

The performance and integrity of Australia's administrative review system

Senate Standing Committee on Legal and Constitutional Affairs

Submission by the Office of the United Nations High Commissioner for Refugees

6 December 2021

I. INTRODUCTION

The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide this submission to the Senate Standing Committee on Legal and Constitutional Affairs in respect of its inquiry into the performance and integrity of Australia's administrative review system. In this submission, UNHCR focusses its observations on the performance of the Administrative Appeal Tribunal (AAT) as it relates to its handling of asylum and refugee matters.

At the outset, UNHCR wishes to acknowledge efforts by the AAT to provide high-quality merits review of administrative decisions affecting asylum-seekers and refugees and praise continuing efforts to address its backlog of unresolved cases. Currently, Australia's backlog of pending permanent protection visa applications at the primary level exceeds 31,600.¹ Furthermore, the number of refugees awaiting merits review at the AAT has continued to grow from 27,100 in 2019-20 to over 32,000 as of 30 June 2021.² Applicants appealing negative first instance decisions therefore continued to face significant delays in having their cases heard with only 34 per cent completed within 12 months in 2020-21.³

Similarly, the pending migration caseload in the Federal Circuit Court increased from 12,158 applications in 2019-20 to 14,398 applications in 2020-21.⁴ The primary sources of cases were

¹ Department of Home Affairs, *Monthly Update: Onshore Protection (Subclass 866) Visa Processing - October 2021*, p. 4, available at: <https://www.homeaffairs.gov.au/research-and-stats/files/monthly-update-onshore-protection-866-visa-processing-october-2021.pdf>. This figure reflects the total number of refugee status determinations awaiting a decision as at 31 October 2021. The Department of Home Affairs defines 'refugee status determinations' in its report as all departmental subclass 866 visa decisions made either before or after merits review. This figure excludes pending temporary protection visa applications and re-applications.

² Administrative Appeals Tribunal, *Annual Report 2020-21*, p. 55, available at: <https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR202021/AR2020%e2%80%9321.pdf>

³ Ibid.

⁴ Federal Circuit Court, *Annual Report 2020-21*, p. 32, available at: <https://www.fcfcoa.gov.au/sites/default/files/2021-10/21496%20FCC%20Annual%20Report%202020-21%20Web.pdf>.

decisions of the Immigration Assessment Authority (IAA) in relation to protection visa applications by people who arrived in Australia by sea without a visa, and decisions of the AAT's Migration and Refugee Division (MRD) in relation to other visa refusals and cancellations. Only 43 per cent of migration applications finalised were disposed of within 12 months.⁵

The number of applications lodged at the AAT is unlikely to significantly decrease in the foreseeable future, given the gradual easing of worldwide travel restrictions related to the COVID-19 pandemic and the rise in the number of people forcibly displaced due to persecution, conflict, violence, human rights violations and events seriously disturbing public order. UNHCR's latest *Global Trends Report* indicates that number has now grown to 82.4 million, the highest number on record according to available data. This was more than double the level recorded a decade ago.⁶ Further, based on UNHCR's 2021 *Mid-Year Trends* report, there are currently some 20.8 million refugees, as well as another 4.4 million asylum-seekers worldwide.

Backlogs in refugee status determination (RSD) continue to grow in many countries, including Australia. As such, UNHCR emphasises that it is important that States continue to make efforts to improve the efficiency and adaptability of their asylum systems, without compromising fairness or integrity. If backlogs become protracted and asylum-seekers wait several years for a final determination of their claim without meaningful access to rights, there will likely be negative consequences. This holds true for asylum-seekers, who are living in limbo and psychological distress, as well as for the State, because it can create irreparable damage to already fragile asylum systems, erode public confidence in the institution of asylum and make it more difficult to repatriate those found not to be in need of international protection.⁷

II. UNHCR'S AUTHORITY

UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions for refugees.⁸ As set forth in the *Statute of the Office of the United Nations High Commissioner for Refugees*, UNHCR fulfils its international protection mandate by, *inter alia*, '[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.'⁹ UNHCR's supervisory

⁵ Ibid., p. 51. Note also that 67 per cent of the Federal Court's total appellate workload concerned decisions made under the *Migration Act 1958*. More than 1,000 appeals are in excess of 24 months old (see table 3.3): Federal Court of Australia, *Annual Report 2020-21*, pp. 37-38, available at: https://www.fedcourt.gov.au/_data/assets/pdf_file/0011/88265/FCA-Annual-Report-2020-21.pdf.

⁶ UN High Commissioner for Refugees (UNHCR), *Global Trends in Forced Displacement - 2020*, 18 June 2021, p. 6, available at: <https://www.unhcr.org/en-au/statistics/unhcrstats/60b638e37/global-trends-forced-displacement-2020.html>.

⁷ UNHCR, *Global Trends in Forced Displacement- 2020*, p. 43, available at: <https://www.unhcr.org/flagship-reports/globaltrends>.

⁸ See *Statute of the Office of the United Nations High Commissioner for Refugees*, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, para. 1 (Statute).

⁹ Statute, para. 8(a).

responsibility under its Statute is reiterated in Article 35 of the *1951 Convention relating to the Status of Refugees*,¹⁰ (1951 Convention) according to which State Parties undertake to “co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention.” The same commitment is included in Article II of the *1967 Protocol relating to the Status of Refugees* (1967 Protocol).¹¹

In accordance with UN General Assembly resolutions 3274 XXIX¹² and 31/36,¹³ UNHCR has also been designated, pursuant to Articles 11 and 20 of the *1961 Convention on the Reduction of Statelessness* (the 1961 Statelessness Convention),¹⁴ as the body to which a person claiming the benefits of this Convention may apply for the examination of his or her claim and for assistance in presenting it to the appropriate authorities. In resolutions adopted in 1994 and 1995, the UN General Assembly entrusted UNHCR with a global mandate for the identification, prevention and reduction of statelessness and for the international protection of stateless persons.¹⁵ UNHCR’s statelessness mandate has continued to evolve as the UN General Assembly has endorsed the Conclusions of UNHCR’s Executive Committee.¹⁶

Australia is a Contracting Party to the *1951 Convention relating to the Status of Refugees* and its 1967 Protocol (together, the Refugee Convention), as well as the *1954 Convention relating to the Status of Stateless Persons* (the 1954 Statelessness Convention), and the 1961 Statelessness Convention. Through accession to these instruments, Australia has assumed international legal obligations in relation to refugees, asylum-seekers and stateless persons in accordance with their provisions.

¹⁰ UN General Assembly, *Convention relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

¹¹ UN General Assembly, *Protocol relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

¹² UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 10 December 1974, A/RES/3274 (XXIX).

¹³ UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 30 November 1976, A/RES/31/36.

¹⁴ UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175.

¹⁵ UN General Assembly resolutions A/RES/49/169 of 23 December 1994 and A/RES/50/152 of 21 December 1995. The latter endorses UNHCR’s Executive Committee Conclusion No. 78 (XLVI), *Prevention and Reduction of Statelessness and the Protection of Stateless Persons*, 20 October 1995.

¹⁶ Executive Committee Conclusion No. 90 (LII), Conclusion on International Protection, 5 October 2001, para. (q); Executive Committee Conclusion No. 95 (LIV), General Conclusion on International Protection, 10 October 2003, para. (y); Executive Committee Conclusion No. 99 (LV), General Conclusion on International Protection, 8 October 2004, para. (aa); Executive Committee Conclusion No. 102 (LVI), General Conclusion on International Protection, 7 October 2005, para. (y); Executive Committee Conclusion No. 106 (LVII), Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, 6 October 2006, paras. (f), (h), (i), (j) and (t); all of which are available in: [Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 \(Conclusion No. 1 – 114\)](#), October 2017.

III. ADMINISTRATIVE REVIEW OF DECISIONS AFFECTING ASYLUM-SEEKERS, REFUGEES AND STATELESS PERSONS

Applications by refugees and asylum-seekers are predominantly managed by the Migration and Refugee Division, the Immigration Assessment Authority, and the General Division of the AAT.

The Migration and Refugee Division

The MRD reviews decisions made under the *Migration Act 1958* (Migration Act). The vast majority of refugee applications are for review of a decision to refuse to grant a protection visa. This requires the Tribunal to consider whether the applicant is a person in respect of whom Australia has protection obligations, by assessing whether they are a refugee or, in the alternative, entitled to complementary protection. The latest AAT Annual Report notes a sustained increase in applications lodged in the MRD from 2015–16 (18, 929) reached a peak in 2017–18 (37, 933) and 2018–19 (36, 172) before beginning to slow in 2019–20. The size of the on-hand caseload in the Division grew each year to 63, 305 at 30 June 2020.¹⁷

In the last five years, the MRD has received sustained, high levels of lodgements relating specifically to decisions concerning protection (refugee) visas. This has resulted in a gradual but substantial increase in refugee cases on-hand to 32, 064 at 30 June 2021, constituting 57 per cent of all cases on-hand in the Division. Applications from Chinese and Malaysian nationals, some of whom have reportedly used the asylum pathway to extend their stay and lawful working arrangements, represented nearly two thirds of the Division's refugee backlog at the end of the reporting period.¹⁸ Thus far in the 2021–22 reporting period, lodgements to the AAT by Chinese and Malaysian nationals have constituted precisely 70 per cent of all lodgements received.¹⁹

At the beginning of the COVID-19 pandemic, the MRD reportedly focussed on the less complex cases that could be finalised without a hearing or through remote hearings. However, this has now left them with a more complex and aged backlog of cases on-hand, which is likely to present significant challenges for the years ahead. These are the sort of cases which tend to become more complicated and time consuming as waiting times are progressively extended.²⁰

AAT President, Justice David Thomas recognises that the AAT is currently not sufficiently resourced to substantially reduce their significant on-hand caseload.²¹ The need for greater resources was also recognised in 2018 when the Hon Ian Callinan AC QC, former Justice of

¹⁷ Administrative Appeals Tribunal, *Annual Report 2020–21*, p. 31.

¹⁸ Ibid., p. 60; see also: Crowe, D, 'Asylum seeker processing wait time blows out to two years', *The Sydney Morning Herald*, 9 October 2019, available at: <https://www.smh.com.au/politics/federal/asylum-seeker-processing-wait-time-blows-out-to-two-years-20191008-p52yso.html>.

¹⁹ Administrative Appeals Tribunal, 'Migration and Refugee Division Caseload Report – Financial year to 31 October 2021', p. 2, available at: <https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-detailed-caseload-statistics-2021-22.pdf>

²⁰ Administrative Appeals Tribunal, *Annual Report 2020–21*, p. 54.

²¹ Ibid., p. 9.

the High Court of Australia, completed a statutory review of the AAT, wherein he similarly noted:

“There is a real and pressing need for further Members and resources in this Division [MRD]. Whilst there is such a deficit in it, reviews to be made will multiply, deserving applicants will continue to live in uncertainty, and dishonest or ineligible applicants will be able to remain within the country.”²²

Despite this, in 2020-21 the AAT had 13 fewer members at the end of the reporting period compared to the previous year.²³ The Division’s focus in 2020-21 was on finalising the older and more complex cases as well as cancellation cases and cases remitted by the courts. The Division plans to continue focussing on case management through proactive triaging and outreach but considers that unless there is a significant and sustained decline in lodgements, an increase in membership and staffing and legislative changes to give the Division the power to enforce directions, it is anticipated that the backlog and delay in finalising cases will continue.²⁴

The Immigration Assessment Authority

The IAA is established within the MRD but operates independently from it. The IAA provides a fast track merits review of decisions to refuse to grant a protection visa to fast track applicants, who include asylum-seekers who arrived by boat between 13 August 2012 and 31 December 2013, who were not taken to Nauru or Papua New Guinea for offshore processing and who have been permitted by the Minister to make a protection visa application.²⁵

In 2020–21, the IAA received 894 cases to review, nearly 50 per cent less compared to the previous year, largely related to reduced levels of decision making within the Department of Home Affairs as a result of the COVID-19 pandemic. The IAA finalised 788 cases and had 212 pending cases on hand as at 30 June 2021. On average, the IAA finalised cases within 5 weeks from referral, as was the case for the preceding year. The IAA affirmed the decision made at first instance in 717 cases and remitted only 55 cases back to the Department of Home Affairs for reconsideration.²⁶

The General Division

Amongst other things, the AAT's General Division reviews decisions made with respect to Australian citizenship (predominantly cases where the applicant fails to meet the good character, identity or residence requirements) and visa decisions made on character grounds. There was a 12 per cent increase in reviews of character-related visa decisions, consisting of applications for review of decisions made pursuant to the Migration Act to either cancel or

²² Ian Callinan, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015*, 23 July 2019, Attorney-General’s Department website, p. 23, available at: <https://www.ag.gov.au/legal-system/publications/report-statutory-review-tribunals-amalgamation-act-2015>.

²³ Administrative Appeals Tribunal, *Annual Report 2020–21*, p. 7.

²⁴ *Ibid.*, pp. 58-61.

²⁵ The definition of ‘fast track applicant’ also includes asylum-seekers who were sent to Nauru or Papua New Guinea between 13 August 2012 and 19 July 2013 and later returned to Australia and those seeking review of their negative re-application decision for a Temporary Protection Visa or Safe Haven Enterprise Visa.

²⁶ *Ibid.*, pp. 7, 87.

refuse a visa under section 501, not to revoke a mandatory visa cancellation under section 501CA, or to refuse a protection visa on either character or security grounds. Most applications in this area are required to be finalised within 12 weeks after the applicant is notified of the decision. The AAT reported that 89 per cent of such cases were finalised within 12 months and the average time to finalise a case was 11 weeks, which is consistent with the requirement that the majority of these applications to be finalised within the legislated timeframe.²⁷

IV. THE IMPORTANCE OF A FAIR AND EFFICIENT ASYLUM SYSTEM

The 1951 Convention and the 1967 Protocol define those to whom international protection is to be conferred and establish key principles such as non-penalisation of irregular entry and *non-refoulement*. Whilst these instruments do not set out procedures for the determination of refugee status as such, it is generally recognized that fair and efficient procedures are an essential element in their full and inclusive application. As a general rule, quality RSD processes should aim to demonstrate fairness, efficiency, adaptability and integrity.²⁸

It is important to note that Australia was among the States that voted to support the Global Compact on Refugees (GCR) in 2018, thereby expressing its ambition to assist in strengthening cooperation and solidarity with refugees and affected host countries. As part of this Compact, Australia acknowledged the importance of fair and efficient asylum systems. As stated in the GCR:

Mechanisms for the fair and efficient determination of individual international protection claims provide an opportunity for States to duly determine the status of those on their territory in accordance with their applicable international and regional obligations (A/RES/72/150, para 51), in a way which avoids protection gaps and enables all those in need of international protection to find and enjoy it.²⁹

In order to ensure that asylum-seekers have effective access to asylum procedures and that States can uphold their international obligations, States need to ensure that the appropriate status determination structures are in place, that they are adequately resourced, and that minimum procedural safeguards are provided and upheld.³⁰ A fully functioning fair and efficient asylum system will:

- Benefit refugees, as they can receive a decision promptly, be assured of safety, and begin to rebuild their lives;
- Benefit the government, as claims are handled expeditiously and in a cost-effective manner, as well as with due respect to human rights principles;
- Decrease the overall demands on the reception system, discourage misuse of the asylum system, and avoid protracted periods of uncertainty for the asylum-seeker;

²⁷ Administrative Appeals Tribunal, *Annual Report 2020–21*, p. 48.

²⁸ UNHCR, *RSD Procedural Standards Unit 4: Adjudication of Refugee Status Claims*, p. 11, available at: <https://www.refworld.org/docid/5e87075d0.html>.

²⁹ UNHCR, *Global Compact on Refugees*, p. 23 [61], available at: <https://www.unhcr.org/5c658aed4>

³⁰ UNHCR, *A guide to international refugee protection and building state asylum systems*, 2017, Handbook for Parliamentarians N° 27, pp. 154-155, available at: <https://www.refworld.org/docid/5a9d57554.html>.

- Make an important contribution to improving the capacity of States to manage arrivals of non-nationals;
- Help the public to be more inclined to support refugee protection, since it is clear that national authorities are responding to the presence of asylum-seekers; and
- Identify promptly individuals who are not entitled to international protection, thus also facilitating their return.³¹

If RSD becomes protracted it is often challenging to build a resilient asylum system that can adapt to change and address pending applications in a fair and efficient manner. Delays in processing can also damage the integrity of asylum systems as applicants can use the system for purposes of the “time” that it provides in terms of legal or tolerated stay during the asylum procedure, with adverse consequences for both the individual and the State.

Backlogs may also contribute to increasing pressures on social support services, as applicants, without legal certainty, sometimes face increasing risks and vulnerabilities, and a significant deterioration of physical and mental health over time. In such circumstances, systems lose credibility in the eyes of the participants, and also among the public. The uncertainty may also delay or prevent achievement of self-sufficiency for applicants and, at the same time, de-facto integration over time may affect the possibility of giving effect to negative decisions later. Generally, several of these consequences of an RSD backlog may contribute to further growing of the backlog, further entrenching it, negatively impacting the system and making resolution more difficult.³²

Generally speaking, processing backlogs normally arise as a result of either a large influx of applications that exceeds the processing capacity of an RSD system or because of systemic issues that result in inefficiencies or reduced output over a sustained period. Systemic issues that can result in or contribute to growing backlogs include factors such as:

- Lack of adequate resources;
- Inadequate staffing arrangements;
- Scheduling challenges;
- Inadequate management;
- Inadequate infrastructure;
- Inadequate case management tools and techniques;
- Any disruption of processing for a time causing delays;
- Poor quality first instance decisions, resulting in a substantial number of applications;
- Needing to be re-interviewed, overburdening the system;
- Philosophical obstacles: lack of value attributed to, understanding of, or prejudice towards RSD;
- Existing backlogs (an existing backlog often compounds the other problems).³³

Where backlogs exist, often a combination of these causes and contributing factors are present and may compound the problem over time if not adequately addressed early on. Backlogs

³¹ Ibid., pp. 154-155.

³² UNHCR, *Refugee Status Determination Backlog Prevention and Reduction*, January 2018, PPLA/2018/03, pp. 1-2, available at: <https://www.refworld.org/docid/5b1a38374.html>.

³³ Ibid., p. 4.

will grow and require greater human and financial resources the longer they go unaddressed.³⁴ Additionally, backlogs have implications for an RSD authority's organisational culture - with increasing pressure and a seemingly insurmountable backlog, turnover is common, and staff are more likely to be demotivated, contributing to reductions in productivity and quality of decision-making, which is likely to further increase the backlog.

V. STRATEGIES TO INCREASE EFFICIENCY IN AN ASYLUM SYSTEM

In the face of RSD backlogs, there may be a temptation by States to reduce quality or procedural standards for the sake of efficiency. However, lowering quality tends only to push the backlog further down the chain and lead to re-applications. Instead, it is important to invest in high-quality decision-making at every level of the determination process.³⁵ In particular, investing in measures that enhance the quality of decision-making at first instance can not only support correct decision-making but also reduce pressure at the appeal stage and the rate of overturn.

Whether at first instance or merits review, RSD is time and resource intensive and requires a great deal of specialized skill and expert knowledge of refugee and asylum matters. Decision-makers should also possess the personal attributes and values required to perform this essential protection-oriented role to the highest standard. They should be familiar with the use of professional interpreters and have appropriate cross-cultural interviewing techniques. Not only must States allocate sufficient personnel and resources, so that they can build capacity, but they should also provide continuous professional training so that officials can accomplish their task expeditiously and fairly. Such training should also encompass how to adjudicate and support applicants who may be vulnerable or have specific needs, such as children, women with specific needs, LGBTIQ persons, and psychologically vulnerable applicants.³⁶

Additional measures include putting in place mechanisms for continuous evaluation, quality review of decision-making and quality assurance, as has been done in the United Kingdom since 2004.³⁷

Access to quality legal assistance and representation at all stages of the process can also help to ensure that asylum-seekers put forward all information relevant to their claim at the outset,

³⁴ Ibid., p. 4.

³⁵ Ibid., p. 2.

³⁶ UNHCR, *Guidance Note on the Psychologically Vulnerable Applicant in the Protection Visa Assessment Process*, November 2017, available at: <https://www.refworld.org/docid/5ae2d74d4.html>. See also: Administrative Appeals Tribunal, *Migration and Refugee Division Guidelines on Vulnerable Persons*, November 2018, available at: <https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Guidelines-on-Vulnerable-Persons.pdf>.

³⁷ For example, the UK Quality Initiative Project which ran from 2004 to 2009; the Quality Integration Project which ran from 2010-2019; and the Quality Protection Partnership (QPP) which began in 2019. For further information see: UN High Commissioner for Refugees (UNHCR), UK Quality Protection Partnership webpage, available at: <https://www.unhcr.org/uk/quality-initiative-and-integration.html>.

thereby avoiding inefficiencies associated with further submissions and decisions being overturned on appeal.³⁸

Triaging is an important case management tool which can strengthen the response and contribute to decongesting the asylum system as it can assist in identifying cohorts which can be channelled into appropriate case processing modalities. However, it is essential that clear, transparent yet sufficiently flexible criteria be established to guide the triaging process.³⁹

Another effective case management tool is the use of forms with pre-populated legal analysis and/or country of origin information, including caseload specific assessment forms. By way of example, in Italy, simplified interviewing forms, templates and country of origin factsheets have been developed for asylum-seekers from Bangladesh, Senegal and Southern Nigeria while others are being developed for countries with high recognition rates, such as Afghanistan, Eritrea, Somalia and Syria.⁴⁰

VI. ENSURING THE FAIRNESS OF AN ASYLUM SYSTEM IS RETAINED

UNHCR emphasises the importance of States maintaining quality asylum systems that are efficient and adaptable, while also upholding fairness and integrity of processing. Sacrificing key procedural safeguards and/or setting short time limits or numerical targets may result in flawed decisions which will defeat the objective of a fair and efficient asylum procedure.

Against this backdrop, it is important to point out that Australia has in place a fast track review mechanism, in the form of the IAA. So far, in the 2021-22 reporting period, the average time in which a case was finalised (between lodgement and decision) at the AAT was 657 days for a protection visa. By contrast, the IAA's average time between lodgement and decision peaked at only 41 days.⁴¹

In UNHCR's view, the swiftness with which the IAA can finalize cases has come at a cost; for key procedural safeguards are absent from the review process. For instance, its accelerated review process denies asylum-seekers the opportunity to attend a review hearing and the review authority can only consider new information that was not before the first instance decision-maker in exceptional circumstances. This has resulted in consistently high rejection

³⁸ UNHCR, RSD Procedural Standards Unit 2.7: Legal Representation in UNHCR RSD Procedures, 26 August 2020, available at: <https://www.refworld.org/docid/5f3114a74.html>.

³⁹ UNHCR, *UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, 25 July 2018, p. 8, available at: <https://www.refworld.org/docid/5b589eef4.html>; UNHCR, *UNHCR's Guide to Asylum Reform in the United Kingdom*, 23 February 2021, pp. 3-4, available at: <https://www.unhcr.org/uk/publications/legal/60942d8e4/unhcrs-guide-to-asylum-reform-in-the-united-kingdom.html?query=asylum%20reform>.

⁴⁰ UNHCR, *UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, 25 July 2018, p. 10, available at: <https://www.refworld.org/docid/5b589eef4.html>.

⁴¹ Immigration Assessment Authority, 'Caseload Report', p. 1, available at: <https://www.iaa.gov.au/IAA/media/IAA/Statistics/IAACaseloadReport2021-22.pdf>; Administrative Appeals Tribunal, 'Migration and Refugee Division Caseload Report – Financial Year to 31 October 2021', p. 6, available at: <https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-detailed-caseload-statistics-2021-22.pdf>.

rates, especially for particular nationalities, since commencement.⁴² Moreover, the fast track merits review process is not available to all those who receive a negative outcome at the primary stage. As at 31 March 2021, 71 persons had been found to be excluded from any form of merits review, many on the basis that their protection claims had been refused by a country other than Australia, despite the passage of time and any new protection claims that may have emerged in the interim.⁴³

UNHCR considers that access to an effective remedy is a core due process standard in promoting the fairness and integrity of asylum systems and a central aspect to protecting the right to seek and enjoy asylum from persecution and the principle of *non-refoulement*. To be effective, the remedy must provide for a review of the claim by a court or tribunal, and the review must examine both facts and law based on up-to-date information. Access to appeal should not be restricted for reasons related to procedural irregularities or because of the perceived merits of the claim. In addition, an accelerated procedure in law or practice that effectively prevents an asylum applicant from exercising basic procedural rights, and thereby prevents them from pursuing an asylum claim is not in line with international standards.⁴⁴

There are a variety of strategies or mechanisms that States can utilise to make improvements to the efficiency and adaptability of their asylum systems, without compromising fairness or integrity. For instance, procedural case management approaches can be used or developed to help streamline and speed up the determination of an asylum-seeker's international protection needs whether at the primary or review stage.⁴⁵ Accelerated and simplified procedures might be well suited to caseloads or profiles with high or low protection rates, such as where claims are likely to be manifestly well-founded, manifestly unfounded and/or cases with a presumption of inclusion. Such procedures might also be appropriate when claims are made by applicants with specific needs or by those manifestly in need of a protection intervention. These approaches must still afford applicants all the procedural safeguards required to have a fair determination of their claim, and to be heard, in accordance with international standards.

An additional or alternative approach would be to conduct simplified interviews or hearings that focus only on the core elements of the claim such as nationality, area of origin, ethnicity or religion or other protected characteristics. The personal interview remains nonetheless crucial as it provides the applicant with an opportunity to explain comprehensively and directly to the authorities the reasons for seeking asylum and gives the determining authority the opportunity to establish, as far as possible, all the relevant facts and to assess the credibility of the oral evidence.⁴⁶

⁴² Immigration Assessment Authority, Statistics, available at:

<https://www.iaa.gov.au/about/statistics>.

⁴³ Department of Home Affairs, *Budget Estimates*, 24 to 28 May 2021, Response to question taken on notice, Question BE21-365, available at:

https://www.aph.gov.au/Parliamentary_Business/Senate_estimates/legcon/2021-22_Budget_estimates.

⁴⁴ UNHCR, *UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures*, 21 May 2010, available at: <https://www.refworld.org/pdfid/4bf67fa12.pdf>.

⁴⁵ See also; UNHCR, *Aide-Memoire & Glossary of case processing modalities, terms and concepts applicable to RSD under UNHCR's Mandate (The Glossary)*, 2020, available at:

<https://www.refworld.org/docid/5a2657e44.html>.

⁴⁶ *Ibid.*, p. 10.

In order to preserve the credibility of any asylum system, it is also necessary that individuals found not to be in need of international protection and who have been issued a final negative decision in a fair procedure, are promptly returned to their country of origin. In its 2003 Conclusion on International Protection, UNHCR's Executive Committee noted 'that the efficient and expeditious return of persons found not to be in need of international protection is key to the international protection system as a whole, as well as to the control of irregular migration and prevention of smuggling and trafficking of such persons'.⁴⁷

UNHCR also acknowledges the importance of effective and meaningful scrutiny mechanisms to ensure transparency and accountability. The AAT is subject to external scrutiny through various mechanisms from judicial review through to complaints made to the Office of the Australian Information Commissioner, the Commonwealth Ombudsman, the Australian Human Rights Commission and other bodies as well as through audits, reviews and parliamentary scrutiny.⁴⁸ UNHCR notes the desirability of such mechanisms and takes this opportunity to reiterate the critical importance of the institution of asylum remaining non-political and fundamentally humanitarian in nature.

VII. CONCLUDING REMARKS

Protracted processing will result in asylum-seekers waiting several years for a final determination of their claim without meaningful access to rights. For some, it will also likely lead to a deterioration of physical and mental health over time, for which concessions and accommodations will need to be made.⁴⁹ Importantly, unaddressed processing backlogs will also erode public confidence in Australia's asylum system and impede efforts to repatriate those determined not to be in need of international protection.

UNHCR acknowledges and supports the AAT's continued efforts to build its capacity and capability. Securing additional member appointments and commensurate increases to staffing levels to support members is critical. UNHCR also welcomes the AAT's attempts to explore further opportunities to deal more effectively and efficiently with its caseload through improvements to case management and system-building, member support arrangements and the use of digital tools and technology.

UNHCR also supports measures designed to streamline RSD processes to improve efficiencies within asylum systems, including through the use of triaging of cases into different case processing modalities such as simplified and accelerated processes. However, expedited status determination processes should not involve a simplification of any aspect of the

⁴⁷ Conclusion on the return of persons found not to be in need of international protection, No.96 (LIV) – 2003, <http://www.unhcr.org/excom/exconc/3f93b1ca4/conclusion-return-persons-found-need-international-protection.html>; see also UNHCR, 10 Point Plan of Action, Refugee Protection and Mixed Migration, 2016 Update, Chapter 9, Return arrangements for non-refugees and alternative migration options, <http://www.unhcr.org/publications/manuals/5846d2957/10-point-plan-action-2016-update-chapter-9-returnarrangements-non-refugees.html>.

⁴⁸ Ibid., p.70.

⁴⁹ UNHCR, *Guidance Note on the Psychologically Vulnerable Applicant in the Protection Visa Assessment Process*, November 2017, available at: <https://www.refworld.org/docid/5ae2d74d4.html>.

substantive determination of a refugee claim.⁵⁰ Appropriate procedures should also be in place to ensure procedural fairness in order to deliver an effective remedy.

Accordingly, UNHCR would not support expansion of Australia's existing fast track review process under the IAA to address the backlog of pending cases. This model, and the absence of procedural safeguards within it, fails to guarantee applicants a protection assessment process that is as fair as it is efficient and thus concerns remain in relation to the IAA's ability to reliably identify persons in need of international protection.

United Nations High Commissioner for Refugees
6 December 2021

⁵⁰ UNHCR, *RSD Procedural Standards Unit 4: Adjudication of Refugee Status Claims*, p. 186, available at: <https://www.refworld.org/docid/5e87075d0.html>.