UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

EXPERT ROUNDTABLE ON NATIONAL SECURITY ASSESSMENTS FOR REFUGEES, ASYLUM-SEEKERS AND STATELESS PERSONS IN AUSTRALIA

CANBERRA, 3 MAY 2012

Chair's Summary

Background

Australia has accepted responsibilities under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the 1954 Convention relating to the Status of Stateless Persons, the 1961 Convention on the Reduction of Statelessness and other applicable international human rights treaties, to provide protection to any person who may experience persecution and/or other serious human rights violations.

At the same time, Australia, as with all sovereign States, has a responsibility to protect its population from serious threats to its national security. In the context of immigration, this includes a duty to make due enquiry, through appropriate security and health checks, into the identity and circumstances of people who enter its territory.

Under current Australian domestic law any visa applicant who is found to be a refugee and assessed by the Australian Security Intelligence Organisation (ASIO) to be a risk to the security of Australia, either directly or indirectly, is not eligible for the grant of a permanent visa to remain in Australia and has no meaningful opportunity to challenge an assessment which has such serious consequences for that individual. If he or she does not leave Australia, such a person currently remains in prolonged immigration detention, with the very real risk of serious psycho-social and other harm developing. As at the date of the Roundtable, 50 refugees are in this situation, including some who have young children, survivors of torture and trauma, and other vulnerable individuals. The situation is particularly invidious for young children whose liberty is curtailed.

In June 2011, UNHCR and the International Detention Coalition co-chaired an Expert Roundtable to explore the broader issue of Alternatives to Detention in Australia for refugees, asylum-seekers and stateless people. A key problem area identified during that Roundtable was the detrimental impact of national security assessments on persons assessed to be in need of international protection in Australia but who found themselves in prolonged detention without any reasonable opportunity for release or review. The Roundtable recommended that issues relating to national security assessments in Australia required greater clarity and transparency, and that there needed to be some 'bridge' between the confidentiality of intelligence information and decision-making, and the procedural fairness necessary to decisions relating to detention. Participants also recommended further consideration of alternatives to detention where there was an assessed risk to national security.

Since the June 2011 Expert Roundtable on Alternatives to Detention, there have been a number of positive developments in Australia's policy and practice of detaining refugees and asylum-seekers. However, a number of key concerns remain around the fairness of the security assessments procedures themselves, and the humanitarian consequences of prolonged detention for those found to represent a risk to security.

In this area, Australia faces a number of very complex legal, security and humanitarian challenges that require deeper analysis if these two areas of Australia's responsibilities reconciled.

The purpose of the Expert Roundtable on National Security Assessments for Refugees, Asylum-Seekers and Stateless Persons, therefore, was to bring together experts from Australia and similar jurisdictions to examine two broad areas where some progress might be achieved:

(i) To explore whether the current security assessment procedures could be made more transparent and fairer but in ways that did not impinge or unduly compromise the work of the security services; and,

(ii) To examine alternatives to protracted detention in secure immigration detention centres for individuals who have received adverse security assessments but who may, on closer analysis, be able to reside in non-custodial settings notwithstanding their adverse assessment.

Finally, the Chair wishes to acknowledge the experience and expertise brought to the Roundtable by the participants, the frank and rich diversity of discussion and, not least, the seriousness which all participants brought to the challenge of finding ways to accommodate these two important and challenging areas of State responsibility.

Particular appreciation is due to those who came from overseas and to the Australian Human Rights Commission for its financial contribution to the Roundtable.

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At the conclusion of the Expert Roundtable on National Security Assessments for Refugees, Asylum-seekers and Stateless Persons in Australia, the Chair issues the following summary.[1]

Introduction

1. Notwithstanding the overarching 'mandatory detention' policy still being in place, the Roundtable broadly welcomed the 25 November 2011 announcement and ongoing implementation of the Government's new approach to case management to move asylum-seekers, on a case-by-case basis, into the community on bridging visas while their asylum claims are being completed and their status resolved, following initial identity, security and health checks.

2. The meeting noted the Australian Labor Party's National Conference resolution to examine ways to extend procedural fairness to refugees who have been refused visas on the basis of an adverse security assessment and the recommendations by the Joint Select Committee on Australia's Immigration Detention Network:

   (i) To place all refugees who do not trigger any concerns, following initial security checks and subject to a risk assessment, into the community while any necessary in-depth security assessments are conducted (Recommendation 26);
   (ii) To establish and implement periodic, internal reviews of adverse security assessments (Recommendation 27); and,
   (iii) To allow the Administrative Appeals Tribunal to review security assessments of refugees and asylum-seekers (Recommendation 28).

3. Notwithstanding these positive developments, at the date of the Roundtable, 50 refugees were in prolonged immigration detention in Australia as a result of having received adverse security assessments, with an additional 442 refugees awaiting in-depth security assessments.[2] This includes families with children, survivors of torture and trauma, and other vulnerable individuals.

4. It was noted that individuals with adverse security assessments represented a very small percentage[3] of the overall refugees, asylum-seekers and stateless people entering Australia, and that the vast majority of these received permanent protection visas. Despite the relatively small number of persons subject to these conditions, the negative humanitarian impact for those affected was particularly serious, as the rates of self-harm and suicide demonstrate.

5. The Roundtable noted that adverse security assessments were issued by the Australian Security Intelligence Organisation (ASIO) on the basis of the ASIO Act, which defines "security" as the protection of Australia's territorial and border integrity from serious threats, and the protection of Australia and its people from espionage, sabotage, politically motivated violence, the promotion of communal violence, attacks on Australia's defence system, and acts of foreign interference. [4]

6. One participant noted that the criteria relating to border integrity, if used to make an adverse security assessment on the basis of suspected involvement in people smuggling, were incongruous when

[1] The Chair's Summary seeks to capture the main elements of discussion and conclusion, but remains the sole responsibility of the Chair.
[2] In-depth security assessments of protection visa applicants are currently, as a matter of practice, undertaken after persons are found to meet the definition of 'refugee' in the 1951 Refugee Convention.
[3] Less than one per cent of irregular maritime arrivals.
[4] Section 4, Australian Security Intelligence Organisation Act 1979.

compared to the gravity of the other criteria, and that the current criminal law relating to people smuggling seemed to be more than adequate to deal with this category of case.

7. In many cases there was no legal option for the Government but to detain, in the absence of a power to grant a visa or where there is a legislative requirement to cancel a visa. Even where there is Ministerial discretion to grant a visa, allow community detention or make a decision not to cancel a visa, government policy is that the holders of adverse security assessments remain in secure detention.

8. One participant noted that increased transparency in the security assessment procedures could have a detrimental impact on Australia's ability to receive source materials from its security partners, that the adverse security assessments were reviewed by the Director-General of ASIO personally, and that the Inspector-General of Intelligence and Security already provided some measure of reassurance as a procedural safeguard.

9. Most participants agreed that there was a need actively to explore the scope to increase the procedural safeguards for refugees who were subject to adverse security assessments, and to enhance their ability to have a "fair hearing".

10. International refugee and human rights law were considered in light of Australia's legislative settings, and models for increasing procedural safeguards, as well as for alternative ways of managing risk to the community, were provided by experts in the field, including with special reference to models in jurisdictions similar to Australia such as Canada, New Zealand and the United Kingdom.

11. There was broad agreement that the status quo was not sustainable and that some new approaches were needed to ameliorate the situation for those held in protracted detention whilst, at the same time, preserving the integrity of the security services' work.

Procedural fairness

12. With regard to enhancing procedural fairness, various options were considered, including the introduction of a special "security-cleared" advocate and expansion of the Administrative Appeals Tribunal (AAT) jurisdiction to refugees and others to whom Australia owes international protection obligations, but who do not meet the current criteria of citizenship, permanent residency or special purpose visa. The AAT jurisdiction had been settled in 1977 and some participants considered it required review in light of the different security context and human rights developments, including those relating to universality and non-discrimination. Others noted that in a globalized world, the narrower protection of rights of nationals and permanent visa holders under the AAT jurisdiction was outmoded and that broader categories of people present in Australia could legitimately expect fairer treatment than under the current legal settings. Persons in need of international protection were a distinct and vulnerable category because, unlike voluntary migrants, they could not return to their country of origin.

13. One participant noted that the ASIO Act did not require, but nor did it preclude, the giving of reasons for an adverse security assessment. There might be operational reasons why reasons were not given, but there was no legal impediment.

14. Several participants considered it likely that legal proceedings might well be mounted to challenge the current practices in Australia. It was noted that successful legal challenges had led to substantive change in a number of other similar jurisdictions, including in Canada, New Zealand and the United Kingdom. In Australia, the Government currently appeared to have the option of taking proactive

steps to resolve this situation, or else the High Court might make a finding in relation to a particular case which would have clarify the lawfulness, or otherwise, of detention under the current approach.

15. While judicial review was available, it was limited to jurisdictional error and does not permit refugees to access the reasons for the decision. Some participants considered that any model of reform must include merit review and involve the affected individuals knowing at least the essence of the evidence against them upon which the decision is based. It was suggested that refugees should be able to challenge the basis for the decision in an independent and neutral setting, preferably a court or through a widened jurisdiction of the Security Appeals Division of the AAT.

16. It was further discussed that an effective legal challenge implicitly involves the ability to give a full defence and to challenge the credibility of the other side. Though legitimate security concerns might prevent full disclosure in security proceedings, some participants considered that any proposed model should allow for as full a disclosure as reasonably and proportionately possible, and an ability to mount an informed defence to the case against the individual.

17. International experience in Canada, New Zealand and the United Kingdom showed that the availability of a special advocate could provide additional safeguards for the rights of the affected individual. This did not, however, necessarily ensure the provision of all aspects of due process and administrative fairness and, also, such a procedure had associated cost implications.

18. One participant noted there needed to be caution in regard to use of a special advocate system which gave a veneer of legality to a process where, in reality, the essential particulars of the case were not given to affected person and, therefore, fell short of acceptable standards of fairness and transparency. In some instances, the special advocate system might legitimize the enhanced use of secret information because it could be seen as fairer than a system where no one is given access to classified information.

19. Another limitation of certain special advocate mechanisms, including those in Canada and the United Kingdom, related to where a special advocate is unable to obtain judicial permission to communicate with the client after the classified information is released. The advocate might be able to challenge internal consistency, the significance of parts of the evidence and the strength of the case overall, but – without instructions or evidence from the client in response to the essentials of the case against him or her – the advocate cannot provide evidence which contradicts or explains the classified essential features of the case against the client.

20. It was noted that in jurisprudence from the United Kingdom and the European Court of Human Rights administrative fairness requires that the individual be given sufficient information about the allegations against them to enable them to give effective instructions in relation to those allegations.[5] In those contexts, it is possible to do so without providing the individual with full details of the evidence, and without compromising the sources or *modus operandi* of those who gather the information and intelligence.

[5] *A. and Others v. The United Kingdom* – 3455/05 [2009] ECHR 301 (19 February 2009); *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28 (10 June 2009); *Mellat v Her Majesty's Treasury (Rev 1)* [2010] EWCA Civ 483 (04 May 2010); Joined cases C-402/05P & C-415/05P K*adi & Al Barakaat International Foundation v. Council and Commission*, judgment of the Court of Justice of the European Communities (Grand Chamber), 3 September 2008.

21. If there were to be some degree of merits review by the AAT, some participants asked whether a special advocate was desirable or indeed necessary (especially when such mechanism is not currently used in the merit review of citizens, permanent residents, or holders of special category/purpose visa in the Security Appeals Division). The presence of a special advocate might enhance the likelihood that the client receives the essential details of the allegations and assessment as the advocate may be able to push for further disclosure from the Tribunal – as is the experience in the United Kingdom. However, in such cases, it would ultimately be more desirable to enshrine in law the special advocate's ability to communicate with the client after the release of classified information.

22. One participant noted that a court, rather than ASIO, could be charged with issuing an adverse security assessment. This would allow ASIO to continue its important work of intelligence gathering but to leave the assessment of risk to another entity.

Role of Inspector-General of Intelligence and Security

23. The role of the Inspector-General of Intelligence and Security (IGIS) was discussed and it was noted that the IGIS had the power to review decisions by ASIO but these conclusions were not enforceable. Some participants considered future reform could be achieved through strengthening the powers of the IGIS.

Periodic review of adverse security assessments

24. It was broadly agreed that there was a need to introduce a mechanism to allow for the periodic re-assessment of risk to Australia's national security, especially in view of the fact that an adverse security assessment continues indefinitely. A re-assessment might be required in the light of changed circumstances or after a specified period had expired. It was not clear how and by who such a periodic re-assessment could be initiated. It was acknowledged by some participants that it might not necessarily be ASIO's role to trigger such reviews. Participants noted time and costs of such re-assessments were an important factor, given ASIO's other (and unrelated) responsibilities.

Alternatives to detention

25. Several participants, who have firsthand knowledge of individuals in detention, described the extremely damaging psycho-social and physical impact that protracted detention has on their wellbeing.

26. It was broadly recognized that at the heart of the challenge – and therefore the solution – might be to find more flexible and nuanced ways of grading and managing the security risk to Australia's national security, on an individualized 'case-by-case' basis. At present, a security assessment is limited to three possible outcomes and an adverse assessment results in an automatic and open-ended period of detention which may or may not be necessary or proportional to the nature of the risk posed.

27. Most participants highlighted the need to explore further the 'grey zone' of options within an adverse security assessment that lie between a complete and unrestricted release into the community and mandatory detention in a secure immigration detention centre. It might be possible that there would be an ongoing need for some individuals to be subject to some form of restrictive controls while others could have increased degrees of freedom of movement – with or without conditions as required by the individual case. The current 'green light'/'red light' dichotomy, triggered by an adverse security assessment and which results in release or detention, was seen by some participants as inflexible and inappropriate, especially where the affected person is in need of international protection.

28. One concern raised about conditional release was that it was expensive to monitor individuals in the community, and it was unclear which government agency would have responsibility for it. The detaining authority was not the law enforcement or the monitoring authority.

Durable Solutions

29. The Expert Roundtable discussed alternative 'durable solutions' for refugees where, under the current legal and policy settings, their lawful and long term stay in Australia was not possible.

30. Two alternative options were considered, both of which were considered to be problematic: (a) resettlement to a third country; or, (b) return to county of origin.

    (a) While resettlement to a third country was not excluded altogether, especially where there might be family links elsewhere, it had not been very successful to date. Some participants considered that the chances of such resettlement were so minimal that it should not be considered as a viable alternative. Indeed, there was a risk that if resettlement was elevated too highly as an option – when in reality it was not – that focus and attention could be distracted from reform to the *status quo*.

    It would be difficult for UNHCR to assist with such resettlement referrals because it did not have access to the information about the individual concerned. If Australia had 'red flagged' security concerns, then the prospect of resettlement to another third country was unlikely, unless the reasons for the adverse security assessment were unique or specific to Australia. In the absence of any details of an adverse assessment, it could be impossible to advance this option to a third State unless this could be negotiated on a bilateral (State-to-State) basis.

    (b) With regard to the possibility of a refugee or stateless person returning to a country of origin, this was also considered to be illusory. Refugees, themselves, had asked how their return could be contemplated when they had effectively been labeled 'terrorists'. Any return would either have to be fully voluntary or based on the cessation of a refugee's need for protection – both of which were unlikely if a refugee had been given an adverse assessment based on serious security concerns which had come to the attention of the country of origin. Return of a person determined to be stateless is equally illusory.

31. In this regard, participants noted that the basis for detention in Australia was to resolve status. Notwithstanding the judgment of the High Court of Australia in Al-Kateb that indefinite detention could be legal under Australian law, one participant noted that under international human rights law, detention had to be for a reasonable purpose, receive judicial oversight, and be subject to periodic review. If the purpose of the detention was to effect removal from the country – and that removal could not reasonably and realistically be carried out – then, the view of many participants was that under international law, the legal basis for the detention was undermined and the detention rendered unlawful.

32. One participant noted that where the only alternative to returning home was indefinite detention, and a refugee felt compelled by that impossible dilemma to opt for return, then this might be considered 'constructive' *refoulement*, since it was not effectively a reasonable choice, and was not made freely and without coercion. Such a result might appear to place Australia in violation of its international obligations under the 1951 Refugee Convention and international human rights law.

33. Furthermore, any efforts to expel a refugee needed to comply with the relevant provisions of the 1951 Refugee Convention, articles 33 (2) and 32. Even if a State were able to expel someone pursuant to the Refugee Convention, other human rights treaty obligations might prevent this (eg under the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* or the 1966 *International Covenant on Civil and Political Rights*).

34. Linked to this issue, some participants noted that diplomatic assurances of safety provided by the receiving country of origin could not be relied upon with any degree of confidence and might still place Australia in breach of the *non-refoulement* obligations of the Refugee Convention or other human rights treaties.

Summary of Conclusions and Recommendations

35. ***On the process of security assessment***: It was broadly recognized that there was a real need to explore the scope and opportunity to increase the procedural fairness and transparency of national security assessments without compromising the work of security agencies. This could be through:

    (i) an expanded jurisdiction of the Administrative Appeals Tribunal to cover refugees, stateless persons and others who did not have the option of voluntary and safe departure to another state's jurisdiction; and,
    (ii) provision of a summary of redacted or 'sanitized' evidence for adverse security assessment to allow an affected person to have some idea of the reasons for a decision that has such serious consequences for his/her rights, health and security;
    (iii) use of a Special Advocate, court or security-cleared legal representative;
    (iv) periodic review of adverse assessments on a regular basis and where a change of circumstances required it.

36. ***On the management of risk following an adverse security assessment***: An 'individualized case management' approach could be adopted to ensure that all decisions to detain or remain in the community are determined by the nature and degree of risk actually posed by an individual. A differentiated grading of risk would argue in favour of a differentiated response through case management. The roles and responsibilities of relevant Government agencies would need to be clarified and demarcated. Such an individualized management of risk would be defensible on legal, security, and moral grounds notwithstanding the public interest and scrutiny these issues undoubtedly attract.

37. Alternatives to protracted detention in secure immigration detention centres might include:

    (i) increased use of 'open facilities' such as at Inverbrackie;
    (ii) increased use of community detention;
    (iii) use of appropriate control orders, including monitoring;
    (iv) use of case specific or 'tailor-made" reporting arrangements to match the risk;
    (v) special hearings to consider release and conditions of release (along the lines of 'bail' hearings);
    (vi) best interests of the child determinations for children affected by the adverse security assessments of their parents or principal caregivers.

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