed principally at expediting the primary decision making process. In this regard, the Committee supports priority processing of border claimants and detained illegal entrants, imposition of time limits on the lodgement of applications, and greater emphasis on case officers obtaining information at interview. Such measures accord with the view of the Committee that the Government seize the initiative and control refugee determinations.

6.82 The Committee also notes the Government's recent decision to replace the RSRC with a new and independent RRRT. The Committee heard no criticism of the actual decision making of the RSRC. While certain witnesses supported the principle of an independent merits review body, they did not argue that the RSRC was biased against applicants or in favour of DILGEA. The Committee, for its part, does not regard the RSRC review model as flawed. In the Committee's view, the RSRC met the requirements for independence. The independence of the RSRC was assured by the breadth of views represented. The RSRC provided detailed consideration of each case by three senior government officers and an experienced community representative. In addition, it allowed for UNHCR commentary and advice. The RSRC was, as the Minister described it, a 'rolls royce' review system.

6.83 The Committee's concerns about the RSRC were focused on its appropriateness for the high volume of on-shore refugee claims which Australia currently is experiencing. It was evident that the refugee review process involving the RSRC was lengthy and too elaborate. As indicated above, a significant number of experienced people were involved in assessing, reviewing and determining each

62 In camera evidence, 21 July 1992, p. 255.

application. In the Committee's view, the system was too expensive and was unworkable given the number of persons now seeking asylum. It had a myriad of administrative controls which, given the large number of claimants, unnecessarily complicated and prolonged the process.

6.84 The Committee anticipates that the RRT, sitting as single member panels independent of DILGEA, with determinative powers and the ability to conduct hearings with refugee applicants, should overcome many of the deficiencies identified in relation to the RSRC. In particular, it should be demonstrably fairer, as the tribunal member, who will be independent of DILGEA, will see and question the refugee applicant. This should allow for more accurate assessment of the merits of a claim and the credibility of applicants. The RRT is expected to be faster and less costly, by reducing the number of people and layers involved in the decision making process. This is evident from the cost comparisons between the RSRC and the RRT provided by DILGEA, as noted at paragraph 6.50.

6.85 The Committee, of course, recognises that there are risks associated with single member panels, particularly with regard to borderline cases. On balance, though, the Committee considers that any disadvantages can be overcome by careful selection of appropriately qualified tribunal members. In relation to this issue, the Committee notes that in its March 1992 Draft Final Report on the Determination of Refugee Status in Canada, the Law Reform Commission of Canada recommended, subject to certain safeguards, that decisions on refugee claims should be taken by single member panels.

6.86 One potential problem with single member panels, is the difficulty of ensuring consistency in decision making between the various members appointed to the RRT. The Committee considers that Tribunal members ought to take a consistent approach towards the generalised risks of persecution in particular countries, as well as a consistent approach to the meaning of Convention terms, such as persecution, and the Convention grounds, namely race, religion, nationality, membership of a particular social group, and political opinion. The Committee considered various ways one might achieve this consistency. The Committee considered, for example, whether it would be appropriate to refer complex cases or relevant 'model' cases in the first instance to a specially constituted AAT. The AAT's determinations in relation to such cases would not be binding on, but would be persuasive for, future decisions of the RRT. The Committee rejected this possible model in favour of a mechanism based upon the RRT itself.

6.87 In the Committee's view, there should be a senior member appointed to the RRT, who would be required to allocate work to Tribunal members so that members develop or enhance particular country expertise. To further ensure consistency of approach, in cases which appear complex or which illustrate useful 'model' case types, the senior member of the RRT should be empowered to set up three member RRT panels comprising, where appropriate, members from other branches, ie Melbourne, Sydney and so forth. The three member panels would decide

the case at first instance. Their decision on matters, such as country profile and the meaning of Convention terms, would not bind Tribunal members, but would be of persuasive authority.

6.88 The Committee is also of the view that reasons given to refugee applicants for decisions taken by DILGEA and the RRT include, where appropriate, the findings concerning the country situation relevant to the applicant's case. In situations where an applicant is taken to be excluded from Convention protection on national security or serious criminal grounds, in accordance with the Conevtion provisions set out in Article 1F and Article 32, the Minister should be empowered to provide a conclusive certificate to this effect.

6.89 In order that the decisions of the RRT have a sound factual basis, the Committee considers that the RRT should have access to comprehensive and up to date country information relevant to the refugee applicants appearing before it. Much effort needs to be directed towards the collection of country data before the RRT commences operation, to ensure that the RRT is factually well resourced.

6.90 In this regard, the Committee considers that DILGEA should establish a comprehensive data collection covering every country represented in the refugee caseload. This data collection should be maintained with the assistance of other Commonwealth Departments, particularly the Department of Foreign Affairs and Trade. Country files should be current and comprehensive. They ought to be updated monthly. The information and documentation in this data collection should be available to DILGEA officers and the RRT. The RRT should have access to all information available to DILGEA.

6.91 To alleviate concerns that country information is not as complete as it should be, or has been misquoted or used selectively by DILGEA, the Committee considers that applicants ought to be able to request and obtain all public information or country information which is publicly available, including available overseas, and which is relied upon by DILGEA or the RRT in their decisions. Security information and sources of the Department of Foereign Affairs and Trade should be protected.

6.92 Finally, in relation to the operation of the humanitarian provisions under the new RRT, the Committee is of the view that the RRT should be empowered to refer to the Minister for consideration cases which do not satisfy the requirements for grant of refugee status, but which, in the view of the RRT, deserve protection on humanitarian grounds, under the Minister's section 115 powers (see also Chapter 5). The RRT's powers should be determinative in refugee cases and recommendatory in humanitarian cases.

Recommendations

6.93 The Committee recommends that:

12. a senior member be appointed to the Refugee Review Tribunal with responsibility for allocating work to Tribunal members, to ensure the development and enhancement of country expertise among Tribunal members;

13. as a mechanism for ensuring consistency in decision making among Tribunal members, the senior member of the Refugee Review Tribunal be empowered to constitute three member panels of the Tribunal to consider at first instance cases which are complex in nature or which illustrate 'model' case types. The decisions of such panels would not be binding on Tribunal members, but would be of persuasive authority;

14. the Department of Immigration, Local Government and Ethnic Affairs establish and maintain, with the assistance of other Commonwealth Departments, particularly the Department of Foreign Affairs and Trade, a current and comprehensive database, to be updated monthly, relating to every country in the existing refugee case load;

15. the country information database maintained by the Department of Immigration, Local Government and Ethnic Affairs be available to all departmental officers and the Refugee Review Tribunal. The Tribunal should have access to all information and documentation available to the Department, including confidential security information;

16. security information provided to the Department of Immigration, Local Government and Ethnic Affairs, along with the information sources of the Department of Foreign Affairs and Trade, be kept confidential;

17. the reasons given to refugee applicants for decisions by the Department of Immigration, Local Government and Ethnic Affairs and the Refugee Review Tribunal include the findings concerning the country situation relevant to the applicant's case;

18. in situations where an applicant is taken to be excluded from Convention protection on national security or serious criminal grounds, in accordance with the provisions set out in Article 1F and Article 32 of the Convention Relating to the Status of Refugees, the Minister for Immigration, Local Government and Ethnic Affairs be empowered to provide a conclusive certificate to this effect;

19. refugee applicants be able to access any publicly available country information used by the Department of Immigration, Local Government and Ethnic Affairs or the Refugee Review Tribunal in their case determinations; and

20. the Refugee Review Tribunal be empowered to recommend to the Minister for Immigration, Local Government and Ethnic Affairs that, in deserving cases which do not meet the requirements for grant of refugee status, the Minister grant stay on humanitarian grounds, in accordance with the Minister's discretionary powers under section 115 of the *Migration Act 1958*.

Chapter Seven

BORDER CLAIMANTS: PROCESSING AND DETENTION PRACTICES

Introduction

7.1 By international standards, Australia has a secure border against unauthorised immigration. There are very few clandestine entrants who remain undetected in Australia. DILGEA estimates that the number would be in the hundreds each year, not higher.[1] Australia also has relatively few frontier claimants for refugee status. On-shore asylum seekers are mainly either lawful temporary residents or illegal entrants who have overstayed the term of their permits.

7.2 Australia's border security derives in part from an accident of geography and part from design. Australia is accessible to most people only by air or large passenger vessel. International airports and shipping terminals are a great deal easier to keep under surveillance than land borders.

7.3 Australia is a country of final destination on most airline routes. Consequently, relatively few international transit passengers wait in Australia while ostensibly en route to another country. Australia does not have the difficulty with transit passengers experienced in Europe and North America, where many such passengers seek entry on refugee and humanitarian grounds.

7.4 Australia has a legal requirement that all persons arriving at the border must have a visa authorising their travel to Australia. Carrier sanctions allow for fines to be levied on airlines or shipping companies which bring in unauthorised arrivals. DILGEA noted:

> We have a system that protects our borders. We get very few people arriving without documentation.[2]

7.5 In all, between 500 and 700 people are refused entry to Australia each year. They arrive without appropriate documentation, or with fraudulent or defective documentation. The number of persons refused entry has included 571 in 1986/87, 660 in 1987/88, 717 in 1988/89, 704 in 1989/90 and 528 in 1990/91.[3] A

1 Joint Standing Committee on Migration Regulations, *Illegal Entrants in Australia - Balancing Control and Compassion*, September 1990, AGPS Canberra, p. 15.

2 Evidence, p. 1290.

3 Evidence, pp. S644-S645.

small number of these have been refugee claimants. The number and nationalities of persons refused entry is provided at Table 7.1. The numbers and nationalities of border refugee claimants is provided at Table 7.2.

7.6 From November 1989 to May 1992, eleven unauthorised boats have arrived in Australia carrying 460 passengers.[4] The details of these arrivals are discussed further at paragraph 7.71.

7.7 Persons without valid entry documents who seek asylum at Australia's borders presently are held in detention until their applications for refugee status are determined.. Detainees comprise 1.5 per cent of the existing backlog of refugee claimants. As at 12 June 1992, applications for refugee status had been lodged in relation to 478 persons held in detention.[5]

7.8 While the numbers of such detainees may appear small in comparison to the much larger backlog of on-shore asylum applicants, the Committee was concerned to ensure that the processing of and the detention arrangements for border claimants are adequate. After all, detention can involve a number of significant costs. First, there is the trauma of detention. This is particularly true for genuine refugees who may have suffered previously in detention. There also are sizeable operational costs associated with maintaining such facilities

Legal status of border claimants

7.9 The legal status of border claimants is presently extremely complicated and can only be discovered by examining a number of different sections of the Migration Act and Regulations. Under section 4(5) of the Migration Act, a person is taken to have entered Australia when:

- in the case of a person arriving by a vessel other than an aircraft, he or she disembarks from the vessel in Australia; or
- in the case of a person arriving by aircraft, he or she disembarks from the aircraft in Australia, or, if he or she disembarks at a proclaimed airport, when he or she leaves the airport.

4 Evidence, p. S915.

5 Evidence, p. S912.

TABLE 7.1[6]

PASSENGERS REFUSED ENTRY: 1986/87 - 1990/91

NATIONALITY	1986/87	87/88	88/89	89/90	90/91
ALGERIA	2	1	10	4	-
ANGOLA	-	-	1	-	-
ARGENTINA	-	-	1	-	1
AUSTRIA	5	5	2	4	2
BANGLADESH	4	12	38	35	21
BELGIUM	-	2	2	1	3
BOLIVIA	1	-	1	-	-
BRAZIL	-	17	5	6	2
BULGARIA	-	1	-	-	9
CANADA	4	5	5	4	3
CHINA	3	4	6	2	16
CHILE	-	-	-	1	3
CUBA	-	-	-	-	1
CZECH'VAKIA	-	-	-	1	-
DENMARK	-	3	3	7	1
EGYPT	1	-	1	-	1
ETHIOPIA	1	2	1	-	-
FIJI	24	51	34	33	19
FINLAND	-	1	1	1	-
FRANCE	9	18	9	-	3
GAMBIA	2	-	2	-	-
GERMANY	6	7	14	14	6
GHANA	4	4	4	6	11
GUINEA	-	-	-	-	2
HONG KONG	6	13	3	5	8
HUNGARY	1	-	-	-	2
INDIA	91	43	27	57	20
INDONESIA	13	45	59	41	26
IRAN	6	2	4	2	8
IRAQ	2	1	1	3	-
IRELAND	1	-	5	8	4
ISRAEL	1	4	8	3	9
ITALY	4	1	1	9	4
JAPAN	7	2	4	-	11
JORDAN	1	-	1	-	-
KENYA	-	1	1	-	1
KIRIBATI	-	-	-	1	1
KOREA	23	9	21	5	4
LEBANON	-	8	6	15	7
MALDIVES	-	1	-	-	-
MALTA	2	-	-	-	1
MALAYSIA	69	62	64	68	46
MALAWI	-	-	-	1	-
MAURITIUS	2	2	5	1	8
MEXICO	-	-	2	-	-
MOROCCO	2	-	-	-	-
MOZAMBIQUE	-	-	1	-	-
MYANMAR	-	3	5	1	2

6 Evidence, pp. S644-S645.

NATIONALITY	1986/87	87/88	88/89	89/90	90/91
NAURU	-	-	1	-	-
NEPAL	-	2	4	19	7
NETHERLANDS	1	7	6	1	1
NEW ZEALAND	46	35	38	47	54
NIGERIA	1	1	2	10	6
NORWAY	-	-	-	1	-
PAKISTAN	8	43	62	49	21
PNG	-	-	-	2	-
PALESTINE	1	-	-	-	1
PERU	1	-	-	4	-
POLAND	2	1	2	2	1
PORTUGAL	1	-	3	1	1
PHILIPPINES	63	67	65	25	45
ROMANIA	2	-	-	-	2
SAMOA	2	-	-	-	2
SAUDI ARABIA	-	-	-	1	-
SENEGAL	-	-	5	6	1
SEYCHELLES	-	1	-	1	-
SINGAPORE	9	23	20	26	6
SOLOMON ISLAND	-	-	1	-	1
SOMALIA	2	3	2	4	2
SOUTH AFRICA	4	3	1	-	2
SPAIN	-	-	2	3	-
SRI LANKA	16	16	10	28	6
SWAZILAND	-	-	-	1	-
SWEDEN	-	2	5	5	3
SWITZERLAND	3	-	2	4	2
SYRIA	-	1	1	-	2
TAIWAN	15	2	1	3	4
TANZANIA	1	-	2	2	-
THAILAND	36	71	43	27	31
TOGO	1	-	-	1	1
TONGA	7	5	2	7	2
TUNISIA	1	-	3	1	1
TURKEY	-	6	13	6	8
TUVALU	-	-	-	-	1
URAGUAY	-	-	1	-	-
USA	4	8	12	21	11
UK	23	19	43	44	26
USSR	-	-	-	1	1
VANUATU	6	1	-	-	-
VIETNAM	1	2	-	-	-
YUGOSLVAIA	10	4	4	2	5
ZIMBABWE	-	-	-	3	-
STATELESS	8	4	3	3	6
TOTAL	571	660	717	704	528

TABLE 7.2[7]

Border Refugee Claimants

Nationality	86/87	87/88	88/89	89/90	90/91
Cambodia	-	-	-	222	123
Iran	-	18	30	6	9
Iraq	-	-	12	-	-
Somalia	-	-	6	90	18
Sri Lanka	5	-	-	6	-
Other*	8	14	7	8	15
Total	13	32	55	332	165

NB:
(a) * 14 nationalities are included in these figures
(b) Figures include principal applicants and dependants
(c) It is not the practice of the Government to publish specific statistics where small numbers are involved, as this may lead to the identification of individual applicants. This could result in harm to such individuals or their relatives in their source country and thus would be in breach of Australia's obligations under the 1951 Convention and 1967 Protocol relating to the Status of Refugees.

7 Evidence, p. S646.

7.10 Sections 88(8) and 89(8) of the Migration Act provide that persons taken into custody while on board their vessel or within the airport confines are taken not to enter Australia unless they are granted entry permits. Border claimants detained on board a ship or within an airport have not entered Australia in law even though they are physically present in Australia. Undocumented boat or ship arrivals are termed 'prohibited entrants' (section 88). There is no descriptive term given for undocumented airline arrivals. Those who disembark from their ship or boat in Australia, or who manage to leave a proclaimed airport without going through immigration controls, have entered Australia, but they are illegal entrants because they have entered without obtaining entry permits (section 14(1)). Prohibited entrants are those boat arrivals whom an authorised officer reasonably believes would become illegal entrants if they were to enter Australia (section 88).

7.11 According to DILGEA, persons detained at the border are 'on the international side of the border'.[8] DILGEA does not claim that such entrants are therefore outside Convention or domestic law protection. Nevertheless, as the following example of French border legislation illustrates, such phrases are ambiguous. France has sought to rely on a legal fiction that passengers in transit lounges are not within their sovereign territory and, therefore, are not protected by the Refugee Convention or the European Convention on Human Rights. In February 1992, their Constitutional Council declared that laws aimed at detaining foreigners in such international transit zones where French laws do not apply were unconstitutional.[9] A modified version of this arrangement, to be called 'waiting zones', was reintroduced in June 1992 and includes certain legal guarantees for asylum seekers.[10]

7.12 The significance of the Australian distinction between those who have or have not entered is shown in the following sections dealing with border asylum referrals, processing and detention. In this chapter, the Committee takes border claimants to include those who have not 'entered' Australia, as well as those, like the Chinese on the boat Isabella, who are illegal entrants detained not at the border but soon after entry.

8 Evidence, p. 1288.

9 see N G Etzwiler, 'The Treatment of Asylum Seekers at Ports of Entry and the Concept of International Zones', European Information Network; *Migration News Sheet*, May 1992, p.7.

10 *Migration News Sheet*, July 1992, p. 6 - The text states that asylum seekers may be held in waiting zones only if it appears that their cases are manifestly unfounded.

Referral of border claims

7.13 The action of officials responsible for immigration border control is of central importance in refugee protection. It is the first step of the on-shore refugee and humanitarian determination process.

7.14 Under Australian migration law, there is no legal requirement for border claimants to be referred to DILGEA for a decision on their refugee claims. In practice, however, Australia 'accepts that it has an obligation not to return a person to a country of alleged persecution without examining the claim'.[11]

7.15 In this regard, DILGEA referred in evidence to the case *Azemoudeh v MIEA* (1985) 8 ALD 281, in which an Iranian Christian, a transit passenger, who was a border refugee claimant was summarily returned to Hong Kong and from there back to Iran. DILGEA stated:

> After that case, the Government gave an undertaking that it would not repeat that process without giving the person who arrived at the border a formal hearing.[12]

7.16 Prior to the *Azemoudah* case, DILGEA had taken the position that a transit passenger with entry authority to another protection country should continue his or her journey. DILGEA's present practice is to consider all claims made in Australia.[13]

7.17 International standards for the protection of asylum seekers make it clear that border officials must refer all asylum applications to a central authority for determination. In its Handbook, the UNHCR states:

> The competent official (eg immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments [and] should be required to ... refer such cases to a higher authority.[14]

11 Evidence, p. 1274.

12 Evidence, p. 1274.

13 Evidence, pp. 1282-1283.

14 Conclusion 8 (xxviii) adopted by consensus in 1977 in the Executive Committee of the UNHCR, UNHCR Handbook, paragraph 9.

7.18 The Council of Europe recommended in a 1981 directive to its members that:

> Clear instructions for dealing with asylum requests with a view to their being forwarded to the central authority shall be given to the authorities responsible for frontier control. These instructions shall in particular ... require these authorities to provide the central authority with all possible information with a view to examination of the request.[15]

7.19 Legislation in the UK and Canada, for example, requires border officials to refer refugee claims to the determining authority, including, in the UK, claims which might give rise to a finding of refugee status. Such legislation cannot guarantee refugee claimants are not returned without proper examination and determination, but it is a safeguard to minimise the risk of such errors or bad practices.[16]

7.20 In Australia, there is no legislative requirement for referring border refugee claims as in the UK or Canada. Arguably, there is not the same need for such legislative strictures. Australia's border refugee claimants are more often well publicised boat arrivals and not the steady stream of land and air travellers as in Europe and North America. DILGEA told the Committee:

> ... all people who are seeking the protection of Australia, in our experience, make it very clear the moment they arrive on our territory that they want asylum. ... All people have to do is say they are seeking protection. It does not matter whether they have got documentation or not, they are given full process.[17]

7.21 DILGEA assured the Committee that because the numbers of border claimants are not high, the task is 'easy for us'.[18] Refugee claims are referred in 'all cases'.[19]

15 Council of Europe Recommendation R (1981) 16 on the Harmonisation of National Procedures Relating to Asylum.

16 see Amnesty, op cit, concerning the removal of Kurds without investigation or determination of their refugee claims.

17 Evidence, pp. 1275-1276.

18 Evidence, p. 1276.

19 Evidence, p. 1277.

7.22 Australia's procedures for dealing with persons who arrive without valid visas and who are refused entry to Australia were set out in the International Movement Control Manual. However, DILGEA noted that the manual is substantially out of date, and is being replaced progressively by Procedures Advice Manual topics and Policy Control Circular Instructions.[20]

7.23 In evidence to the Committee, DILGEA stated:

> If people arrive without documents at an airport, normally compliance action will follow to remove them from Australia. They will need to make that indication [that they are refugees], as they do now, immediately on arrival. That means before that action which, in some cases, would mean putting them back on the plane that they arrived on.[21]

7.24 DILGEA also stated:

> The officers who man the border do not consider the claims of refugee applicants. The instructions to officers are to refer the applicants to the officers of the determination of refugee status section for examination. The role of officers at the border is to examine documents, to issue entry permits, or to refuse entry to people who are not permitted entry. Where a [refugee] claim is lodged by people at the border, the process of turning them around or removing them from Australia is halted and the people are taken into custody pending an examination of their claims by the determination of refugee status area.[22]

7.25 This evidence was given by DILGEA in response to claims by AIA that border officials initially attempted to dissuade a person from making a refugee application when the person was detained at Sydney airport. The person made and was granted refugee status.[23] AIA did not disclose any specific details of the case. The person had not given permission to reveal his identity.[24] DILGEA advised that it had contacted AIA on two occasions, but that AIA had declined to give any specific

20 Evidence, p. S637.

21 Evidence, p. 1614.

22 Evidence, p. 1272.

23 Evidence, pp. 1125-1126.

24 Evidence, pp. 1134-1136.

information which would have enabled DILGEA to investigate the allegation.[25] DILGEA stated:

> ... we cannot do any more than stress that our instructions are clear. We do not turn people around who have a claim for refugee status until that claim has been examined and determined.[26]

7.26 To emphasise its concern about border refugee referrals, DILGEA circulated all its State Directors and the Northern Territory Director concerning the substance of AIA's allegations. The Directors were required to remind all staff with responsibility for entry control of their obligations to refugee claimants. In that letter, which was sent on to the Committee, DILGEA stated:

> Where a person claims refugee status, or provides information that indicates that the person is a refugee, the decision to remove the person or person's family from Australia must await consideration of the refugee claim.[27]

7.27 As no further evidence on this matter was put before the Committee, AIA's allegations were not pursued.

Conclusions

7.28 The Committee is mindful of the UNHCR advice that border immigration officials play a crucial role facilitating the claim for protection from border claimants and preventing their return to countries where they fear persecution. Therefore, it is essential that all border officials be given clear instructions on dealing with refugee claims. In the Committee's view, it is important that such instructions are clearly identified. It is the responsibility of DILGEA to ensure that any instructions relevant to border refugee claimants are highlighted prominently in all procedural advice and other relevant information provided to border officials.

7.29 The Committee is concerned that there has been a long period of time when border officials were required to rely on outdated instructions in the International Movement Control Manual. The manual, which still is listed in DILGEA's current instruction system, was published in 1983. It was not amended on or after 19 December 1989. The letter to DILGEA Directors sent on 16 July 1991

25 Evidence, p. 1274.

26 Evidence, p. 1271.

27 Letter of 16 July 1991 from W J Gibbons, Deputy Secretary, DILGEA to DILGEA State Directors.

stated that border refugee matters ' will be set out in detail in a revised instruction on refusal of entry, which will be issued in the near future'. Those instruction were published on 19 September 1991.[28]

7.30 The Committee also is concerned that existing instructions for dealing with border refugee claimants are not as clear as they could be, nor are they highlighted prominently. Recent policy control instructions emphasise the refugee claimants' obligations to lodge timely applications, rather than the immigration officers' obligation to ensure that border refugee claimants are not returned without consideration of their claims for protection. Chapter 5 of the International Control Manual, entitled 'Refusal of Entry', makes no specific reference to the procedure for dealing with refugee claimants. Indeed, in one of the few references to refugee claimants at paragraph 5.6.3, it is stated simply that:

> if ... there is a situation which cannot be dealt with quickly and custody is necessary, such as, for example, with a group of people claiming to be refugees, requirements should be deferred until investigations, ... serving of interviews etc have been completed.

Recommendation

7.31 The Committee recommends that:

> **21. the Department of Immigration, Local Government and Ethnic Affairs ensure that any instructions relating to the recognition, referral and processing of border refugee claimants be kept up to date, be stated in detail and highlighted prominently in all procedural advice and other relevant information provided to border immigration officials.**

Processing procedures

7.32 When border claimants identify themselves as refugees, various procedures are set in train. DILGEA informed the Committee that most people seeking asylum at the border have no documentation, that is no visa or identity documents.[29] Boat arrivals are not visaed. A common occurrence with airport

28 Policy Control Instruction Numbers 1789 and 1790 (19 September 1991), and 1798 (13 December 1991).

29 Evidence, p. 1275.

arrivals is to board the aircraft with documents but then to dispose of them en route.[30] Such unidentified persons cannot be turned around immediately on arrival.

7.33 Those arriving without documentation are referred at first to DILGEA's compliance section. Officers from that section interview them to establish their identities and their circumstances. Under the new, expedited processing arrangements from May 1992, such refugee claimants then would sign a simple declaration that they have come to Australia and are seeking refugee status. As soon as practicable, generally within a few days, they would attend a comprehensive assessment interview, which should give the interviewer all the information necessary to make a decision. Then there is a period of a further few days during which the applicant is informed if the decision will be negative. The applicant is given three days in which to reflect and provide any additional information which might assist his or her claim.[31]

7.34 At the end of the initial interviewing period, the applicant is given a firm, primary decision. Seven days is provided for the claimant to consider and lodge an application for review. Another seven days is provided to prepare the review application for the RSRC, which likewise is organised to give a quick decision. DILGEA stated that this model allows border claims to be processed within approximately two months. DILGEA claimed:

> We are confident that this procedure retains quite adequate procedural fairness and elements of natural justice. That is the judgement that we are putting forward ... we believe it is reasonably fair.[32]

7.35 The expedition of border claims reflects the maximum priority given to their processing. DILGEA noted:

> ... it is in the interests of everybody - the claimant himself and others involved, the receiving community, if the decision process is begun as quickly as possible and completed as quickly as possible.[33]

7.36 Specific evidence was received by the Committee in relation to the processing of various boat arrivals in Australia. This is discussed in detail at paragraph 7.81.

30 Evidence, p. 1277.

31 Evidence, pp. 1615-1616.

32 Evidence, p. 1617.

33 Evidence, p. 1619.

7.37 The recent emphasis on an expeditious processing system for border claimants reflects the view that refugee claimants should not be held in detention for excessive periods of time. The recent experience of the Cambodian border claimants has added weight to the arguments against lengthy detention. The remaining sections of this chapter deal with detention arrangements both from an international and an Australian perspective.

UNHCR guidelines on detention

7.38 Before considering Australia's detention arrangements for border refugee claimants, the Committee surveyed international law and practice concerning such detention.

7.39 Under Excom Conclusion No. 44 on the Detention of Refugees and Asylum Seekers, the UNHCR advised that detention of refugee claimants should normally be avoided. If necessary, detention may be resorted to but only on grounds prescribed by law to:

- verify identity;
- determine the elements on which asylum claims are based;
- deal with cases where asylum seekers have destroyed or presented fraudulent travel and/or identity documents; or
- protect public order or national security.

7.40 According to the UNHCR, detention measures taken against asylum seekers should be subject to judicial or administrative review.[34]

International practice on detention

7.41 There is a variety of international practice concerning the detention of asylum seekers. In the UK, people arriving at the border seeking asylum may be granted temporary admission and released into the community, or detained pending a determination of their claim. Asylum seekers may be detained indefinitely pending a Home Office determination of their asylum claim.[35] The UK Immigration Act does not specify the grounds on which a person may or should be detained. There is no provision for a detainee to appeal against the decision of an immigration officer

34 Conclusion 44 (xxxviii) adopted by consensus by the Executive Committee of the UNHCR.

35 Schedule 2 of the 1971 Immigration Act enables the detention of asylum seekers pending their examination and pending a decision to give or refuse leave to enter.

refusing bail. However, under Schedule 2 (paragraph 22) of the 1971 UK Immigration Act, if a decision on an application to enter the UK has not been reached within seven days, detainees may apply to an Immigration Appeals Adjudicator to be released on bail. Adjudicators are not required to give reasons for refusal of bail. They normally require two sureties of £1,000 or more before granting bail.[36]

7.42 The number of refugee claimants detained in Britain has increased steadily in recent years. Amnesty has recorded that in 1986, 125 asylum seekers were detained for a month or more. In 1987, there were 449 detained for 14 days or more. Due to overcrowding in prisons and detention centres, some were held for four months on board a converted car ferry moored in Harwich harbour. During May and June 1989, when some 3,000 Turkish Kurds applied for asylum at British ports, 300 of them were detained for periods ranging from one day to five months. In February 1991, there were 110 asylum seekers detained for one month or longer.[37]

7.43 The Canadian Immigration Act provides that persons may be detained while awaiting examination at the point of entry if they are considered to be a danger to the public, or if they are unlikely to appear when required. An immigration officer must detain anyone seeking to enter Canada who cannot confirm his or her identity, or who is suspected by the Deputy Minister as being a security risk. The detention of each claimant must be justified at a regular weekly detention review. At this review, it is possible for an adjudicator to order the release of the detainee. A senior immigration officer may also release a detainee.[38]

7.44 In the USA, the Select Commission on Immigration and Refugee Policy, in its 1981 report, recommended the detention of asylum seekers.[39] The Commission recommended that processing centres be set up for 'mass asylum' emergencies. Their plan was for centres to be staffed with expert asylum adjudicators who would expeditiously and uniformly process asylum applicants. In support of this recommendation, the Select Commission noted that:

> ineligible asylum applicants would not be released into communities where they might later evade efforts to deport them or create costs for local government;

36 Amnesty International, op cit, pp. 36-37.

37 ibid.

38 Employment and Immigration Canada, *Immigration Manual*, Chapter 2, Port of Entry Controls.

39 Select Commission on Immigration and Refugee Policy, *US Immigration Policy and the National Interest*, 1981.

> . a deterrent would be provided for those who might see an asylum claim as a means of circumventing United states immigration law; and
>
> . applicants would not be able to join their families or obtain work while at the processing centre.

7.45 In 1981, the United States Immigration and Naturalisation Service (INS) began detaining systematically Haitians entering the USA until their status was determined. In 1982, this new detention rule was published formally in the Federal Register. The rule was extended to all asylum seekers arriving undocumented.[40]

7.46 In the USA, border claimants who have not 'entered' must be held in detention. The language is mandatory:

> Every alien ... [there are certain limited exceptions] ... who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer.[41]

7.47 Current INS regulations make detention mandatory for aliens who arrive at the border without any documentation or with facially false documentation. The Attorney-General, however, has a discretion to 'parole' temporarily into the community, 'for reasons deemed strictly in the public interest', aliens who arrive with documentation but appear to be inadmissible. Detention of documented arrivals who appear to be inadmissible depends upon whether the inspecting officer determines that they would be likely to abscond or pose a security risk if paroled.[42]

7.48 RACS informed the Committee of a 'successful scheme' of community release for asylum seekers trialled in New York, Miami, Los Angeles and San Francisco, and now implemented nationally. In the program, aliens are released into the community pending resolution of their asylum claims. To be eligible for release aliens must establish their identity, have lawyers or accredited representatives, and have jobs and residence while their case is pending. Aliens also must:

> . agree in writing to report monthly to the immigration centre;
>
> . appear at all hearings before an immigration judge;

40 A C Helton, *op cit*, p. 7.

41 P Wicham Schmidt, 'Detention of Aliens', *San Diego Law Review*, vol. 24, 1987, p. 310.

42 ibid, p. 311.

- *return to detention if parole ends;*
- leave the country if exclusion is ordered; and
- post a bond of $500 to $2500.[43]

7.49 The Committee was unable to obtain data on the numbers of asylum seekers detained in the USA or Canada.

Australian detention arrangements

7.50 The legal status of border refugee claimants becomes significant in the context of Australia's detention arrangements for such claimants.

7.51 Under the Migration Act, prohibited entrants (undocumented boat arrivals), those detained in airports and illegal entrants can be detained in custody (sections 88, 89 and 92). The Migration Act does not set down a mechanism for a prohibited entrant or airport arrival to obtain bail. The statutory provisions state that authorised officers may direct such claimants to be kept in custody. The term of custody for boat and airport arrivals is different. Boat arrivals 'may be kept in such custody as the authorised officer directs ... until departure of the vessel from its last port of call in Australia or until the person is granted an entry permit or until such earlier time as an authorised officer directs' (section 88(1)). Airport detainees 'may be kept in custody until the person is removed from Australia or granted an entry permit' (section 89(1); 7(B)). As the discretionary term ('may') in the statute indicates, the authorised officer or a court in AD(JR) proceedings also may order the claimant's release from detention.

7.52 For those who have entered Australia and who are arrested and detained as illegal entrants, section 92 requires that they be taken before a 'prescribed authority', generally a magistrates court, within 48 hours of, or as soon as practicable after, being arrested. The court may authorise the continued detention of the entrant if the court is satisfied that there are reasonable grounds for supposing that the person is an illegal entrant. Otherwise, the court shall order the person's release (section 92(4)). Where detention is ordered, the term of detention must not exceed seven days, unless the person consents.

7.53 This distinction, arising from the differing status of border claimants and illegal entrants, was illustrated dramatically by the bail appearances in the Darwin magistrates court of Chinese refugee claimants, all illegal entrants, from the Isabella vessel.

43 Letter of 27 August 1991.

7.54 While the distinction between border claimants and illegal entrants is an important one, it has become blurred, at least in respect of certain border claimants arriving by sea, because of recent amendments to the Migration Act.

7.55 In June 1991, the Migration Act was amended to allow the Minister to gazette nominated processing areas to which 'unprocessed persons' may be taken until such time as their claims are determined. Explaining the relevance of these amendments, DILGEA stated:

> It creates a status of unprocessed person on the international side of the border and enables us to hold people in a form of administrative detention, which is much looser than the formal detention arrangements that exist at the moment, while their cases are examined. The place of detention could be anywhere gazetted by the Minister - it could be a hostel, it could be a facility at Broome or wherever it is needed.[44]

7.56 This amendment concerned only border claimants who had not 'entered' Australia. Under section 54D of the Migration Act, an unprocessed person becomes a 'prohibited person' if he or she:

- gives a written request to leave Australia to an authorised officer;
- does not apply for an entry permit before the end of the prescribed period; or
- is refused an entry permit (section 54D).

7.57 A prohibited person must be removed from Australia as soon as practicable, and may be kept in custody until such removal (section 54F).

7.58 DILGEA explained that these amendments were necessary because of the lengthy processing delays experienced with border refugee claimants. The old provisions in sections 88 and 89 were 'designed for rapid determination of cases at the border and for rapid turnaround'.[45] According to DILGEA:

> When [the Migration Act] was drafted in 1958 it was not considered that we would have to hold people at a border situation for months, sometimes years.[46]

44 Evidence, p. 1288.

45 Evidence, p. 1288.

46 Evidence, p. 1288.

7.59 Recent amendments to the Migration Act (6 May 1992) legislate another custody arrangement for border claimants. This time the class of persons affected are termed 'designated persons'. They are non-citizens who have been on a boat in the territorial seas of Australia after 19 November 1989 and before 1 December 1992, who are in Australia, and who have not presented a visa and have not been granted an entry permit (section 54K). The designated person class includes boat arrivals who have not 'entered' Australia, and boat arrivals who landed in Australia and who are in law 'illegal entrants'.

7.60 For such designated boat arrivals, the distinction between illegal entrants and prohibited entrants has lost its legal significance. Border illegal entrants, such as the Isabella group, could no longer be given bail under section 92 of the Migration Act. All designated boat arrivals, whether illegal entrants or border claimants, must be kept in custody unless or until they are removed from Australia or granted an entry permit (section 54L). Designated persons cannot be released from custody by court order (section 54R).

7.61 The custody period for designated persons in Australia begins from 7 May 1992, when the provisions came into effect. The provisions in the Migration Act which provide that designated persons be detained in custody or in certain circumstances be removed from Australia do not apply if a designated person has been held for 273 days in application custody. The 273 day clock ceases to run whenever one of the following is happening:

- DILGEA is waiting for information relating to the application to be given by a person who is not under the control of DILGEA;
- the dealing with the application is at a stage whose duration is under the control of the person or of an adviser or representative of the person;
- court or tribunal proceedings relating to the application have begun and have not been finalised; or
- continued dealing with the application is otherwise beyond the control of DILGEA (section 54Q).

7.62 The purpose of the new provisions is noted in the legislation itself. At section 54J of the *Migration Amendment Act 1992*, it is stated:

> This Division is enacted because the Parliament considers that it is in the national interest that each non-citizen who is a designated person should be kept in custody until he or she:
>
> (a) leaves Australia; or

> (b) is given an entry permit.

7.63 Introducing the new provisions in the House of Representatives, the Minister stated:

> I believe it is crucial that all persons who come to Australia without prior authorisation not be released into the community. Their release would undermine the Government's strategy for determining their refugee status or entry claims. Indeed, I believe it is vital to Australia that this be prevented as far as possible. The Government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community.[47]

7.64 The Minister indicated that the legislation is only intended to be an interim measure aimed at a specific class of persons, and designed to address the pressing requirements of the existing situation. The Minister foreshadowed a more comprehensive program of legislative amendment to be implemented in the near future.[48]

7.65 One factor relevant to the Government's strict approach to detention is the cost of locating and detaining or deporting absconders. In answer to a question on notice in the Senate on 21 November 1989, the then Minister, Senator Robert Ray, advised that the average cost, excluding court costs, associated with locating and deporting a prohibited non-citizen was $9,000.[49]

Conclusions

7.66 Although the latest legislation is intended as an interim measure, it has added to the complexity of the border arrangements. There are a confusing array of provisions focused not so much on the status of the person as their mode of arrival in Australia. There also is a variety of terms now used to describe border claimants. These terms often carry little if any legal significance. A border claimant can be a prohibited entrant and an unprocessed person and a designated person. The effect of all these terms is simply to permit the Government to order and control the detention of border claimants.

7.67 A further complication arises with illegal entrants who enter undetected and who lodge refugee claims. Some such illegal entrants, like the Isabella group, are also designated persons and are unable to obtain release during

47 Parliamentary Debates (Hansard), House of Representatives, 5 May 1992, p. 2371.

48 ibid, p. 2372.

49 Parliamentary Debates (Hansard), Senate, 21 November 1989, p. 2970.

processing. Other illegal entrants claiming refugee status almost immediately after entry, say within one day, such as in the *Somaghi* case (see paragraph 4.61), may insist on being brought before a magistrate to consider bail every seven days. The overall effect is confusing. The level of complication is largely unnecessary.

Recommendation

7.68 The Committee recommends that:

22. the provisions in the *Migration Act 1958* relating to the detention arrangements for border claimants be rewritten in a simplified and comprehensible manner. The rewritten provisions should not make legal distinctions concerning custody of border claimants based on the mode of transport which they have used to travel to Australia or their method of arrival in or at Australia. The rewritten provisions also should not use a variety of terms, for example prohibited entrant, prohibited person and designated person, to describe the same or similar class of persons. Rather, the provisions should use, as far as possible, a single descriptive term for border applicants.

Detention statistics

7.69 During the course of the inquiry, the Committee sought information from DILGEA about the numbers and profile of asylum seekers being held in detention in Australia, including the time held in detention and the time taken to lodge applications for refugee status.

7.70 On 12 June 1992, DILGEA advised that 478 persons held in detention had applied for refugee status. Of those persons, 57 either lodged their claims for refugee status at the time of or after being located by DILGEA compliance officers, or were detained on arrival at an air or shipping port. The other 421 persons were boat arrivals and their children.[50]

7.71 In total, 460 unauthorised boat persons, in 11 boats, arrived on Australia's shores between November 1989 and May 1992 (see Table 7.3). Since their arrival, 17 children have been born to these persons. The children are being held in detention with their parents. Of the 460 arrivals, 18 have been repatriated, four have left Australia voluntarily, one has been resettled in New Zealand, one has left for the USA, one has been approved for residence, seven have been granted refugee status, and 24 have absconded and remain at large in the community. That has left 421 in detention, including the 17 children born in Australia.[51]

50 Evidence, pp S912-S913.

51 Evidence, pp. S913, S915.

7.72 Cambodians feature as the main nationality group currently held in detention in Australia (see Table 7.4).[52]

7.73 These detainees are held mainly in migration detention centres located in Sydney (Villawood), Melbourne (Maribyrnong), Perth and Port Hedland. Some detainees are held in prisons, remand centres and other facilities where movement is restricted (see Table 7.5).[53]

7.74 In relation to the 57 non-boat arrivals currently held in detention, the majority have been in detention for periods of less than 18 months. Some are being held in prisons on criminal charges. Ten have been in custody from various months in 1991. Forty-three have been held since the first half of 1992. The longest period in detention has been three years and five months. This has occurred where the claimants lodged appeals to the Federal and full Federal Courts.[54]

7.75 With regard to the 421 boat arrivals currently held in custody, the longest period in detention has been 2 years and 7 months. Those persons are the Pender Bay boat arrivals. Other detainees have been in custody since the arrival of their boats (see Table 7.3).[55]

7.76 For boat arrivals, the intervals between the dates of detention and the lodgement of applications for refugee status have not been uniform. While some applications for refugee status were lodged within a month of the boat arriving, other applications have taken up to 18 months to be lodged. Figures provided by DILGEA in September 1991 indicate that out of 215 persons, 69 lodged their applications for refugee status within four weeks of being detained, 91 took six weeks, and 51 took eight weeks or more. In some cases, applicants arriving on the same boat have three months difference in the dates of lodgement of their applications.[56] The months in which the applications typically were lodged are indicated at Table 7.3.

52 Evidence, p. S914.

53 Evidence, pp. S916-S918.

54 Evidence, p. S912.

55 Evidence, p. S912.

56 Evidence, p. S912.

TABLE 7.3[57]

Unauthorised Boat Arrivals: November 1989 to March 1992

Boat	Arrival date and location	Nationality of passengers	Date of lodgement of refugee applications
Pender Bay	28.11.89 Broome	25 Cambodians 1 Vietnamese	December 1989
Beagle	31.3.89 Broome	117 Cambodians 2 Vietnamese	May 1990
Collie	1.6.90 Darwin	79 Cambodians	May, Sept, Oct, Dec 1991
Dalmatian	4.3.91 Darwin	24 PRC 9 Vietnamese	October 1991
Echo	6.3.91 Darwin	35 Cambodians	July, Aug, Sept 1991
Foxtrot	24.3.91 Darwin	1 Indonesian 2 Bangladeshi	none lodged
George	26.4.91 Darwin	57 Cambodians 18 Vietnamese 2 PRC	June, Nov 1991
Harry	9.5.91 Darwin	10 Vietnamese	October 1991
Isabella	31.12.91 Swiss Bay	56 PRC	January 1992
Jeremiah	6.5.92 Darwin	10 PRC	May 1992
Kelpie	22.5.92 Darwin	12 Poles	May 1992
TOTAL		460	

57 Evidence, p. S915.

TABLE 7.4[58]

Nationality of persons held in detention as at June 1992

Cambodian	306
PRC	83
Vietnamese	27
Polish	12
Iranian	7
Somali	7
Fijian	6
Pakistani	4
Indian	3
Indonesian	3
Sri Lankan	3
Albanian	2
Bangladeshi	2
Lebanese	2
CIS	2
Other	9
Total	478

TABLE 7.5[59]

Location of detainees as at 12 June 1992

Location of detention	Number of detainees
Port Hedland (WA)	292
Villawood (NSW)	139
Maribyrnong (Vic)	15
Darwin (NT)	12
Roebourne (WA)	10
Fremantle (WA)	6
Adelaide (SA)	1
Parramatta (NSW)	1
Westbridge (NSW)	1
Albany Prison (WA)	1
Total	478

58 Evidence, p. S916.

59 Evidence, p. S916.

Community comment on detention

7.77 RACS (New South Wales) expressed concern to the Committee about the lengthy periods some asylum seekers were spending in detention. RACS argued that the practice of detaining asylum seekers for long periods of time was unnecessarily punitive in some cases and costly to the Department. RACS recommended that a temporary entry permit should be granted to asylum seekers identified as having a claim of substance, subject, if necessary, to appropriate reporting conditions.[60]

7.78 From a broader perspective, AIA suggested that the detention of asylum seekers in Australia may not be in accordance with international standards. It stated:

> AIA notes the clear presumption in international standards that the detention of asylum seekers should normally be avoided and should be resorted to only where necessary. ... Given this presumption, the burden lies with the government detaining asylum-seekers to demonstrate legitimate grounds and necessity (ie. that there is no alternative) for the detention of asylum-seekers.[61]

7.79 AIA expressed concern that there were no specific grounds for the detention of asylum seekers in Australian law. It also was concerned about detention being automatic, and about there being no alternative. AIA stated:

> Our suggestion is not that there be no detention, our suggestion is that detention be properly regulated and prescribed and that it be subject to a proper review and that all people should be entitled to those review processes. And where it is found to be unnecessary and alternatives to detention are available, they should be used.[62]

60 Evidence, p. S660.

61 Evidence, p. S92.

62 Evidence, p. 279.

7.80 AIA suggested that a major underlying reason for keeping asylum seekers in custody, regardless of the necessity of detention, is so that the costs of removal and custody can be recovered from the carrier.[63] It argued against the use of detention as a means of discouraging further border claimants. DILGEA, in contrast, regards detention as a major disincentive for border claimants.[64]

Detention and processing of boat arrivals

7.81 As an illustration of the procedures relevant to the detention and processing of border claimants, the Committee received specific evidence in relation to recent boat arrivals. While some of the evidence highlighted difficulties which have arisen, other evidence suggested mechanisms for facilitating the processing of refugee applications from border claimants.

7.82 One of the principal concerns in relation to the Cambodian boat arrivals was the time taken to prepare and lodge their applications for refugee status. When the Committee visited Darwin in April 1991, the applications for refugee status from the Cambodian boat arrivals in detention there were yet to be lodged, even though the Cambodians had been in detention for up to 15 months. The Committee was told about a range of difficulties which had been encountered and which had led to delays in the preparation of the applications.

7.83 First, there was the problem of the lawyers assisting the Cambodians only being available on a volunteer basis, outside of normal working hours. One lawyer told the Committee:

> ... five or so of us started out working on 70 applications. Most of us have jobs and families and first off we were driving some 100 kilometres out of Darwin to interview people at weekends, with very scanty access to interpreters.[65]

63 Evidence, p. S92.

64 Evidence, p. 1289.

7.84 Secondly, the lawyers who volunteered their services lacked experience in immigration law. One lawyer stated:

> Most of us had not dealt with the peculiar problems of applying for refugee status before. .... For myself, I can only say that I was a complete novice with immigration law and I am still not much the wiser, trying to keep up with the small area I have been involved in.[66]

7.85 Thirdly, it was claimed that there were problems in accessing interpreters. One lawyer told the Committee that, in the main, only one professional interpreter was available, with occasional volunteer interpreters. The Committee was advised that the interpreter was shared with DILGEA officers, who needed the interpreter on various occasions, such as trips to the doctor. One lawyer stated:

> You could not just sit in front of someone who had just arrived from Cambodia without an appropriate interpreter, particularly because the form requires someone to speak English and Cambodian at a high level. We could not use people who had even average English skills. They really had to be good interpreters to make sure they were getting the precise information.[67]

7.86 In response, DILGEA indicated that one to two interpreters had been made available, but had to be withdrawn because they were not being used. DILGEA stated:

> ... we were paying the bill to keep one or two interpreters in Darwin; it did not worry us when they worked. There must have been some breakdown in the process because if the lawyers wanted the interpreters to work on a Sunday or in the evenings, it would not have worried us. They were being paid, and they were doing nothing else.[68]

7.87 DILGEA also indicated that the Minister was concerned that undertakings given by voluntary agencies and lawyers acting in a voluntary capacity were not followed through.[69]

66 Evidence, p. 1090.

67 Evidence, p. 1088.

68 Evidence, p. 1313.

69 Evidence, p. 1301.

7.88 A fourth factor cited as delaying the preparation of the refugee applications was the time taken to gain the confidence of the Cambodians. The Committee was told that, because of the trauma which the Cambodians had experienced, it took them some time to adjust to their new environment and to understand the processes for seeking and gaining asylum. The Darwin Citizens for Support of Cambodian Boat People stated:

> However streamlined the procedures, in cases like this it will take time for people to be in a position where they can articulate what their situation is. Interpreters have to be sensitive, but it is also a psychological case that the people themselves who are making the application may need time to work out where they are and what is happening to them and how to explain what there situation has been ... in this case generally, despite the problems of time and interpreters, the applicants themselves needed half a year to get their stories out and to be confident to tell their stories.[70]

7.89 Finally, the lawyers acknowledged that the group's decision to submit all applications at the one time also caused delays in the process.[71]

7.90 RCOA gave evidence of similar difficulties experienced by RACS in Victoria, which acted for Cambodian boat arrivals who were initially held in detention in Melbourne, but who were later transferred to Sydney. RCOA indicated that as no resources were initially made available to RACS, the work had to be done after normal working hours by volunteers, so as not to disadvantage existing clients. RCOA stated:

> It would be reasonable to argue that had funds been made available in early 1990 when the boat first arrived ... the applications could have been processed within months, not years as has happened.[72]

7.91 RCOA outlined the following chronology of events in relation to the Cambodian boat arrivals:

- March 1990: boat arrived;
- May 1990: applications completed by DORS staff;
- May-June 1990: all clients interviewed by DORS;

70 Evidence, p. 1092.

71 Evidence, pp. 1089-1091.

72 Evidence, p. S900.

- July-August 1990: trial audit of eight cases by RACS revealing discrepancies between information obtained by DORS and RACS;
- September-October 1990: agreement for RACS to interview all applicants;
- October 1990: RACS recruit volunteer staff for interviewing;
- December 1990: only 20 clients interviewed and DORS expresses concern that process is moving too slowly;
- January 1991: DORS and RACS agree to deadline of June 1991 for submission of primary applications;
- June 1991: first negative assessments received;
- August 1991: asylum seekers moved from Melbourne to Sydney and agreement reached with DILGEA to enable continuity of legal advice;
- September 1991: first primary decisions received with remaining decisions coming regularly thereafter; and
- April 1992: review decisions anticipated (and received).[73]

7.92 RCOA indicated that the determination process itself has often been the cause of difficulties which may have been experienced in dealing with the Cambodians. RCOA commented:

> It has been reported by RACS Victoria that their clients in Sydney, almost without exception, have been extremely co-operative. It has been noted that many have had difficulty coming to terms with the process, the delays and the seemingly endless round of interviewing by DORS and RACS. Sometimes this presents as non-compliant behaviour but is recognised by the legal advisers that this is symptomatic of their frustration rather than representing any reluctance to co-operate.[74]

7.93 In addition to the above evidence, the Committee was told about interview techniques allegedly adopted by some DILGEA compliance officers in the initial compliance interviews for recent boat arrivals. It was claimed that when some

73 Evidence, p. S898.

74 Evidence, p. S899.

boat arrivals were interviewed by compliance officers, they were questioned about the activities of other passengers on board the vessel, in particular whether those passengers had been involved in criminal activities.[75]

7.94 Concerns were raised with the Committee about such alleged interviewing techniques. Concerns also were expressed that in some cases departmental officers who attended or were involved with the compliance interviews subsequently made the determinations on grant of refugee status for the same group of people. It was felt that, as a result of their involvement in the compliance interviews, such officers may have formed a prejudiced view of the applicants.[76]

7.95 In relation to the above, the Committee is firmly of the view that it is appropriate for DILGEA's compliance officers to investigate whether border arrivals have criminal associations, and whether their passage to Australia was organised or sponsored by persons as part of some international criminal activity. However, the Committee was concerned about allegations that certain border claimants were threatened with regard to their chances of staying in Australia if they did not co-operate in the provision of information regarding other passengers on their boat.

7.96 These allegations and concerns were put to DILGEA by the Committee. In response, DILGEA vehemently denied the allegations of impropriety in the compliance interview process. DILGEA stated:

> ... there is no question of that being improper or those procedures being exceptional.[77]

7.97 DILGEA explained that the purpose of a compliance interview is to 'establish those basic facts of who the people are, how they came here, where they came from and what their intentions are or what their motives are'. DILGEA commented:

> I would not characterise the process as interrogation; it is a process of interviewing. ... Sometimes the people are less than transparent in the information they put to us and some of them have been exposed in inconsistencies. It may be uncomfortable for them when those inconsistencies are put back to them, but I would not suggest that that is interrogation.[78]

75 In camera evidence, 15 June 1992 and 21 July 1992.

76 In camera evidence, 15 June 1992 and 21 July 1992.

77 In camera evidence, 15 June 1992, p. 134.

78 In camera evidence, 15 June 1992, p. 136.

7.98 As one example of such inconsistencies, DILGEA noted that on at least two occasions it was discovered that the group of boat arrivals were not the nationality they presented themselves as upon their arrival.[79]

7.99 As for the allegations that unfair, or even threatening, tactics were used to illicit information from boat arrivals about other passengers on the boat, DILGEA again denied any impropriety. DILGEA stated:

> Certainly, in dealing with interviewing, we do encourage people to be transparent and open with us but we do not engage in threats or intimidation.[80]

7.100 DILGEA indicated that where adverse information regarding an applicant is known or might be inferred to be known by the decision maker, natural justice requires that the applicant be given the opportunity to respond to that information or allegation. Referring to specific examples, DILGEA noted that some adverse material regarding certain boat arrivals was discovered at compliance interviews. DILGEA indicated that while that information had nothing to do with the group's claims for refugee status, it bore directly on the credibility of the group. As that information initially was not put to the persons concerned for response, there may have been a perception that there would be a bias or prejudice against individuals in the group. As a result, the primary interviews were repeated and any adverse material obtained in compliance interviews was put to the relevant applicants. Applicants were informed of the adverse information concerning them, and were given an opportunity to comment on that information and allegation.[81]

7.101 Concluding its evidence on the allegations put to the Committee, DILGEA noted that no complaint had been made to it about compliance interviews. DILGEA stated:

> While there have been complaints about conditions in detention centres and the question of custody, there has not been a formal complaint, nor to my knowledge an informal complaint, until what I heard [from the Committee] about the compliance process.[82]

79 In camera evidence, 15 June 1992, p. 136.

80 In camera evidence, 15 June 1992, p. 139.

81 In camera evidence, 15 June 1992, pp. 146-147.

82 In camera evidence, 15 June 1992, p. 337.

Conclusions

7.102 The allegations regarding compliance interviewing of border claimants were made to the Committee in camera. The Committee is not in a position to come to a view on these allegations. However, it considers that if these allegations are to be pursued further, formal complaints need to be lodged with DILGEA to enable a proper investigation.

Port Hedland

7.103 The Committee also received specific evidence on the detention facility at Port Hedland. On 24 October 1991, DILGEA advised the Committee that 80 Cambodians who had not submitted applications for refugee status were to be moved to a new processing centre at Port Hedland in order that their applications could be prepared expeditiously. DILGEA noted:

> In the case of the Cambodians the Minister has responded by moving them to Port Hedland. He has made arrangements to fly legal advisers and interpreters to Port Hedland and have a crash program to get all outstanding applications in as quickly as possible.[83]

7.104 The processing centre for undocumented arrivals was established at Port Hedland in August 1991. The centre is the former BHP single men's quarters at Cooke Point, north-western Australia. It covers an area of 3,374 hectares and contains 10 blocks of accommodation, an administrative centre, kitchen mess area and laundry facilities.[84]

7.105 DILGEA estimated that the base operating costs, that is for operating the centre without detainees but with a manager, groundsperson and property security officer, would be $417,400 in 1991/92 and $658,800 in a full year.[85] DILGEA also advised that the 1991/92 cost for holding boat people at the Port Hedland facility was $39.44 per person per day. This compares with $105.73, which is the daily cost of holding a person at the Villawood/Westbridge complex.[86] According to DILGEA, the daily amount for detainees at Port Hedland covers an appropriate Australian Protective Services custodial force, full-time interpreting and welfare staff, a nurse, medical, dental and hospital services as required, primary and

83 Evidence, p. 1485.

84 Evidence, p. S754.

85 Evidence, p. S754.

86 Evidence, p. S985.

secondary education for school age children and adults who are illiterate or innumerate, some additional English language tuition for adults, foodstuffs, and cleaning materials.[87]

7.106 On 12 June 1992, DILGEA noted that as at 29 May 1992 a total of 292 persons were held in detention at Port Hedland, including 177 Cambodians, 76 PRC nationals, 27 Vietnamese and 12 Poles.[88]

7.107 In its report on the situation of asylum seekers detained at the Port Hedland facility, a delegation of the Australian Council of Churches expressed a number of concerns about the centre and the length of detention of asylum seekers held there. In particular, it opposed the isolation of detainees at Port Hedland and recommended the replacement of the centre with an alternative site in Sydney and Melbourne. It also was critical about the lack of interpreters on the site, the lack of professional torture and trauma counsellors, and the lack of a clear understanding of the role of supervisors.[89]

7.108 Concerns about the location of the centre also were expressed in evidence to the Committee by RCOA and Australian Lawyers for Refugees Incorporated (ALRI). RCOA indicated that it would be preferable to locate a detention centre in a population centre where detainees could have easy access to independent advisers and welfare agencies.[90] ALRI commented that the isolation of the centre created difficulties both for ALRI and DILGEA in terms of the logistics and costs of moving people to Port Hedland. ALRI stated:

> ... if there were detention centres in Perth, Sydney or Melbourne, form our point of view it would be much easier for us to access those people and to provide continuity without the costs associated with having to locate our people all the way in Port Hedland.[91]

87 Evidence, p. S754.

88 Evidence, p. S918.

89 *Report to the Australian Council of Churches on the Present Situation of Asylum Seekers Detained at Port Hedland Reception and Processing Centre*, March 1992, pp. 1, 6 and 14.

90 In camera evidence, 21 July 1992, p. 234.

91 In camera evidence, 21 July 1992, p. 234.

7.109 At the same time, ALRI indicated that the isolation of Port Hedland enables lawyers to get on with the specific task of assisting border claimants with their applications for refugee status without the distractions which arise in the large population centres. ALRI stated:

> In Port Hedland one is able to focus on the task of bringing in lawyers and interpreters in order to complete it in a reasonable time by and large. We can get on with the business of helping them without being distracted by day to day issues back in the office of clients calling up, wanting this or that or cases being heard and so on.[92]

Legal assistance to border claimants

7.110 To assist in the task of preparing the applications for refugee status, DILGEA funded RCOA to provide legal advice for the Port Hedland detainees who arrived in Australia prior to the end of 1991. RCOA sent an initial team of lawyers to Port Hedland for four weeks between October and November 1991, in order to complete the primary applications. An additional team of lawyers was sent in February 1992 to assist with the natural justice consultation and appeal stages of the process.[93] DILGEA also funded ALRI to send a team of lawyers to Port Hedland to assist with the refugee applications of the *Isabella*, *Jeremiah* and *Kelpie* groups.[94]

7.111 RCOA told the Committee of the initial difficulties it faced in the establishment of its work. It was critical of the short time frames which were set both in terms of tendering for the project, and for the actual provision of the legal services. RCOA commented:

> Of concern to the Council is that what should have been a relatively simple procedure was made infinitely more complex because of the frequent changes to the project specifications and because of an apparent lack of understanding of what is involved in providing such a service.[95]

7.112 RCOA noted that it is difficult to find suitably qualified legal advisers at short notice, particularly as they are expected to relocate to Port Hedland. While expressing confidence in the lawyers which were eventually sent to Port Hedland,

92 In camera evidence, 21 July 1992, p. 191.

93 Evidence, p. S901.

94 In camera evidence, 21 July 1991, p. 163.

95 Evidence, p. S902.

RCOA warned that rigid time constraints may preclude selection of those lawyers who are best qualified to do the job. RCOA stated:

> It is important to recognise that we are dealing with a highly specialised area of law. Incompetent and/or inexperienced legal advisers can jeopardise an asylum seeker's claim and place a genuine claimant at risk of refoulement and all the consequences of this.[96]

7.113 In terms of their work at Port Hedland, RCOA noted that the lawyers encountered a number of administrative difficulties, ranging from faulty computer equipment to incorrect information about the type of interpreters needed. One of RCOA's principal concerns was the location of the offices provided for the use of the lawyers. RCOA indicated that because the lawyers were placed in offices immediately adjacent to DILGEA staff offices, it was difficult for the lawyers to convince their clients that they were independent and not working for DILGEA.[97]

7.114 Overall, though, RCOA is supportive of the concept of funding independent legal advisers to assist asylum claimants held in detention, both because of the better treatment which can be afforded to detainees and the time and the cost savings which can result. RCOA noted that, according to its estimates, the total cost of the legal service they provided at Port Hedland was roughly equivalent to the cost of four days detention for the group. RCOA commented:

> ... had independent legal advisers been funded from the outset to work with the asylum claimants as they have done with the Isabella group their period of detention would have been significantly less. The cost of this service not only would have been dramatically less than the cost of detention for two years but would undisputedly have been much more humane.[98]

7.115 ALRI also highlighted the positive role that legal advisers play in the determination process. It rejected suggestions that the involvement of lawyers made the process more adversarial. ALRI indicated that during the interviews between DILGEA officers and the refugee applicants, ALRI lawyers do not intervene unless an issue is not being addressed which in the lawyers' opinion should be addressed, or if the lawyers believe that the delegate is unduly harassing the applicant, or not conducting the interview in a fair manner. ALRI noted that their main involvement in the interview process comes after the initial questioning by the delegate, when an

96 Evidence, p. S902.

97 Evidence, p. S902.

98 Evidence, p. S905.

opportunity is given for the applicant to consult with the lawyer about issues which the applicant may wish to address further. ALRI commented:

> ... our intervention in the process is really at the latter half of the interview. The interview is otherwise conducted without us taking an adversarial role; it is more in the nature of a supporting and clarifying role.[99]

7.116 In ALRI's view, the atmosphere between DILGEA, the lawyers and the applicants has improved since ALRI first commenced its assignment. ALRI noted:

> ... the approach now between the Department, lawyer and client is more conciliatory and more beneficial to both sides.[100]

7.117 One particular concern of the Committee raised with RCOA and ALRI was that public funding is being utilised to pursue unmeritorious claims through the appeal processes available to them. The Committee questioned both organisations on whether it would be possible to put in place a mechanism which would ensure that lawyers who are publicly funded do not, as part of their contract arrangements, provide assistance to applicants whose cases do not have merit, but who still insist on appealing negative decisions. Both RCOA and ALRI indicated that there would be merit in such an approach. ALRI commented:

> Providing there was enough time available ... for us to thoroughly assess the merits of individual cases, I do not think we would have difficulty with that, because that is an issue that we address in Hong Kong, where there are limited numbers [of lawyers].[101]

7.118 RCOA noted, though, that under their existing arrangements with DILGEA, they are contracted to provide legal assistance to the applicants. As such, their clients can insist that they want their application to go to the RSRC, and RCOA is bound, in that limited context, to provide the service for which they have been contracted.[102]

7.119 The Committee also questioned Attorney-General's on the extent of Australia's obligations to provide legal aid to persons held in detention. Attorney-General's highlighted the obligations under section 96 of the Migration Act, which provides that where a person is held in custody under the Act, that person

99 In camera evidence, 21 July 1992, p. 187.

100 In camera evidence, 21 July 1992, p. 187.

101 In camera evidence, 21 July 1992, p. 186.

102 In camera evidence, 21 July 1992, p. 266.

shall be afforded 'all reasonable facilities for obtaining legal advice or taking legal proceedings in relation to his or her custody'. Attorney-General's advised that 'reasonable facilities' could be afforded under the Act by providing paper and writing or typing implements, a telephone, facsimile or postal facilities, or a room in which a lawyer could consult with the person in custody. Attorney-General's concluded that the obligations 'do not of themselves include the provision of legal aid', or other publicly funded legal assistance.[103]

Interim Report to the Minister

7.120 As noted earlier in the report, the Committee provided the Minister with an interim letter of advice on 17 July 1991, which focused principally on detention of border claimants. In that letter, the Committee noted its concern that undocumented arrivals could be held in to detention for long periods of time while their applications were being prepared, submitted and processed.

7.121 The Committee concluded that strict time limits should apply for the lodgement of claims by undocumented arrivals and the determination of those applications. The Committee recommended that:

- people arriving at the border without appropriate documentation be required to submit a written notice of intention to apply for refugee status at the earliest opportunity and at most within 48 hours;
- such claimants be required to submit a full application within 28 days from date of arrival, with the possibility of applying for a further extension of 28 days in appropriate circumstances;
- the Government provide increased assistance to organisations such as the Legal Aid Commissions and RACS, in order that claimants are able to meet the requisite deadlines;
- border claimants be given priority in the assessment of their applications;
- border claimants be given a period of three months to be the target time for the initial determination of their claim and that priority be given by the RSRC for the determination of any appeals from border claimants.[104]

103 Evidence, p. S930.

104 Joint Standing Committee on Migration Regulations, *Special Report No. 1, Recommendations to the Minister for Immigration, Local Government and Ethnic Affairs*, September 1991, AGPS Canberra, pp. 3-4.

7.122 The Minister responded to this report by announcing on 13 August 1991 that a 28 day time limit would apply for the lodgement of refugee applications after an initial intention to apply had been indicated, and in the case of border arrivals that the time limit would apply from the date of arrival.[105] As discussed in Chapter 6, and noted earlier in this chapter, further measures to expedite the refugee determination process, particularly for border claimants, were announced on 12 February 1992.

Conclusions

7.123 The Committee supports the detention of border claimants. It is essential to maintain the integrity of Australia's borders, to ensure that control over Australia's immigration program remains with Australian authorities, and to prevent any potential risk to the Australian population. The Committee concurs with the principle that those who arrive at the border without valid entry documents should not be permitted to enter the Australian community until their status is determined. It also agrees that those who claim refugee status but do not satisfy the refugee or humanitarian criteria should be returned in a timely manner.

7.124 There were differing views within the Committee about the principle of mandatory detention of border applicants. Committee members were agreed about the need for detention in cases where there are doubts about the person's identity or, for example, where applicants were likely to abscond and disappear into the community. While some Committee members supported the general principle of detention for all unprocessed border claimants, other members felt that the Minister and or the courts ought to have some discretion to release such unprocessed claimants into the community, subject to appropriate guarantees and safeguards. All Committee members are anxious to ensure that the time spent in detention by border claimants is as short as possible. In its interim report, the Committee sent a clear message to the Minister about the need for faster processing of border claimants. In this regard, the Committee notes the Government's recent initiatives aimed at achieving a more efficient and expeditious determination system for border claimants, particularly the adoption of processing target dates, as recommended by the Committee.

7.125 Various explanations have been given to account for the two year detention and processing delays of the various boat arrivals, especially the Cambodian boat arrivals currently held in custody. The Committee is firmly of the view that the detention of the Cambodians in particular has lasted far too long. It is imperative that the procedures which are in place do not allow a repetition of such lengthy detention.

105 Ministerial Press Statement 50/91, 13 August 1991.

7.126 The Committee deliberated on a formula which would ensure that border claimants who did not have their applications for refugee status determined within a particular time frame would be released from detention. The amendments to the Migration Act which came into effect on 7 May 1992 contain provisions along the lines considered by the Committee. The new legislation sets out the intention of the Parliament that undocumented boat arrivals must be held in detention until their status is determined, but that such detention should not extend beyond a designated time frame. In this regard, though, the Committee considers that the Government cannot be held responsible for the time taken to bring a case to finality if a person decides to pursue their claims through all of the appeal processes available to them.

7.127 Overall, the Committee reiterates its earlier message on the need for expeditious processing of border claimants. In particular, sufficient resources must be made available to DILGEA to ensure that processing targets for border claimants are met.

7.128 Alongside the legislative and administrative changes to the refugee determination process for border claimants, the establishment of the detention facility at Port Hedland has been another important development. Committee members supported the establishment of this detention facility. It was considered appropriate that it be sited in the north west of Australia, given that the majority of boat arrivals enter Australia through that region. There appeared to the Committee no justification for transferring at public expense boat arrivals across the continent to Sydney or Melbourne. As for the facilities at Port Hedland, a number of Committee members have visited this centre and other refugee processing centres in other parts of the world. These Committee members were struck particularly by the high standard of facilities at Port Hedland. The problems experienced by those detained at Port Hedland appear to derive from the term of detention rather than the location of or conditions at the facility.

7.129 The Port Hedland centre was established with the aim of improving the processing time for border asylum seekers. Given the recent experience of the Cambodian boat arrivals, it is evident that delays in the preparation of applications for refugee status by border claimants must be avoided. In this regard, the Port Hedland facility has proved useful by ensuring improved access to detainees and improved opportunities for obtaining information relevant to their claims. While some concerns have been expressed about the costs associated with the facility, particularly because of its remote location, it would appear that the reduction in detention times which are likely to result from better access to applicants and earlier lodgement of applications will lead to an overall reduction in the cost to government of detaining border claimants. Of significance in this regard was the evidence received from ALRI that the isolation of Port Hedland enables the lawyers who are assisting border claimants to focus on the task of preparing the applicants' claims.

7.130 The Committee also deliberated on the practice of funding independent legal advisers to assist in the preparation of applications for refugee status from border claimants, as utilised in the case of the Cambodians. This practice was adopted when, as part of the determination process, border claimants were required to complete detailed application forms. Under the previous procedures, it was felt that applications would be lodged in a more timely manner if independent legal advice was made available to the applicants. Under the new procedures, this practice should continue where it facilitates the lodgement of applications.

7.131 The Committee notes the obligation under Section 96 of the Migration Act that persons who are held in custody under the Act shall be afforded 'all reasonable facilities for obtaining legal advice or taking legal proceedings in relation to [their] custody'. Notwithstanding the advice from Attorney-General's that this obligation of itself does not include the provision of legal aid or other publicly funded legal assistance (see paragraph 7.119), the Committee is of the view that border claimants should have the right to obtain legal assistance, and should be advised of that right in a clear, comprehensible and timely manner. A written statement to this effect should be provided to border claimants as soon as they have indicated their intention to apply for refugee status.

7.132 While supporting each border claimant's right to access legal advice, the Committee considers that public funds should not be utilised in pursuing unmeritorious claims through every avenue of appeal. Where public funds are made available for the provision of legal advice, for example through organisations such as RCOA, RACS, ALRI and other similar bodies, there should be a limit on the level of funding provided to ensure that public expenditure only covers advice given in relation to primary applications and those review applications which are judged to have some merit.

7.133 In relation to legal assistance for review applications, the Committee notes that under the review process involving the RSRC, which made its assessment on the papers, it was appropriate to fund legal advisers to assist border claimants in the preparation of review applications. With the change to the RRT, which will be seeing and questioning applicants, there no longer appears to be, in the Committee's view, such a need for review applicants to be given legal assistance.

Recommendations

7.134 **The Committee recommends that:**

23. given the new expeditious processing arrangements for border claimants, the Government retain the policy of holding border claimants for refugee status in detention until such time as their applications can be processed;

24. the detention facility at Port Hedland be maintained to ensure that processing targets in relation to border claimants for refugee status are met;

25. priority be directed to the expeditious processing of border claimants, with adequate resources to be directed to the Department of Immigration, Local Government and Ethnic Affairs to ensure that processing targets are met;

26. public funding be available through the Department of Immigration, Local Government and Ethnic Affairs for the provision of legal advice and assistance to border claimants in relation to the preparation of primary applications for refugee status. Thereafter, publicly funded legal assistance to refugee claimants seeking review of a refusal decision, whether to the Refugee Review Tribunal or the Federal Court, be provided via the Legal Aid Commission, based on the merits of the particular case.

Chapter Eight

CITIZENS OF THE PEOPLE'S REPUBLIC OF CHINA

Introduction

8.1 Citizens of the People's Republic of China comprise the great majority of existing applicants for refugee status. The number of Chinese refugee claimants rose from 17 in 1987/88 to 36 in 1988[1], 223 in 1989, 7,386 in 1990 and 9,120 in 1991 (see Chapter 3, Table 3.5). During the last six months of 1989, large numbers of PRC citizens also made application for residence on strong humanitarian grounds under section 6A(1)(e) of the old Migration Act. These applicants averaged 250 in each of the months June to October 1989, increasing to 388 in November 1989, and to 5,399 in December 1989.[2] In all, this represented a dramatic rise in the number of applications to be processed. The rise in PRC applications was not foreseen by DILGEA. It took place over a very short time span.

8.2 The Chinese in the refugee and humanitarian claimants' queues were almost all students. Most of them were fee paying english language students, enrolled in English Language Intensive Courses for Overseas Students (ELICOS). A smaller proportion were fee paying students in 'special studies', such as computer or business courses. Others were sponsored students, funded by private sponsors or the Australian International Development Assistance Bureau.

8.3 Most of the Chinese applicants in the 1989 Grant Of Residence Status humanitarian queue were caught here when the Tiananmen Square incident occurred on 4 June 1989. Special arrangements (detailed at paragraph 8.18) were made for such Chinese. Therefore, pre-Tiananmen Chinese comprise only a small proportion of the Chinese applicants in the refugee claimant's queue. Most of the current PRC refugee claimants arrived in Australia after the Tiananmen Square incident.

1 DILGEA, Operations Management Division, *PRC Analysis April 1990*, pp. 8 and 15.

2 ibid.

The numbers profile

8.4 DILGEA has estimated that there were 21,000 PRC citizens in Australia on 20 June 1989.[3] The Minister indicated, in an answer to a question in the Parliament, that 1,649 of these were enrolled in tertiary courses and 11,324 of them in non-formal courses, mostly ELICOS.[4] The arrivals and departures of PRC citizens in Australia after Tiananmen is shown at Table 8.1.

TABLE 8.1[5]

Persons With People's Republic of China Citizenship: Arrivals and Departures

	Pre 21/6/89 Arrivals	Post 20/6/89 Arrivals
*Estimated number in Australia on 20/6/89**	21,000	Nil
Arrivals 1/7/89 to 31/5/91		
Students	Nil	24,838
Visitors		15,076
Temp. residents		3,526
Other		1,204
		44,644
Departures to 31/5/91		
Students	1,904	2,125
Visitors	474	11,741
Temp. residents	412	1,434
Other	10	1,082
	1,990	16,382

* Date of suspension of visa issue in PRC. Figures as at date of Tiananmen Square are not available.

3 This was the date on which Australian visa issue in the PRC was suspended. Figures in Australia for 4 June 1989, the Tiananmen date, are not available. The estimate of 21,000 was given in the DILGEA publication *PRC Analysis, 5 June 1990*. On other occasions a figure of 19,400 has been quoted. This discrepancy was explained by the Minister in answer to a question in the Parliament on 4 March 1992. The 19 400 estimate represents the number of PRC citizens in all visa categories who arrived before 21 June 1989 and were still in Australia on 31 January 1990.

4 Parliamentary Debates (Hansard), House of Representatives, 22 December 1989, p. 3638.

5 Parliamentary Debates (Hansard), House of Representatives, 4 March 1992, p. 767.

Student entry

8.5 The arrival in Australia of large numbers of PRC students was a direct result of the active overseas promotion of Australian education. The 1984 Committee of Review of Private Overseas Student Policy, for example, recommended the active marketing of non-formal courses overseas to produce foreign exchange and 'a valuable service' to Australia's neighbours.[6] These efforts coincided with the PRC Government's decision to relax exit controls for PRC nationals, as well as the Japanese Government's decision in 1986 to close off access by PRC students to short term courses in Japan. In that same year, the ELICOS program was established in Australia.

8.6 Concurrently, Australia's procedures for processing overseas student visas were streamlined in order to expedite access to courses, particularly short term, non-formal courses such as ELICOS. Until late 1989, prospective students applied first to their proposed colleges or educational institutions for enrolment. Course fees were paid in advance. The institution sent an 'Acceptance Advice Form' to students accepted into a course. The form proved that the student was in an accredited course and had paid course fees. Visa processing by the diplomatic mission commenced on production of the 'Acceptance Advice Form'.

8.7 Bona fides testing of student applicants (the checks made of the applicants to ascertain whether they genuinely intended to study and to return home on completion of their courses) was eased in 1986. DILGEA described bona fides testing during this period as a 'reasonably perfunctory process'.[7]

8.8 The 1986 changes resulted in a dramatic increase in the number of overseas students in Australia. Overseas student numbers increased from 31,545 in 1986/87 to 82,066 in 1989/90. PRC student numbers increased from 1,881 (or 6 per cent of total overseas students) in 1986/87 to 22,547 (or 27 per cent of total overseas students) in 1989/90. PRC citizens comprised 44 per cent of the 10,000 ELICOS students in 1988 and 54 per cent of the ELICOS total in 1989.[8]

6 Committee of Review of Private Overseas Student Policy, March 1984, p. 140.

7 Senate Estimates Committee D, 15 May 1990, p. 57.

8 Industry Commission, *Exports of Education Services*, Report No. 12, 14 August 1991, AGPS, Canberra, p. 24.

8.9 The deregulated program for short term overseas students was 'open to wide abuse', according to the CAAIP.[9] The then Minister also commented in 1989:

> Students from some countries were enrolling in courses which cost ten times their annual salary. Funds were frequently borrowed at high interest rates to pay course fees, significantly increasing the costs to students. These students needed to work in Australia to repatriate funds to repay the loans. It should be obvious to most people that this cannot be achieved within the approved work limit of 20 hours per week, and it results in abuse of work rights, and an incentive for students to overstay their entry permits.[10]

8.10 The overstay rate for all overseas students in 1988/89 was 23.3 per cent and 40 per cent for PRC students in May 1989. This compared with a visitor overstay rate in that period of 1.8 per cent.[11] Of the 15,111 PRC students who had arrived in Australia since 1 January 1986, only 1,685 (or 11.2 per cent) had left Australia by the end of May 1989.[12] Table 8.2 shows that the pattern of PRC student overstay continued. CAAIP recommended that 'early steps be taken to protect the integrity of the total immigration program' where it might be compromised by the unintended consequences of such short term student programs.[13]

8.11 To combat the abuses within the program, additional entry requirements for prospective PRC ELICOS students were introduced in 1987. Chinese students were restricted to courses of six months or more in duration. They were required to prepay all course fees and a minimum of $100 for each week of their course to cover living costs.[14]

9 CAAIP Report, op cit, pp. 97-98.

10 Industry Commission, op cit, p. 61.

11 Parliamentary Debates (Hansard), Senate, 21 November 1989, p. 2969.

12 ibid.

13 CAAIP Report, op cit, pp. 97-98.

14 Industry Commission, op cit, p. 55.

TABLE 8.2[15]

Persons With People's Republic of China Citizenship: Pattern of Overstay

	Pre 21/6/89 Arrivals	Post 20/6/89 Arrivals
Estimated Overstayers in Australia at 30/4/91		
Students	161	3,866
Visitors	331	563
Temp. residents	45	301
Other	7	768
	544	5,498
Number legally in Australia at 27/9/91*		
Students	8,666	
Visitors	1,102	
Temp. residents (mainly Class 437)	16,838	
Other	331	
	26,937	

* Breakdown by arrival date not available

8.12 Further measures were announced in August 1989, first to deal with the increasing problem of students overstaying and breaching the terms of their permits, and secondly to overcome a visa processing backlog in the PRC.[16] This backlog arose as a result of the temporary closure of visa facilities at the Australian embassy in Beijing following the June 1989 events in Tiananmen Square.

15 Parliamentary Debates (Hansard), House of Representatives, 4 March 1992, p. 767.

16 Parliamentary Debates (Hansard), Senate, 21 November 1989, p. 2969.

8.13 Tighter entry requirements, including more rigorous bona fides testing, were introduced for all overseas students from August 1989. Student applicants from countries with high overstay rates, such as PRC applicants, were required to have a minimum education level, equivalent to Australia's year 12, and certification that their proposed courses were relevant to current or future home country employment. Dependants of such students were not permitted to accompany them to Australia.[17]

8.14 DILGEA noted:

> Now [overseas student processing] is a more vigorous process, particularly in countries which had displayed high overstay rates. Basically, it relates to an assessment of a person's intention when coming to Australia and an assessment of whether the person shall comply with the entry permit granted, particularly with respect to the person's leaving Australia on or before its expiry.[18]

8.15 As for the June 1989 visa processing backlog in the PRC, the then Minister indicated that less stringent measures than the global criteria were to be applied in clearing the 'pipeline' of 25,000 applications lodged with the Australian embassy in Beijing. Senator Ray stated:

> The 'pipeline' processing measures are less stringent than the global measures (which will apply to PRC applicants from 1 January 1990) in that 'pipeline' applicants will be assessed against a lower education level criterion (year 10 compared with year 12 for the global measures) and will not be subject to more extensive bona fides testing (required under the global measures).[19]

8.16 From 1 July 1989 to 31 May 1991, the months immediately following the Tiananmen Square incident, a further 24,838 Chinese students, 15,076 PRC visitors and 3,526 PRC temporary residents arrived in Australia. In all, 44,644 PRC citizens arrived during this time.[20]

8.17 Against this background, the Australian Government's response to the events in Tiananmen Square in June 1989 proved to be particularly significant.

17 ibid.

18 Senate Estimates Committee D, 15 May 1990, p. 57.

19 *Parliamentary Debates (Hansard), Senate, 21 November 1989, p. 2969.*

20 Parliamentary Debates (Hansard), House of Representatives, 4 March 1992, p. 767. NB: the total number includes 1,204 PRC citizens classified as 'other' visas/permits.

After Tiananmen Square

8.18 On 3 and 4 June 1989, government troops violently confronted demonstrators participating in pro-democracy demonstrations in Tiananmen Square. On 6 June 1989, the then Minister announced that PRC citizens legally in Australia on 4 June 1989 would be granted, upon application, any necessary extension of their temporary entry permits until 31 July 1989. The Minister observed that this temporary extension allowed 'a breathing space while the situation in the People's Republic of China becomes clearer'.[21] The Minister also announced that compliance action against PRC nationals here illegally would be temporarily suspended, and in the meantime no deportations would be effected to the PRC.[22]

8.19 Subsequently, on 15 June 1989, the then Prime Minister, the Hon R J L Hawke, MP, announced that these temporary entry permits could be extended for another 12 months until 31 July 1990.[23] The Prime Minister was quoted in a media report on 17 June 1989 as 'considering boosting Australia's refugee quota to cope with the number of Chinese nationals expected to apply for permanent residence here in the wake of the crackdown'.[24]

8.20 On 8 December 1989, just before the amended Migration Act came into effect, the then Minister announced that PRC citizens who were in Australia on 20 June 1989 and who, on that day, held a valid temporary entry permit could apply at any time before 31 March 1990 for an extended eligibility (PRC) entry permit (Class 829), valid until 31 January 1991. The Minister also announced that PRC citizens who were in Australia illegally on 20 June 1989 could apply for a special temporary entry permit (Class 434), also valid until 31 January 1991. Regulations 119D and 119E introducing the new permits were gazetted on 15 January 1990. In DILGEA's Procedures Advice Manual, it was stated that Class 829 permit holders (those lawfully in Australia on 4 June 1989) could continue to undertake studies, but 'should aim to complete the course of study before January 1991 as no extension of stay beyond that date can be guaranteed to enable completion of the course'.[25]

21 Parliamentary Debates (Hansard), House of Representatives, 6 June 1989, p. 3415.

22 Media Release, 6 June 1989.

23 Parliamentary Debates (Hansard), House of Representatives, 15 June 1989, p. 3523.

24 *The Australian*, 17 June 1989.

25 DILGEA, PAM Humanitarian Responses to People in Australia - Extended Eligibility PRC Entry Permit (Class 829) Paragraph 6.6.1, March 1990.

8.21 Another PRC permit class was created at this time. On 16 February 1990, the Minister announced that PRC citizens legally in Australia on 20 June 1989 could apply for permanent residence. Regulation 142A established a PRC citizen (permanent) entry permit (Class 809). Regulation 142A provided that:

- the Minister must be satisfied that resettlement was the most appropriate course for the applicant, was not contrary to the interests of Australia and that there was no third country where the applicant was entitled to live; and
- the Minister must be satisfied that without resettlement in Australia there is a substantial probability that because of circumstances involving individual danger to the applicant, the applicant will personally suffer serious and lasting consequences.

8.22 The permanent entry permit was available to PRC citizens lawfully in Australia on 4 June 1989 who held a Class 829 PRC eligibility permit. At this time, PRC citizens unlawfully in Australia at the time of Tiananmen were offered merely a temporary extension of stay. At the end of May 1990, some 8,000 PRC citizens had applied for the Class 809 permit, the PRC permanent entry permit.

8.23 Regulation 142A was repealed on 27 June 1990. No PRC permanent entry permit applications could be lodged with DILGEA after that date. On 31 May 1991, there were 4,195 such applications awaiting a decision; 1,864 of such applications had been approved.

8.24 On 27 June 1990, the Prime Minister and Minister announced in a joint statement that PRC nationals in Australia on 20 June 1989, whether legal or illegal, would be able to stay in Australia for four years under a special category of temporary residence permit. This announcement coincided with a new general refugee policy, released on the same day, which allowed those persons granted refugee or humanitarian status to obtain a four year temporary entry permit rather than immediate permanent residence.

8.25 Announcing the PRC decision, the Prime Minister and Minister stated:

> No PRC national in Australia on 20 June 1989 will be required during the four years or subsequently to return to China against their will unless they have seriously breached Australian laws.[26]

26 Joint Statement by the Prime Minister and the Minister for Immigration, Local Government and Ethnic Affairs, Mr Hand, 27 June 1990.

8.26 The Prime Minister commented that this decision 'fully confirms the undertaking that I have previously given publicly that no Chinese national would be required to return to China against their will'.[27]

8.27 The Prime Minister and Minister also noted:

> Whether PRC nationals in this special category who wish to stay beyond the four years gain an extension of their temporary residence or whether they gain permanent residence will depend upon conditions then prevailing in China. Unless we were confident that the situation in the PRC was such that human rights were no longer generally at risk, permanent residence would be granted to those who apply, subject to normal health and character checks. The timing of such a grant of permanent residence will depend on the rate at which places can be provided in the immigration program at that stage, and in the meantime their temporary residence permits would be extended.[28]

8.28 The existing PRC permit classes were repealed. Regulation 119(H), creating the special PRC four year temporary entry permit, came into effect on 1 August 1990. Under the regulation, any PRC nationals in Australia on 20 June 1989 could apply for the permit. The 15,405 PRC nationals remaining in Australia who were here on 20 June 1989 were eligible to apply for the four year permit without undergoing the vigorous scrutiny of refugee or humanitarian processing.

8.29 The Government hoped that the pre-Tiananmen PRC citizens in Australia would withdraw from existing processing queues, whether refugee or GORS residence queues, and take up the four year permit. Regulation 119H stated that to be eligible to apply for the special PRC permit, an applicant was required to withdraw any outstanding entry permit applications, whether these were lodged before 19 December 1989 or made under any other regulation. The legal status of this criteria requiring pre-existing applications to be withdrawn is not entirely clear.

8.30 Taking the criteria literally, those who made applications for stay as refugees or humanitarian cases faced a difficult choice. They could maintain those applications or withdraw them and apply under regulation 119H. While an entry permit under the old section 6A(1)(e) or regulation 142A gave permanent residence, those applications generally had been given a lower processing priority.[29] In the

27 Transcript of Joint News Conference, 27 June 1990.

28 Joint Statement, op cit.

29 see *Wei Jianxin and Others v The Minister for Immigration, Local Government and Ethnic Affairs*, Neave J., Federal Court of Australia, 22 May 1991 (unreported).

meantime, such applicants could not work or obtain welfare benefits, or sponsor families into Australia. By contrast, those who withdrew their applications and obtained the four year PRC permit were permitted to work, obtain social security benefits and Medicare, and to sponsor immediate family members into Australia for an equivalent four year term. However, the PRC permit only gave four year stay. There was no guarantee to such permit holders of permanent residence status.

8.31 As for those PRC nationals arriving in Australia after 20 June 1989, they were and are not eligible to apply for the special PRC permit. From 1 July 1989 to 30 September 1991, 52,519 PRC nationals arrived in Australia. Only 20,582 of those people have departed.[30] A very large number of those remaining (some 17,000) have applied for refugee status.

Opposition policy

8.32 In response to the June 1990 announcement, the Opposition advocated a case by case approach for dealing with PRC nationals in Australia, in accordance with existing refugee determination procedures. The Opposition criticised the decision to introduce a special PRC permit. The Shadow Minister for Immigration and Ethnic Affairs, Mr Philip Ruddock, MP, in a press release issued on 27 June 1990, stated:

> It is because claims and circumstances vary and there are many cases where no PRC National or Student, pre or post Tiananmen Square should be forced to return that case-by-case examination was always the only sensible available option.
>
> Provision of proper resources to enable this to occur was all that was required along with an extension of time for processing under existing arrangements.

8.33 Similarly, the Leader of the Opposition, Dr John Hewson, MP, speaking on radio station 2UE on 17 July 1990, commented:

> ... giving a blanket approval for a group of people to stay without any knowledge as to whether they are genuine refugees is of course going directly against the standard procedure. Now I don't know whether they would all qualify as genuine refugees or not. But it's not for me to make that determination, it is for the DORS Committee to do it. I know there are a lot of students and I know its a laborious and labour-intensive process but its the only equitable way to do it.

30 Evidence, p. S828.

8.34 Mr Ruddock reiterated the Opposition policy in the House of Representatives on 6 March 1991 when he stated:

> The Opposition has no hesitancy in saying that the proper approach to deal with PRC cases is to look at them individually. That is, each claim for protection ought to be determined on that basis. There is no doubt that the greater claim of those who were pre-Tiananmen Square could be tested in that process. Those with entitlements under existing non-discriminatory criteria for a grant of resident status should also have their claims ... properly tested. Spouse and occupational grounds are obviously amongst those entitlements.[31]

Recent developments

8.35 In December 1991, the Hon P J Keating, MP, became Prime Minister of Australia. There was some confusion as to whether the previous Prime Minister's commitment allowing PRC nationals to remain in Australia would be upheld by the new Prime Minister. Leaders of the Chinese community sought clarification of this matter from the new Prime Minister.

8.36 In response, Prime Minister Keating, in a letter published in the April 1992 edition of the Chinese language magazine New Migrant, confirmed the Government's decision of June 1990 that PRC nationals in Australia on 20 June 1989 would not be returned forcibly to China unless they had seriously broken Australian laws. The Prime Minister stated:

> The Labor Government has made it clear that Chinese nationals in Australia on 20 June 1989 will not be required to return to China against their will, unless they have seriously breached Australian law. After 30 June 1994, subject to a need for ongoing protection, places in the immigration program and conditions in China, permanent residence or extended temporary stay will be available to those reluctant to leave.

31 Parliamentary Debates (Hansard), House of Representatives, 6 March 1991, p. 1444.

8.37 Following on from the Prime Minister's letter, the Minister stated in the House of Representatives on 5 May 1992:

> ... the Prime Minister's letter to the editor said nothing new. It did no more or less than restate the policy announced by the Government on 27 June 1990. ... It is quite clear that there is no automatic permanency for anybody at the end of four years because the status of people at the end of that period will depend on conditions in China.
>
> People from the PRC who were in Australia on 20 June 1989 will have to apply for either a temporary entry permit or, depending on the circumstances in China, as referred to in the second paragraph of the Hawke statement, and subject to places in the migration program. a permanent resident's permit.
>
> Such applications will have to be ... handled case by case. ... All applicants will have to satisfy certain criteria and be found a category within the permanent component of our intake. It is not right to say that X number of Chinese people resident in Australia at this point in time who were here in June 1989 will automatically be granted permanent residency in 1994 - that is just not true.[32]

8.38 The Minister commented further:

> ... I support the letter by the current Prime Minister to the Chinese community because I think that if we go back to the emotions that were on hand at the time and reflect on that, and the decision that was made, we will realise that it would be a very cruel act to renege on the decision as announced on 27 June 1990 by then Prime Minister Hawke.[33]

8.39 As the restated commitment from Prime Minister Keating makes clear, there is no guarantee to PRC nationals that they will be given permanent residence status in Australia after June 1994. They can seek permanent residence. If the situation in China necessitates a grant of protection, they will be given residence at the rate at which places become available within the migration program. If the situation in China changes, and the Australian Government decides that they could

32 Parliamentary Debates (Hansard), House of Representatives, 5 May 1992, p. 2361.

33 ibid, p. 2364.

return there safely, they would not be given permanent residence as a class. The 'undertaking' that they will not be returned against their will appears to require that those wishing to stay be given an extension, perhaps repeated extensions, of temporary stay.

8.40 Should there be a change in government, a different approach is likely to be adopted, in accordance with the Opposition's stated policy position. That position was reiterated by the Leader Opposition in a Media Release on 25 April 1992, which contained the following statement on the Opposition policy:

> At the end of the four year temporary entry permit, the Coalition has said that each case will be reviewed on a case-by-case basis. Those who can substantiate claims for further protection, determined against existing internationally accepted criteria, will be given the protection they seek.
>
> At the end of four years, the only way to achieve permanent residence lawfully are:
>
> - that a student has married, or is in a bona-fide defacto relationship with an Australian citizen or permanent resident; or
>
> - on occupational grounds where the student has qualifications that are highly skilled and recognised in Australia, and that he or she has found a position which cannot be filled by an Australian citizen or permanent resident.
>
> The question of refugee status or other humanitarian criteria applies only if the student, at the end of the four year permit, requires ongoing protection. That is, that the student will satisfy the internationally recognised criteria that he or she has a well-founded fear of persecution if returned to the country of origin.

Conclusions

8.41 Recent policy in relation to PRC citizens has been aimed at providing a humanitarian response to students affected by the unrest in China. The policy, though, has contributed significantly to the immense burden which has been placed on Australia's refugee determination system over the past three years. It also has led to a significant degree of uncertainty among PRC nationals in Australia. The Committee is critical of the prevarication concerning Chinese in and outside Australia. The delay and confusion has aggravated the position of genuine PRC refugee and humanitarian claimants in Australia. It has resulted in many thousands more Chinese arriving in Australia after the Tiananmen Square incident without

appropriate bona fide checks. The decision to grant a four year permit to Chinese students has produced community resentment, particularly amongst groups like the Sri Lankans, Lebanese and Cambodians, who have at least as good if not, in many instances, better claims to protection.

8.42 The recent changes to the law relevant to PRC citizens has provided them with a confusing array of choices for pursuing their claims to remain in Australia. Of particular concern to the Committee is the significant uncertainty among PRC nationals in Australia about their future prospects for remaining in Australia. The four year temporary entry permit effectively has created a class of temporary citizens who are unable to make any long term plans for the future. If, as suggested by DILGEA in evidence to the Committee, they can be permitted to remain indefinitely on temporary entry permits[34], they have been given a type of 'guest worker' status. Without the security of residence status, they may be marginalised, a tolerated but unwanted group in the community. Their uncertain immigration status affects their families, as well as their employment and education prospects.

8.43 The Committee notes that both the Government and the Opposition have stated their positions in relation to PRC nationals. However, because there is a divergence of views between the Government and Opposition, PRC nationals in Australia remain in a state of uncertainty.

8.44 There are difficulties in granting permanent residence to pre-Tiananmen Chinese as a class. There also are real problems if all such PRC citizens are rejected for permanent residence in 1994. This may result in some 10,000 PRC citizens, the present four year permit holders, joining the refugee claimants queue. There is the real and alarming possibility that, in June 1994, the refugee determination system will be clogged with another large contingent of PRC applicants. Australia can ill afford the cost of processing such a large number of applicants via the refugee determination process.

8.45 The Committee notes that a previous Prime Minister of Australia made a commitment to PRC nationals in Australia at the time of the Tiananmen Square incident. That commitment has been confirmed by the present Prime Minister. While Committee members disagree as to whether the commitment should have been made in the first place, the Committee considers that Australia, as a nation, must stand by the word of its Prime Minister, and should honour the commitment which has been made. Any solution to the PRC dilemma must be within the spirit of that commitment.

34 Evidence, p. 1304.

Recommendations

8.46 The Committee recommends that:

27. the Government end the uncertainty concerning the long term future of PRC permit holders in Australia by announcing the arrangements which will be used to differentiate between those who from June 1994 will be granted permanent residence, those who may be granted a further four year temporary entry permit, and those who will be returned to the PRC;

28. as non-discriminatory criteria are an important principle in Australia's refugee determination system, from June 1994 PRC permit holders should be eligible to apply as follows:

    - for permanent residence, on the basis of relevant universal selection criteria; or
    - for continuing protection, to be established on a case by case basis against internationally accepted criteria.

29. to assist in determining whether there is a need for on-going protection for PRC permit holders, an in-country assessment of human rights provisions in the PRC should be prepared for use by the Department of Immigration, Local Government and Ethnic Affairs, and assurances should be sought from the Government of the PRC that those PRC permit holders who return to the PRC will not suffer discrimination or detention upon their return; and

30. those PRC permit holders who do not meet selection criteria should be granted, on expiry of their permits, a short extension of stay, say three months, to enable them to put their affairs in order and make appropriate arrangements for departing Australia.

Dr Andrew Theophanous, MP
Chairman
August 1992

CHAIRMAN'S DISSENTING REPORT

IN RELATION TO CHAPTER EIGHT ON PRC PERMIT HOLDERS

In paragraph 8.45 of the report, the majority make the following comment :

> While Committee members disagree as to whether the commitment should have been made in the first place, the Committee considers that Australia, as a nation, must stand by the word of its Prime Minister, and should honour the commitment which has been made. Any solution to the PRC dilemma must be within the spirit of that commitment.

However, in their recommendations, the majority clearly contradict that spirit. They argue that a large proportion of PRC permit holders should be required to return home after June 1994. In fact, all those who do not qualify for 'continuing protection, to be established on a case by case basis against internationally accepted criteria', should be sent home after 'a short extension of stay, of three months, to enable them to put their affairs in order and make appropriate arrangements for departing Australia'. This position is in clear and blunt contradiction with the assertion quoted earlier in paragraph 8.45 of the report. I cannot support such a drastic solution and especially one which would dishonour the commitments made by the Prime Minister.

I agree with Senator Cooney when he says in his dissent :

> In my view, at the conclusion of the four year temporary entry permit period they now enjoy and which ends in June 1994, they are to be eligible for one of two categories.
>
> The first category is to give them permanent residence; the second is to continue the temporary entry status they now enjoy.

However, I do not agree with Senator Cooney that only those who can satisfy refugee and current humanitarian criteria should be granted permanent residence. Instead, I believe that the Government should create a special category called a special PRC Permit and those who pass this permit should be granted permanent residence after 1994.

Proposed Recommendations

The PRC permit policy to be adopted for implementation from June 1994 should comprise the following:

- that all PRC permit holders be eligible to apply for permanent residence provided that they satisfy certain criteria;
- that all applications be considered on a case by case basis as to whether they satisfy the criteria for a specially designed PRC permanent entry permit;
- that applicants must show, in order to qualify, that they have strong humanitarian grounds, such as the possibility of facing severe discrimination or detention on return and/or that they have appropriate connections with Australia, that they have been making a worthwhile contribution to Australia, and that they satisfy public interest criteria; and
- those applicants who satisfy these criteria would be given permanent residence, the remainder would continue to be given temporary entry permits until such time as they themselves thought it was safe to return to China. At no stage should they be forced to return against their will.

I urge the Government to adopt these recommendations.

Dr Andrew Theophanous, MP
Chairman

DISSENTING REPORT FROM SENATOR BARNEY COONEY

Detention

In my view, a discretion ought to be available, in the appropriate circumstances, to release for a specific period or more generally claimants otherwise to be held in detention. Detention is a grave matter and should be avoided where practicable.

In my view, detention without any flexibility is too rigid an instrument. Unforeseen and exceptional circumstances do occur, and there should be means available to accommodate them.

Recommendations in Chapter Eight

My position on what should happen to the citizens of the People's Republic of China who were in Australia before 20 June 1989 differs from that of the majority.

In my view, at the conclusion of the four year temporary entry permit period they now enjoy and which ends in June 1994, they are to be eligible for one of two categories.

The first category is to give them permanent residence; the second is to continue the temporary entry status they now enjoy.

They may enter the first if they can show as individuals that they require Australia's continuing protection because they are refugees, or alternatively can satisfy tests for the grant of humanitarian status.

The second category is to be for the balance.

I note that all PRC nationals are entitled, as are all other applicants, to seek residence on the general grounds available under the Migration Act and Regulations.

In my view, this position strikes the right balance between the weight given to the legitimate expectations of the citizens of the People's Republic of China arising from Government statements made since June 1989, including those of Mr Hawke, the Prime Minister as he then was, and that to be given to those of the Australian community and others seeking to reside here.

Senator Barney Cooney

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Appendix One

SUBMISSIONS

No.	Name of person/organisation
1.	Mr M Williams, JP
2.	Indo-Chinese Refugee Association (SA) Inc
3.	Peruvian Community of SA
4.	Phoenix Alliance (Inc)
5.	Mr S Darsh
6.	Mr J L Horsley
7.	Mr B Murray Brian Murray and Associates
8.	Name Withheld
9.	Ahmadiyya Muslim Association of Australia
10.	Dr S M Hong, Ph.D
11.	Ms C Russell
12.	Fijian-Australian Resource Centre Inc
13.	Ms H B Simpson
14.	Mr J MacGill
15.	Commander F Menzies
16.	Amnesty International Australia
17.	Migration Committee Law Institute of Victoria
18.	Victorian Immigration Advice and Rights Centre
19.	Australians Against Further Immigration

20. Sri Lanka Tamil Welfare Society of WA

21. The Vietnamese Community in Australia

22. Iranians Welfare Association

23. Illawarra Immigration Interagency

24. Refugee Advice and Casework Service (Vic)

25. Mrs B M MacIntyre

26. Ethnic Minorities Action Group

27. Tamil Association WA (Inc)

28. Multicultural and Ethnic Affairs Commission of WA

29. Burnside

30. Federation of Australian Jewish Welfare Societies

31. Ahmadiyya Muslim Association of Australia
- supplementary submission

32. Australian Cambodian Association of NSW

33. Sri Lanka Organisation for National Harmony

34. Legal Aid Commission of NSW

35. Mr Z Liu
Democratic China

36. Department of Family Services and
Aboriginal and Islander Affairs
Bureau of Ethnic Affairs

37. Refugee Council of Australia

38. Administrative Law Section
Law Institute of Victoria
- supplementary submission

39. Federal Human Rights Commissioner
Human Rights Australia

40. Amnesty International Australia
- supplementary submission

41. South Australian Multicultural &
Ethnic Affairs Commission

42. Fijian-Australian Resource Centre Inc
- supplementary submission

43. Australasian Federation of Tamil Associations

44. Federation of Ethnic Communities'
Councils of Australia Inc

45. Name Withheld

46. Mr M Ross
Ross and Laba Migration Services

47. Mr G Binkowski
Export and Commercial
Research Services Pty Ltd

48. Fijian-Australian Resource Centre Inc
- supplementary submission

49. Sri Lanka Organisation for National Harmony

50. National Spiritual Assembly of the
Baha'is of Australia Inc

51. Mr W Lim

52. Refugee Council of Australia
- supplementary submission

53. All Young Burmese League

54. Mr A Joel
Adrian Joel and Co

55. Bangladesh Association of Australia Inc

56. Mr W Lim
- supplementary submission

57. The Uniting Church in Australia
Mulgrave Parish

58. Russian Ethnic Representatives Council of Victoria, Inc

59. Administrative Law Section
Law Institute of Victoria
- supplementary submission

60. Department of Immigration, Local Government and Ethnic Affairs

61. Mr B Murray
Brian Murray and Associates
- supplementary submission

62. Mr B Murray
Brian Murray and Associates
- supplementary submission

63. Mr B Murray
Brian Murray and Associates
- supplementary submission

64. Mr B Murray
Brian Murray and Associates
- supplementary submission

65. Mr B Murray
Brian Murray and Associates
- supplementary submission

66. Mr B Murray
Brian Murray and Associates
- supplementary submission

67. Victorian Immigration Advice and Rights Centre
- supplementary submission

68. Australian Migration Counselling Services

69. Mr W Lim
- supplementary submission

70. Legal Aid Commission of NSW
- supplementary submission

71. Burnside
- supplementary submission

72. Amnesty International Australia
- supplementary submission

73. Australians Against Further Immigration
- supplementary submission

74. National Spiritual Assembly of the Baha'is of Australia Inc
- supplementary submission

75. Department of Immigration, Local Government and Ethnic Affairs
- supplementary submission

76. Refugee and Casework Service (NSW)

77. Mr D L Bitel
Parish Patience

78. Department of Family Services and Aboriginal and Islander Affairs
Bureau of Ethnic Affairs
- supplementary submission

79. Administrative Law Section
Law Institute of Victoria
- supplementary submission

80. Department of Immigration, Local Government and Ethnic Affairs
- supplementary submission

81. Department of Immigration, Local Government and Ethnic Affairs
- supplementary submission

82. Department of Immigration, Local Government and Ethnic Affairs
- supplementary submission

83. Legal Aid Commission of NSW
- supplementary submission

84. Attorney-General's Department

85. Department of Immigration, Local Government and Ethnic Affairs
- supplementary submission

86. United Nations High Commissioner for Refugees

87. Mr B Murray
Brian Murray and Associates

88. Department of Immigration, Local Government and Ethnic Affairs
- supplementary submission

89. Department of Immigration, Local Government and Ethnic Affairs
- supplementary submission

90. Department of Immigration, Local Government and Ethnic Affairs
- supplementary submission

91. Mr D L Bitel
Parish Patience
- supplementary submission

92. Mr B Murray
Brian Murray and Associates
- supplementary submission

93. Department of Immigration, Local Government and Ethnic Affairs
- supplementary submission

94. Department of Immigration, Local Government and Ethnic Affairs
- supplementary submission

95. Department of Immigration, Local Government and Ethnic Affairs
- supplementary submission

96. Department of Immigration, Local Government and Ethnic Affairs
- supplementary submission

97. Dr D Shoesmith
Senior Lecturer in Politics
Northern Territory University

98. Department of Immigration, Local Government and Ethnic Affairs
- supplementary submission

99. Attorney-General's Department
- supplementary submission

100. Refugee Council of Australia
- supplementary submission

101. Attorney-General's Department
- supplementary submission

102. Department of Immigration, Local Government and Ethnic Affairs
- supplementary submission

103. Department of Immigration, Local Government and Ethnic Affairs
- supplementary submission

104. Mr J H Gates

105. Attorney-General's Department
- supplementary submission

106. Refugee Council of Australia
- supplementary submission

107. Department of Immigration, Local Government and Ethnic Affairs
- supplementary submission

Appendix Two

EXHIBITS

1. Dennis Shoesmith, 'No Peace for Cambodia'.
2. Refugee Council of Australia, 'Position Paper with respect to Asylum Seekers and the Refugee Determination Procedure', May 1992.
3. Extract from 'The Future of Immigration Detention Centres in Australia', Australian Institute of Criminology Report to *DILGEA*, July 1989.
4. A C Helton, 'Refugees in The New World Disorder', Address on the occasion of Refugee Week in Australia, June 1992.
5. *Refugee Council of Australia*, letter to DILGEA, dated 12 February 1992.
6. Refugee Advice and Casework Service (Victoria), letter to the Human Rights Commission, dated 16 June 1992.

Appendix Three

WITNESSES APPEARING AT PUBLIC HEARINGS

Witnesses/Organisation	Date(s) of appearance
Individuals	
Mr Ahmed Chowdhury	02-07-91
Mr Bruce Henry Solicitor South Brisbane Community Legal Service Inc	16-08-90
Professor Patricia Hyndman Associate Professor of Law Faculty of Law *University of New South Wales*	24-10-91
Administrative Review Council	
Professor Cheryl Saunders President	17-07-91
Mr Denis Tracey Acting Director of Research	17-07-91
Afghan Community Group	
Dr Nouria Salehi Member	26-07-90
Afghan Community Support Association of New South Wales	
Mr Abdullah Ahmadi Member Management Committee	17-08-90

Afghan Youth Society

Mr Sahib Shakaib President	26-07-90

Ahmadiyya Muslim Association of Australia

Mr Shakil Ahmad Monir Head of Association	16-08-90
Mr Khalid Saifullah Secretary	16-08-90

All Young Burmese League

Mr Kenneth Than Oo Secretary	17-08-90

Amnesty International Australia

Ms Jennifer Palma Refugee Co-ordinator	02-07-91
Ms Jennifer Savigny Refugee Co-ordinator	16-08-90
Mr Eric Sidoti Communications Director	16-08-90
Mr Harris Van Beek National Director	16-08-90 02-07-91

Attorney General's Department

Mr Henry Burmester Principal Adviser Office of International Law	10-03-92
Ms Joan Sheedy Assistant Secretary Human Rights Branch	10-03-92

Ds Diane Spooner Principal Legal Officer Human Rights Branch	10-03-92

Australian Arabic Welfare Council

Mr Abdalla Nagib Mansour Member Management Committee	17-08-90
Mr Hassan Moussa Co-ordinator	17-08-90

Australian Cambodian Association of New South Wales

Dr Genevieve Kang Committee Member	17-08-90
Mr Vandy Kang Treasurer	17-08-90
Ms Sorathy Michell Committee Member	17-08-90
Miss Nola Randall Secretary	17-08-90

Australian Federation of Tamil Associations

Professor Christie Jayaratnam Eliezer Chairman	26-07-90

Bangladesh Association of New South Wales

Mrs Ambereen Hannan Member	17-08-90

Burnside Khmer Programme

Mrs Joyce Christley Manager	17-08-90 02-07-91

Mr Lychantha Sok Welfare Worker	17-08-90 02-07-91

Cambodian Support Group

Ms Jenny Blokland	30-04-91
Mr Paul Lukitsch	30-04-91

Catholic Multicultural Office

Father Jefferies Foale Director	27-02-91

Ceylon Tamil Association

Dr Rajagunalan Rasiah President	26-07-90
Mrs Ranee Eliezer	26-07-90
Dr Jeyarajan Maheswaran	26-07-90

Chung Wah Society

Mr Charles Seekee Welfare Co-ordinator	30-04-91

Darwin Citizens for Support of Cambodian Boat People

Dr Dennis Shoesmith	30-04-91
Reverend Andrew Williams	30-04-91

Darwin Community Legal Service

Mr Geoffrey Airo-Farulla Public Officer	30-04-91
Ms Margaret Orwin Committee Member	30-04-91

Department of Foreign Affairs and Trade

Ms Penelope Wensley Acting Principal Adviser Asia North, East and South-East Division	07-08-90

Department of Immigration, Local Government and Ethnic Affairs

Dr Evan Arthur Director Determinations and Refugee Status Policy Division	03-07-91 24-10-91 10-03-92
Mr Laurence Bugden appearing as Assistant Secretary Analysis and Compliance Branch	07-08-90
appearing as Acting First Assistant Secretary Temporary Entry Compliance and Systems Division	03-07-91
appearing as Assistant Secretary Refugees, Asylum and International Branch	10-03-92
Mr Dario Castello Assistant Secretary Determinations and Refugee Status Operations Branch	24-10-91
Mr Christopher Conybeare Secretary	07-08-90 10-03-92
Mr Christopher Dear Acting Assistant Secretary Social Policy Branch	07-08-90
Mr John Forster Assistant Secretary DORS Operations	10-03-92
Mr Wayne Gibbons appearing as First Assistant Secretary Development and Systems Division	07-08-90
appearing as Deputy Secretary	03-07-91

Mr Wayne Gibbons appearing as Acting Secretary	24-10-91
Ms Jennifer Gordon Acting Assistant Secretary Procedures Branch	07-08-90
Ms Sue Ingram appearing as Assistant Secretary Policy Secretariat Branch	07-08-90
appearing as Assistant Secretary Refugee Asylum and International Branch	24-10-91
appearing as Assistant Secretary Compliance Branch	10-03-92
Mr Ian Simington First Assistant Secretary Refugee and International Affairs Division	03-07-91 24-10-91 10-03-92

Ethiopian Association in Sydney

Mr Assefa Bekele Secretary	17-08-90

Ethnic Affairs Commission

Mr Arthur Faulkner Acting Director	26-07-90
Mr George Papadopoulos Chairman	26-07-90

Ethnic Communities Council of New South Wales

Ms Katherine Van Weerdenburg Community Development Officer	16-08-90

Ethnic Communities Council of the Northern Territory

Mr Joe De Luca President	30-04-91

Ethnic Minorities Action Group

Mrs Louise Lindsay Facilitator	17-08-90

Federation of Australian Jewish Welfare Societies

Mr Walter Lippmann Executive Vice President	17-08-90

Federation of Ethnic Communities Councils of Australia

Mr Peter Einspinner Convenor Immigration Network	16-08-90

Fijian Australian Resource Centre

Mr Inoke Raikadroka Treasurer	16-08-90
Reverend Tevita David Vuli Deputy President	16-08-90
Mr Viliame Valevatu Secretary	16-08-90

ICRA - The Refugee Association

Mr Kevin Liston Director	27-02-91

Immigration Advice and Rights Centre

Mr George Masri Solicitor	16-08-90
Ms Roslyn Smidt Community Worker	16-08-90

Indonesian Association of New South Wales

Mr Jon Soemarjono President	17-08-90

Iranian Welfare Association

Mr Ahmad Akbari Member	17-08-90
Mr Faramarz Khalilifar President	17-08-90
Dr Syrus Razzachi Pour Member Management Committee	17-08-90

Khmer Community of New South Wales

Mr Chheng Chhor Secretary	17-08-90

Korean Council for Justice and Peace

Mr Edward Kim Treasurer	16-08-90

Korean Uniting Church

Mr Sang Taek Lee Minister	16-08-90

Korean University Students Association

Mr Michael Sung Il Kim Member	16-08-90

Korean Youth Movement in Australia

Mr Keith Kwon Co-ordinator	16-08-90

Law Institute of Victoria

Mr Paul Baker Chairman Migration Committee	26-07-90

Legal Aid Commission

Ms Kathryn Byron Solicitor	02-07-91
Mr Graeme Durie Assistant Director General Law and Policy Division	02-07-91
Ms Kim Magnussen Solicitor Administrative Law Section	02-07-91
Ms Christine Vizzard Solicitor in Charge Administrative Law Section	02-07-91

Legal Services Commission of South Australia

Mr Peter Haskett Deputy Director	27-02-91

Migrant Resource Centre

Mrs Christine Dickenson Community Welfare Worker	30-04-91
Ms Uyen Nguyen-Carrington Welfare Worker	30-04-91
Ms Barbara Pitman Multicultural Arts Officer & Acting Co-ordinator	30-04-91

Parish Patience

Mr David Bitel Solicitor	02-07-91

Refugee Advice and Casework Service

Mr Anthony Krohn Caseworker	10-03-92
Ms Moira O'Leary Caseworker	27-02-91
Ms Philippa McIntosh Co-ordinator	02-07-91
Ms Juliet Morris Caseworker	02-07-91

Refugee Council of Australia

Mr Christopher Hardy Executive Director	17-08-90
Ms Eileen Pittaway Policy Officer Australian National Consultative Committee on Refugee Women	02-07-91

Sri Lanka Association of New South Wales

Mr Asoka Nanayakkara Acting Committee Member	17-08-90
Mr Mahindra Parakrama Ratnapala Committee Member	17-08-90
Mr Cecil Weerakoon President	17-08-90
Mr Don Ubeyasiri Wijeyananda Wickrama Committee Member	17-80-90

Sri Lanka Organisation for National Harmony

Mr Mukundadura Somasri Perera President	17-08-90
Mr Tiddy Wijeratne Vice President	17-08-90

Thai-Australian Association of New South Wales

Ms Rajanee Kitipornchai Member	17-08-90

Timorese Association of the Northern Territory

Mrs Maria Alice Casimiro Branco Secretary	30-04-91
Mr Jose Miranda Branco Member	30-04-91
Mr Olgario Vidigal De Castro Member	30-04-91
Mrs Dulcie Ana Munn Member	30-04-91
Mr Carlos Alberto Soares Member	30-04-91

United Nations High Commissioner for Refugees

Mr Henry Domzalski Deputy Regional Representative	24-10-91

Victorian Immigration Advice and Rights Centre

Ms Mary Crock Joint Co-ordinator	26-07-90
Mr Ronald Merkel President	26-07-90
Ms Clare Morton Joint Co-ordinator	26-07-90

Vietnamese Community in Australia

Mr Tong Van Pham Vice President External Affairs	16-08-90