
FACT SHEET ON THE PROTECTION OF AUSTRALIA'S SO-CALLED "LEGACY CASELOAD" ASYLUM-SEEKERS

1 February 2018

Overview

UNHCR remains concerned about the impact of a number of punitive measures applied to a group of around 30,000 asylum-seekers who travelled to Australia by sea to seek asylum between 2012 and 2014.¹ The Government termed these asylum-seekers the "legacy caseload" largely for political reasons and to categorise them by reason of their mode and date of arrival in Australia. Some of the exceptional measures applied to these asylum-seekers include:

- preventing them from lodging visa applications for up to four years following their arrival in Australia;
- removal of legal assistance and translation services with few exceptions;
- removal of permanent residency and any realistic prospect of attaining citizenship;
- removal of the right to be reunified with immediate family members, even after recognition of refugee status;
- the attainment of only temporary protection requiring periodic re-assessment of protection needs;
- the removal of procedural safeguards that are fundamental to a fair and efficient protection assessment process; and
- the imposition of a "fast track" protection assessment process comprising curtailed appeal rights (and for some, the removal of an independent review altogether).

These and other changes outlined below have had a detrimental effect on the mental health of many asylum-seekers comprised of the so-called "legacy caseload". Moreover, these measures, especially taken cumulatively, create a significant risk that individuals' claims for protection may not be adequately nor accurately considered, giving rise to the possibility of refugees being returned to persecution (*refoulement*) in violation of Australia's international obligations under the 1951 Convention relating to the Status of Refugees.

Legal Representation

In 2014, the Government abolished publicly funded legal assistance from asylum-seekers who arrived in Australia without a valid visa (with only few exceptions). This assistance had been in place for decades, in recognition of the fact that legal assistance by qualified and experienced migration lawyers enhances the overall efficiency of the determination process by enabling asylum-seekers to submit well prepared statements and identify relevant evidence to support their claims. Moreover, providing free legal advice and translation services to disadvantaged asylum-seekers enhances fairness and ultimately reduces the financial costs for Government.

While free legal assistance was removed from asylum-seekers who travelled to Australia without a visa, other asylum-seekers for whom Australia has responsibility continue to have access to such services. This includes asylum-seekers who had their protection claims processed offshore in Nauru or Papua New Guinea and asylum-

¹ S Morrison (then Minister for Immigration and Border Protection), [Second reading speech: Migration and Maritime Powers Legislation Amendment \(Resolving the Asylum Legacy Caseload\) Bill 2014](#), House of Representatives, 25 September 2014, p. 10545.

seekers who travelled to Australia on a valid visa (such as a tourist or student visa) and subsequently sought asylum. This constitutes discrimination between asylum-seekers depending on their mode of arrival.

Asylum-seekers face significant challenges when completing visa applications without legal assistance. They are often unable to articulate elements relevant to their claim because they do not understand Australia's complex immigration system and the prescriptive laws governing recognition of refugee status. Additionally, language and cultural barriers, poor mental health and incomplete disclosure as a result of trauma or a lack of trust with persons in positions of authority may impair engagement in the process. This may ultimately compromise the accuracy of the decision.

Importantly, the provision of funded legal assistance and interpreting services also enables asylum-seekers to understand procedures resulting in appropriate engagement in the process and the ability to meet applicable time frames. This is particularly relevant for the processing of the so-called "legacy caseload", where strict application deadlines were imposed. While community legal centres and other pro bono legal service providers continue to assist as many asylum-seekers as possible in the absence of government funded legal services, there are many who will not have any access to legal services or insufficient support to navigate the processes. The consequences for such persons are potentially grave.

Recommendation

- All asylum-seekers in need must have access to government-funded legal representation and adequate interpreting services throughout the refugee status determination process.

Imposition of Deadlines

After being precluded from applying for asylum from 2012 for up to four years, the Australian Government announced in May 2017 that any of the so-called "legacy caseload" asylum-seekers who did not apply for protection visas by 1 October 2017 would be unable to apply for any kind of visa, would have government income support cut and would be deemed to have forfeited any claim to protection.² Around 70 individuals did not lodge an application before the deadline for a variety of reasons, including lack of access to legal assistance. Whether an asylum-seeker will be permitted to subsequently lodge an application for a protection visa or whether they will be removed from Australia is a decision that now ultimately rests personally with the Minister.

In late 2017, the Department of Home Affairs (the Department) began returning asylum-seekers from Australia who had not lodged an application by the 1 October 2017 deadline. The return of asylum-seekers whose claim for international protection has not been considered on its merits presents a serious risk of return to danger or persecution. UNHCR continues to seek assurances from the Government of Australia that asylum-seekers will not be removed back to their country of origin and that they will have access to Australia's national asylum procedures.

Recommendation

- All asylum-seekers to be granted access to Australia's national asylum procedures and all involuntary removal of asylum-seekers to be in accordance with Australia's international legal obligations.

² P Dutton, "Lodge or leave - Deadline for illegal maritime arrivals to claim protection", media release, 21 May 2017.

Mental Health and Protection Assessments

Asylum-seekers in the so-called “legacy caseload” are required to undertake a series of tasks to complete the assessment of their claims. The tasks associated with protection assessment require various psychological abilities, for example: to attend to and accurately comprehend questions during an extended interview; to recall events that are legally relevant and to draw on specific knowledge and experiences.

The psychological abilities required to undertake the protection assessment process may be impaired by: mental illness; psychological trauma; acquired brain injury; neurological disorders; intellectual and developmental disabilities; substance abuse; medications affecting mental state and physical illness. When an asylum-seeker’s psychological abilities are reduced, the fairness and accuracy of the protection assessment may be compromised unless each stage of the process is informed by their mental state and cognitive abilities.

Many asylum-seekers in the so-called “legacy caseload” suffer from clinically diagnosable mental disorders including depressive disorders and Post-Traumatic Stress Disorder. Other factors including indefinite family separation, prolonged periods of uncertainty, the imposition of strict timeframes, and negative political rhetoric influencing community perceptions have all contributed to the erosion of resilience and the mental health deterioration of this group of asylum-seekers.³

It is critical that any psychological vulnerability is identified as early as possible so that treatment can be provided and assessment processes can be modified to enable effective engagement in the assessment process. It is also critical that assessments are considered in the context of any psychological evidence (attainable from a variety of sources).

Recommendation

- The protection assessment process must be informed by the applicant’s mental state and cognitive abilities at every stage of the process to ensure a fair and accurate outcome; and
- Every stage of the protection assessment process should be conducted in accordance with UNHCR’s [Guidance Note on the Psychologically Vulnerable Applicant in the Protection Visa Assessment Process](#).

The Fast Track Assessment Process

The fast track assessment process is an expedited process for deciding visa applications lodged by asylum-seekers who arrived in Australia on or after 13 August 2012 but before 1 January 2014 and who were not taken offshore to Nauru or Papua New Guinea to have their asylum claims assessed. This process includes shorter timeframes at first instance for responding to requests for information and a limited form of merits review of refusal decisions for eligible asylum-seekers.

UNHCR remains concerned by the lack of procedural safeguards in the fast track review process, established in April 2015. This new review process denies asylum-seekers the opportunity to attend a review hearing. Instead, the majority of reviews of negative first-instance decisions are conducted “on the papers”, meaning on the written material before the reviewer. As asylum-seekers often arrive without documentation, it is important that they are given the opportunity to appear in person, particularly where the personal credibility of the applicant is at issue. This allows the review body to hear from and form a personal impression of the asylum-seeker and it gives the asylum-

³ Procter, N, Kenny, M, and Grecj, C, *Lethal Hopelessness: Understanding and Responding to Asylum Seeker Mental Deterioration Shared Learning in Clinical Practice*, University of South Australia, Supplement – September 2016.

seeker the opportunity to address any negative credibility issues or variations in facts raised in the first-instance decision.

In addition, where normally an independent review process will consider a case afresh and enable new information and protection claims to be made, the fast track review process shifts the onus onto the asylum-seeker to provide a complete statement of claim and supporting documentary evidence to the Department. The review authority can only consider *new* information that was not before the Department in exceptional circumstances. The term 'exceptional circumstances' is not defined in the legislation nor have guidelines been issued to inform the parameters of the term. In practice, the review body has adopted a restrictive interpretation of this criterion in order to ensure the review process is as streamlined and quick as possible. However, in practice some asylum-seekers will be extremely reluctant to disclose their personal experiences to a Department case officer, feared as a person in authority, especially if they do not build rapport with the asylum-seeker or where such claims involve sexual or gender based violence. In such circumstances, it is critical that the independent review process facilitate consideration of such claims and any supporting documentary evidence.

Some asylum-seekers will be excluded from merits review altogether. For instance, where the Department assesses an asylum-seeker's claims to be 'manifestly unfounded', where the applicant has relied upon a 'bogus document', or had access to effective protection in another country. The Department has adopted a restrictive interpretation of the latter and denied merits review to asylum-seekers who have had their claims for asylum rejected in another country irrespective of the time that may have passed or any differences in the protection claims or circumstances that were considered by the other country. As noted by the Australian Parliamentary Joint Committee on Human Rights, the exclusion of merits review for such asylum-seekers "is incompatible with Australia's obligations of non-*refoulement*".⁴

The fast track review process was created on the presumption that asylum-seekers would have already had ample opportunity to present all their claims and supporting evidence before a first instance decision is made by the Department. However, in the context of other policy changes designed to deter future arrivals, such as the removal of free legal assistance and interpreting services, the imposition of strict deadlines and prolonged family separation, it is apparent that the fast track review process is inadequate and lacks appropriate safeguards and flexibility to ensure a fair and efficient protection assessment process to identify persons in need of international protection.

Recommendation

- Amend the law to repeal the fast track assessment process, which does not contain key procedural safeguards and denies certain categories of asylum-seekers the right to access any form of merits review.

Temporary Protection Outcomes

UNHCR is deeply concerned that refugees in the so-called "legacy caseload" are not provided permanent protection in Australia. Refugees who are granted temporary protection for three or five years have no access to family reunification, including immediate family members such as partners and children and do not have the right to depart and re-enter Australia. Moreover, upon expiry of a temporary protection visa, refugees are required to undergo a re-assessment of their refugee status. Such periodic re-assessment of protection needs hinders a refugee's ability to integrate and rebuild their life, and thus contribute to the community and ultimately find an enduring solution to their plight.

⁴ Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament*, 28 October 2014, p. 88.

The re-assessment of protection claims also imposes significant demands on community legal centres, lawyers and migration agents providing their services for free in lieu of Government funded assistance. In addition, the re-assessment of claims imposes a significant and unnecessary financial and administrative burden on Government, as in most cases the necessity for protection will remain. To this end, it is relevant to recall that when temporary protection visas were previously granted to refugees, during the period 1999 to 2007, some 95 per cent of all temporary protection visa holders who arrived in Australia by boat were eventually granted permanent visas in Australia.⁵

UNHCR considers that the grant of temporary protection is only appropriate as an exceptional measure in circumstances of mass arrivals of asylum-seekers, where individual refugee status determination is impractical and temporary protection is granted to address urgent protection needs. The differential treatment afforded to these refugees in Australia simply on account of their mode of arrival is an insufficient justification for the imposition of this measure.

Recommendation

- Amend the law to remove all temporary protection visas, and provide permanent protection, with the right to family reunification, for all persons found to be refugees.

LINKS

[Guidance Note on the Psychologically Vulnerable Applicant in the Protection Visa Assessment Process \(2017\)](#)

[UNHCR Position on Legal Representation for Asylum-Seekers \(2017\)](#)

[Community-based protection and mental health and psychosocial support \(2017\)](#)

[Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health \(2017\)](#)

[UNHCR Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Migration and Maritime Powers Legislation Amendment \(Resolving the Asylum Legacy Caseload\) Bill 2014](#)

[UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status \(2011\)](#)

⁵ *Expert Panel on Asylum Seekers, Report of the Expert Panel on Asylum Seekers, Canberra, August 2012, p. 91.*