



## Précis Paper

### Refugee and Asylum Seeker Laws

An excellent discussion by two experienced practitioners about the complexities of asylum seeker law and policy in Australia.

#### **Discussion Includes**

- The role of the Refugee Advice and Casework Service
- The dichotomy of treatment of people who arrive by boat versus people who arrive by plane
- The process of seeking asylum in Australia
- Complementary protection
- Barriers and hurdles faced by asylum seeker
- Fast-track visa processing
- Avenues for appeal

# Précis Paper

## Refugee and Asylum Seeker Laws

1. In this edition of BenchTV, Sarah Dale (Principal, Refugee Advice and Casework Service, Sydney) and Jemma Hollonds (Senior Solicitor, Refugee Advice and Casework Service, Sydney) discuss Australia's refugee and asylum seeker laws.

### The Role of the Refugee Advice and Casework Service

2. The Refugee Advice and Casework Service (RACS) is a specialist legal centre that provides assistance to people seeking asylum in Australia. RACS travels around Australia to detention centres to provide legal assistance for protection visa applications. Funding ceased for legal services for people who arrive by boat in Australia in March 2014, and so RACS now largely relies on philanthropic, community and pro bono support. Only a small number of people who are considered highly vulnerable may be eligible for some government-funded assistance.
3. All of RACS' clients are financially or socially disadvantaged, which underscores the importance of legal assistance in preparing refugee visa applications. RACS has a specialised service for unaccompanied children who arrived by boat. RACS is also an advocacy service which advocates for the public interest of all people seeking asylum, and has seen its role transformed as policy and law has changed in this area.

### The Dichotomy of Treatment of People who Arrive by Boat Versus People who Arrive by Plane

4. The legal consequences of how a person arrives in Australia may continue throughout a person's life. There is a dichotomy between how people who arrive by boat are treated when applying for asylum, versus those who arrive by plane. There are consequences for the types of visa a person is eligible to apply for, how the visa is assessed, the conditions of any visa that is granted, and what types of support services they are eligible for.
5. An example of this dichotomy is in the type of visa that a person is eligible to apply for. Asylum seekers who arrive by plane with an existing visa and then seek asylum are eligible for a permanent visa. In contrast, people who face exactly the same circumstances in their country of origin but who arrive by boat or without a visa may only be able to apply for a temporary visa, even if the threat that they are facing is likely to be lifelong. Furthermore, refugees who arrive by boat are not eligible to bring their families to Australia.
6. The distinctions in the way that people arrive in Australia are one of the most complex aspects of asylum law. Another example is the difference in access to review rights. People

who come by plane and have an application for asylum refused have the right to merits review. However review rights are extremely limited for people who arrive by boat, making it even more important that they have legal assistance upfront when lodging their application.

7. These distinctions represent a shift in policy that has occurred over the past few years. On 13 August 2012, the "no advantage" policy was implemented to try to ensure that people who arrive in Australia by boat are required to wait as long as they would have to wait outside of Australia in a refugee camp for a grant of asylum. On 19 July 2013, there was a further policy development, with the effect that anyone who came to Australia by boat would be sent to Nauru or Manus for processing. These arrivals would only be eligible for a visa lasting a maximum of five years. Furthermore, the process of applying for a visa and the types of visa that a person arriving by boat would be eligible for also changed. Both presenters emphasised that this uncertainty and change causes significant stress to their clients.

#### The Process of Seeking Asylum in Australia

8. The process of seeking asylum in Australia is governed by the *Migration Act 1958* (Cth) and associated law, including the *Migration Regulations 1994* (Cth). The *Migration Act* defines who can get a particular visa. There are a number of different protection visas under the *Migration Act* and which protection visa a person is eligible to apply for might depend on how they came to Australia.
9. A person is entitled to a protection visa if they meet the definition of a refugee. Australia has redefined the international definition of refugee in its own terms, which causes difficulties where an asylum seeker has been classified as a refugee by the UN High Commission on Refugees outside of Australia, but then reach Australia only to be subjected to a higher standard. Under Australian law, a refugee is defined as a person who is outside of their home country and who fears returning to their home country because there is a real chance they will be seriously harmed. The harm that might be done to them must be for one of five reasons, specifically their race, religion, nationality, political opinion and membership of a particular social group. The risk of harm must apply throughout their home country, so they must be able to show that they are unable to avoid the harm by moving to another part of their home country.
10. In addition to these essential criteria, there are other considerations taken into account by the Department of Immigration, such as whether a person has taken reasonable steps to provide identity documents and whether there is any other country in the world that the person has a right to live in.

11. The complexities in the definition of refugee and the processes of seeking asylum are compounded when there is limited access to legal support and free interpreters.
12. In 2012, the government expanded the categories of people who are recognised as refugees to include "complementary protection". Complementary protection is founded in other international conventions, including the *International Covenant on Civil and Political Rights*, 999 UNTS 171, entered into force 23 March, 1976 and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85, entered into force 26 June, 1987. The principle means that if people seeking asylum can demonstrate that they face a real risk of significant harm (torture, death, or cruel, inhuman or degrading treatment), they can also be granted protection even if they do not meet the refugee definition outlined above. There have not been many grants of protection under these provisions as the harm that has to be established is of such significance.

#### Barriers and Hurdles Faced by Asylum Seeker

13. Refugee law is a niche area of law governed by complex statute, regulations and policies. In addition to these complexities, country information is a major factor as to why the Department of Immigration may or may not grant a visa. Media reports often have to be balanced with reports by the Department of Foreign Affairs and Trade, and it can be difficult for refugees to stay on top of the situation in their home country.
14. The issue of relocation, and why a person might face harm in other parts of their own country, is only established by up-to-date information from the country of origin. As an example, a client from Iraq may need to show why they cannot move to any other part of the country, which depends on having recent information. For clients who do not speak English or may not know how to access information from government agencies and organisations that work in those parts of the world, it can be very difficult to obtain the evidence needed in support of their application.
15. In addition, it can be complicated to assess a person's country of origin, as they may have spent most of their life in a refugee camp in a second or third country. Many Hazara people, for example, are originally from Afghanistan but have lived for all or most of their lives in Pakistan and they are now required to show persecution in Afghanistan, a country of which they may have no knowledge.
16. An application for asylum is a complex and long form with a range of questions. Sometimes even the seemingly innocuous questions have significant legal meaning behind them, such as "what country are you a citizen of" and "in which countries do you have a right to enter

and reside". It is therefore important for clients to understand the implications of the questions and provide accurate responses.

17. Subsequent to the filing of the application, applicants are invited to attend an interview. At interviews with the Department of Immigration, evidence is tested and adverse information is put to the applicant, such as country information to which the client may not have access. The presenters questioned whether this system is procedurally fair and accords with the rules of natural justice, as the asylum seeker is often questioned about information that they had no previous knowledge of, have no access to, and are unable to challenge effectively.

#### Fast-Track Visa Processing

18. Fast-track was implemented to speed through the "legacy caseload", people who arrived by boat on or after 13 August 2012. Asylum seekers living in Australia on bridging visas are being given limited time in which to apply for protection visas, or they face having their bridging visa revoked or financial penalties. About 27,000 people are part of the fast-track system, and many people have been waiting to access pro bono legal services before lodging their application.
19. Because people will face a financial penalty and the possible cancellation of their bridging visa if they do not lodge within time, they are unable to wait for access to pro bono services. RACS currently has around 1500 people on their waitlist, and so it is impossible to provide the services to everyone who is waiting in a short period of time.
20. Once an application is lodged and received by the Department of Immigration, the person will receive a notice to attend an interview. After the interview, the asylum seeker is given a short period of time, sometimes as little as three working days, to respond to any issues that may have arisen and provide any further evidence.
21. Under the fast-track process, once the Department of Immigration has made a decision, the asylum seeker is not able to provide any further information, including any personal or additional country information. This is problematic when many people are unrepresented and do not understand the consequences of the information they initially provide.
22. If an adverse decision is made, the only grounds for review is via the Immigration Assessment Authority (IAA). The IAA does not conduct interviews and does not consider new information unless there are exceptional circumstances. This means that the asylum seeker has no chance to respond to the Department of Immigration's decision.

23. After this, the only grounds for further review is via judicial review in the federal courts. However due to the extreme lack of funding, most people will have to navigate this complex area of law alone. It can be difficult for people to understand that judicial review is not an opportunity for merits review. It can also be difficult for asylum seekers to ascertain whether there are prospects of success.
24. Both presenters indicated that these steps, and the lack of true merits review, creates considerable barriers for fast-track asylum seekers, and arguably denies basic procedural fairness and transparency.

## **BIOGRAPHY**

### Sarah Dale

Principal, Refugee Advice and Casework Service, Sydney

Sarah Dale was admitted to the profession in 2011. She joined RACS after a number of years working with people seeking asylum and refugees in visa cancellation and civil law issues. Having developed an outreach legal service to unaccompanied children within NSW and throughout Australia, Sarah worked extensively with children who were detained on Christmas Island and faced transfer to Nauru. She has appeared before the Senate Committee Hearings in regards to issues children are facing in the asylum process as well as the experiences of those in detention.

### Jemma Hollonds

Senior Solicitor, Refugee Advice and Casework Service, Sydney

Jemma Hollonds was admitted to the profession in 2011. She is a Senior Solicitor at RACS and coordinates the community education program and several of its outreach services. Prior to joining RACS, Jemma worked in legal policy and research at Anti-Slavery Australia (2010-2011), the International Organisation for Migration in East Timor (2009-2010) and at the Australian Human Rights Commission (2007-2009).

## **BIBLIOGRAPHY**

### Legislation

*Migration Act 1958* (Cth)

*Migration Regulations 1994* (Cth)

### Treaties

*International Covenant on Civil and Political Rights*, 999 UNTS 171, entered into force 23 March, 1976

*Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85,