

WHO IS A REFUGEE, HOW ARE THEY PROCESSED AND THE GOVERNMENT REFORMS

*Robert Lindsay**

When one listens to Professor Appleyard's analysis of the numbers of refugees worldwide, now over 22 million¹, the inadequacy of the international community both to agree on joint measures to tackle this problem, and the legal definition of a refugee, over which so much legal learning has been poured, one is conscious that lawyers must fit Spengler's definition of the specialist who tries never to make small mistakes while moving towards the big fallacy.²

This paper seeks to define what constitutes a refugee in the legal sense, how Australia has applied that definition, the procedures by which an application for refugee status is made; and then discuss the Howard government's recent legislative amendments and how these reforms affect both the procedures for applying for asylum and the definition of a refugee itself.

The Background History to the Definition of a Refugee

Border control by countries is a phenomenon of the last hundred years. Before the first world war passports, identity papers, even driving licences were almost unknown. People moved from country to country and were treated as a source of 'communal enrichment'. It was the massive displacements in the early twentieth century; of one million Russians fleeing the Bolsheviks, the exodus of Armenians from Turkey in the early 1920s, those who fled Germany in the 1930s because they opposed National Socialism; and the Iron Curtain coming down after the World War II with the flight of political dissidents to the west,³ that brought about an ever increasing awareness that border control and the rules governing admission, were matters of critical governmental importance.

Following World War II the United Nations was set up, and in 1948 the Universal Declaration of Human Rights was passed, article 14 of which stated that 'everyone has the right to seek and enjoy another country's asylum from persecution'. The right to seek asylum was not accompanied by any assurance that the quest would be successful. The Declaration did, however, pave the way for the 1951 Refugee Convention which defined the refugee as any person who:

*as a result of events occurring before 1st January 1951 and owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it.*⁴

Article 33 of the same Convention forbade the return of a refugee to the frontiers of territories where their life or freedom would be threatened.

* *Barrister, Sir Lawrence Jackson Chambers, Perth. Former Director of Legal Aid in Western Australia and Chairman of the WA Refugee Council.*

The Convention also included provisions about dual nationality; the circumstances in which a person may cease to be a refugee; extradition of persons who have committed serious non political crimes, and where a person has already obtained refuge in a safe third country.

In 1967 there was a Protocol⁵ signed by over a hundred countries including Australia which achieved the universalisation of the convention definition by removing from the definition the words which are underlined in the quotation above. The requirement that the claim relate to events before 1st January 1951 was therefore eliminated.

The nature of the definition of a refugee approved by the United Nations reflected the emphasis of the developed western nations upon protection of human rights and, in particular, the definition sought to safeguard those who needed protection on grounds of political dissidence such as those who sought to escape Stalin's tyranny in Eastern Europe. The definition yielded nothing to the concerns of third world countries in connection with those who seek refuge from generalised civil war or natural disasters. As the High Court recently explained:

The definition ... does not encompass those fleeing generalised violence or internal turmoil and mass movements of persons fleeing civil war or other conflicts, military occupation, natural disasters and bad economic conditions are outside the Convention.

The Court also said:

No matter how devastating may be epidemic, natural disasters or famine, a person fleeing them is not a refugee....

Refugee Law in Australia

By signing the international Refugee Convention, Australia did no more than undertake to implement the terms of the Convention, but legal implementation rested upon parliament being ready to honour the international undertaking. The Australian parliament did pass legislation to permit those who 'engage Australia's protection obligations under the Refugee Convention'⁶ to obtain a protection visa provided also such persons passed certain health and character tests as well as satisfying the Minister for Immigration that he or she had taken all possible steps to avail himself or herself of a right to enter and reside in any country apart from Australia.

Since 1989 there have been a series of judgments by the High court expounding the meaning of the Convention definition. The degree of persuasion is that there must be a 'real chance of persecution' - this may be as low as 10%⁸ for it is difficult to ascertain on often scanty information what the prospect of persecution really will be. A 'real chance' is one that is not far fetched or remote.⁹

The determination of persecution is made at the time of decision as circumstances in the country of origin may have changed since departure. Likewise there may be a prospect of circumstances changing in the future. The language of the Convention tells against the construction that 'once a refugee always a refugee', and hence the government has decided to make protection visas for certain classes of refugees, such as those arriving by boat, 'temporary protection visas' that give the holder no right to permanent residence and, should the situation in the country of origin change for the better, would result in the temporary visa holder being returned from where they came. For example this may preclude many Afghans from obtaining permanent residency in Australia.

A fear of persecution is where an applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage. The denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned may constitute such harm though

not every deprivation of guaranteed freedom would do so.¹⁰ Therefore it has been conceded that enforced sterilisation in China of parents who wish to have children outside the 'one child policy' may amount to 'persecution' though such persons will find it difficult to show they are being persecuted for a convention reason, ie because they belong to a recognised social group.¹¹

Clearly a threat to life or freedom may constitute persecution but it is not confined to a threat to life and liberty. It could arise from loss of employment because of political activities, denial of access to the professions or to education, or the imposition of restrictions traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement. In so far as some of these people may be described as 'economic refugees' nonetheless they do fall within the legal definition of a 'refugee'.¹²

Recently the High Court held that a third child of unmarried parents who would if returned to China have been deprived of essential benefits such as health care, education and basic foods under Chinese law did therefore suffer 'persecution'.¹³ However it remains a critical question in each case whether persecution is for a Convention reason:

whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct (but) on whether it discriminates against the person because of race, religion, nationality, political opinion or membership of a particular social group.¹⁴

So the Chinese couple who had one child, and feared sterilisation under Chinese law if they had a second, were held to be 'persecuted' but not for a Convention reason because such parents did not form a recognisable social group. Conversely the third child of unmarried Chinese parents, deprived of essential benefits did qualify because such children form a recognisable social group in China. Legal definitions may make for such fine distinctions.

The Procedure for Processing Refugees

The early and mid 1990s saw arrival by sea of many Vietnamese and Chinese. Indeed one of the striking changes has been in nationality profile in more recent years of the boat arrivals. Now arrivals are mainly from middle eastern countries such as Iraq, Iran and Afghanistan and parts of Africa such as the Sudan.

Following the border wars between Vietnam and China at the end of the 1970s many ethnic Chinese, who had been settled and brought up in Vietnam, were expelled from Vietnam and refuge was sought by them in China. Many were not actually 'settled' in China by the United Nations Commissioner for Refugees and did not receive household registration without which access to housing, education, health care and employment was restricted. One such group of over 100 ethnic Chinese put up cardboard shacks in China on the beach front for a time before the Chinese authorities sought to move them on. The group decided to buy a boat (it was apparently before the days of people smugglers) and set sail, only to be intercepted in November 1994 near Ashmore Reef by the naval and customs authorities, and brought into Darwin for an overnight stay before being flown to the Port Hedland detention centre. Here they were held in quarantine for a time and interviewed by officials from the Department of Immigration. Each detainee was asked to fill in a bio data form which sought information about their family, whether or not they had been settled by the UNHCR, and why they had come to Australia. Each was asked, through an interpreter, about why they had come to Australia and why they had left China. A solicitor belonging to a refugee agency had unsuccessfully sought access to the detainees. The solicitor was not granted access because the department said no one within the centre had sought legal assistance. In February 1995 the Centre Manager told the detainees they would be returned to China. An amendment to the *Migration Act*, introduced the same month prohibited Sino-Vietnamese, to which class the detainees belonged, from applying for refugee status. All the

detainees, 49 men, 37 women, and 32 children joined in a court action which went to the High Court.¹⁵

In the opinion of the Department, a view supported by the judges, there was no obligation upon the Department to allow a lawyer access to the detainees because it was held that none of the detainees at the relevant time had asked for a lawyer. Only if they had done so was there then a statutory¹⁶ or common law obligation on the department to allow a lawyer to see them. Although the Chinese maintained they had been misled into believing the bio data forms they filled in were valid application forms for refugee status, the Department took the view that only if the Department considered the interviewee said enough 'to engage Australia's protection obligations' would a form to apply be provided to the detainee. In the view of the Department none of the detainees said sufficient to raise a possibility that they were genuine refugees and, accordingly, no valid form was provided to allow them to apply before a February 1995 amendment to the law was introduced, which prohibited any valid application from a Sino Vietnamese being considered.

The majority in the Federal Court decided that, without the proper forms being supplied by the department to the detainees, no valid application could be made for refugee status under the *Migration Act* and, therefore, their claims for protection under the *Migration Act* must fail. However, it was implicit in what the detainees had said to the Department officers as to why they had fled Vietnam, and their lack of protection in China, that they might be refugees, and therefore it did appear that the detainees had engaged Australia's protection obligations and should have been given the relevant forms. However the prohibition upon applications by Sino Vietnamese meant that it was too late for them to have lodged valid applications for consideration after February 1995.

The dissenting judge in the Federal Court, Carr J, considered that there was an obligation upon the department, as a matter of procedural fairness, to have informed the detainees that if they wished they could request legal assistance (which would no doubt have resulted in the provision of the relevant form to make a valid application). His Honour said this about the circumstances of the applicants' arrival:

I should not be taken to have ignored the practical realities of the situation in which the DIEA (Immigration Department) officers were placed. They were faced with boatload after boatload of arrivals, totalling several hundreds of people within a fairly short period. Processing even one refugee application consumes a great deal of time and resources. Multiplied by several hundred this might well have appeared to be an administrative nightmare. Nevertheless, recent cases in this court have demonstrated that the DIEA can, when required, quickly mobilise and, by employing well organised and coordinated procedures rise to such an occasion or series of occasions.

In the present matter ... the officers may, when they finished their work, have felt that they had dealt with the (detainees) efficiently and expediently (probably on instructions from more senior officers in the DIEA's Canberra office). I doubt they would have felt that (the detainees) had been treated fairly.¹⁷

Since that case was decided in 1996 there has been some changes in procedure, but the Department remains the decider of whether or not detainees have said enough to be provided with the necessary form to apply. Once supplied, the applicant's claim is considered by a delegate of the Minister and if unsuccessful, the claimant has a further right of review by the Refugee Review Tribunal. Until the recent amendments there was also a right of further review on questions of law by the Federal Court: first, by a single judge, and then by a court of three Federal Court judges. In rare cases there may be a further appeal to the High Court. All this may take considerable time and may well result in a feeling of exasperation by departmental officers who are seeking to arrange return of detainees.

The Coalition Reforms

It was the intention of the Government to achieve some reforms of the system. This led to the introduction of seven new Bills into the Federal Parliament in 2001.

One of the Bills passed into law means asylum seekers in boats, boarded off Cocos or Christmas Island in the Indian Ocean and Ashmore Reef and Cartier Island in the Timor Sea, do not have a right to apply for asylum in Australia.¹⁸ These measures are not new amongst nations who signed the Convention. An eminent international jurist Professor Goodwin Gill had said as long ago as 1996 :

The developed world has expended considerable energy in trying to find ways to prevent claims for protection being made at their borders, or to allow for them to be summarily passed on or back to others ... the intention may be either to forestall arrivals or to allow those arriving to be dealt with at discretion, but the clear implication is that, for States at large, refugees are protected by international law and, as a matter of law, entitled to a better and higher standard of treatment.¹⁹

The absence of a right of appeal against most decisions of department officials does not instil confidence that the process is impartial and transparent.

Another Bill passed into law removed most rights of appeal from the decision of the Refugee Review Tribunal to the Federal Court subject to very limited exceptions for those who are still processed in Australia.²⁰

In introducing the Bill the Minister for Immigration, Mr Ruddock, explained that recourse to the Federal Court and High Court had been trending upwards from 400 applications in 1994-5 to around 1,640 in 2000-01. So, too, the cost of litigation had increased from \$9.5 million in 1997-8 to \$15 million in 2000-01. He said that of those cases which proceed to appeal the decision of the Tribunals is upheld in about 90% of cases.²¹

Those who conduct cases on behalf of refugees in the Federal Court would maintain that review to the Federal Court, at least on questions of law, should be preserved. Yet there is truth in what the Minister says about the cost, and often the futility, of much of the Federal Court litigation. Those who appear for the Minister in the Federal Court find that many of the applicants who appeal have no understanding of the principles that govern such appeals nor do they understand the court procedures. The effectiveness of an adversary system such as ours depends upon an approximate parity of resources between the competing litigants. Where asylum seekers are often without legal assistance and have no grasp of the language, let alone the legal principles in which the proceedings are conducted, the process comes close to a farce. The counsel for the Minister is often called upon to present the law for both sides. Although there is a court interpreter provided, the submissions of the Minister's counsel, supplied to an applicant before the hearing, may not be understood by the applicant and if they have no lawyer may not even be translated for them to comprehend. In these circumstances, an elaborate appeal system becomes futile, and to provide the resources for the applicant to be fully seised of the law and procedures would mean a large increase in the budget, with the consequential argument that applicants would be receiving a level of legal assistance certainly not available to Australian residents. On the other hand, keeping applicants in the dark about when their applications will be resolved, how the legal system works, and what is likely to occur to them in the end must increase tension and suspicion leading to demonstrations and hunger strikes.

Other reforms include restrictions on the legal definition of a refugee. Persecution for one of the five Convention reasons must now be the 'essential and significant' reason for the persecution. It is no longer enough that it was a contributing cause. Persecution itself is now redefined and certain human rights violations may not now be included and it is yet to be

seen how far serious harm includes some forms of mental harm.²² Conduct is to be disregarded if engaged in by a person in Australia, unless the Minister is satisfied that the applicant did not engage in it to strengthen their refugee claim.

The Future of the Convention and Australia's Role

The Government has expressed its dissatisfaction with the Refugee Convention definition. However, it is difficult to get international consensus for rapid change. It seems unlikely Australia will contract out of the Convention. Whatever it does the refugee problem will not go away.

The Government may reasonably claim that electoral support for these reforms has been overwhelming while critics of government policy can only decry a public attitude that approves such laws, and, that if a country's laws truly reflect the spirit of its peoples, something is badly wrong with the spirit of Australia. On the other hand government can argue that our humanitarian program is generous because about 12,000 refugees are accepted from overseas camps each year. Furthermore Immigration Department officers have been far more ready than their counterparts in other countries to meet and debate these issues with government's critics.

At the heart of the debate is the question of mandatory detention after initial quarantine and identity processes have been completed. The sheer volume of refugee seekers may necessitate revision of this policy unless the Government can obtain international cooperation to obtain a more equitable distribution amongst nations for asylum seekers. In Europe the three circles initiative, whereby there is a degree of burden sharing amongst the states may need a parallel here. The reconstruction of Afghanistan may lend impetus to international cooperation. At the very least one may hope that the level of media and public understanding may be increased, and that those who argue for and against the Government's policies will try and balance fairly the competing demands of humanitarian concern with those of border regulation.

Endnotes

- 1 It is estimated there are 11.5 million international refugees and 20-25 million internally displaced persons forced to leave their homes for the same reason. Peter Nygh Refugee Conference Papers, Nov 2000, p140.
- 2 O Spengler, *The Decline of the West*, Knopf, New York, 1947.
- 3 James Hathaway, *The Law of Refugee Status*, Toronto, Butterworths, 1991 at 1-6.
- 4 Article 1A(2) of the Convention relating to the Status of Refugees done at Geneva at 28th July 1951.
- 5 The Protocol relating to the Status of Refugees done at New York at 31st January 1967.
- 6 *Migration Act 1958 (Cth)*, s36(1).
- 7 *Migration Act 1958 (Cth)*, s36(3).
- 8 *Chan Yee Kin v MIEA* (1989-90) 169 CLR 379 at 429.
- 9 *Chan*, Mason CJ at 389.
- 10 *Chan*, Mason CJ at 388.
- 11 *Applicant A v MIEA* (1996-7) 190 CLR 225.
- 12 *Chan*, McHugh J at 430-1.
- 13 *Chen Shi Hai v MIMA* (2000) 170 ALR 553.
- 14 *Applicant A*, McHugh J at 278.
- 15 *Fang v MIEA* (1996) 135 ALR 583.
- 16 *Migration Act, 1958 (Cth)*, s256.
- 17 *Fang v MIEA* at 607-8.
- 18 Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001.
- 19 Guy S Goodwin Gill, *The Refugee in International Law*, Oxford, Clarendon Press, 2nd ed, 1996.
- 20 *Migration Legislation Amendment (Judicial Review) Act* (2001).
- 21 Second Reading of the *Migration Legislation Amendment (Judicial Review) Bill* 2001, Wed 26th September 2001.
- 22 *Migration Legislation Amendment Act (No. 6) 2001*.