

A Study of Australian
Law, Policy and
Practice Regarding
Unaccompanied and
Separated Children

Mary Crock

seeking asylum

alone



australia

seeking asylum | alone



australia

A Study of Australian
Law, Policy and Practice
Regarding Unaccompanied
and Separated Children

Mary Crock

Published in Sydney by:

Themis Press

An imprint of the Federation Press

PO Box 45, Annandale, NSW, Australia 2038

71 John St, Leichhardt, NSW, Australia 2040

Ph 61 2 9552 2200 Fax 61 2 9552 1681

E-mail: info@federationpress.com.au

Website: <http://www.federationpress.com.au>

National Library of Australia

Cataloguing-in-Publication entry

Crock, Mary E.

Seeking asylum alone : a study of Australian law, policy and practice regarding unaccompanied and separated children.

Bibliography.

Includes index.

ISBN 9781921113017.

ISBN 1 921113 01 4.

1. Refugee children - Government policy - Australia. 2. Refugee children - Legal status, laws, etc. - Australia. 3. Asylum, Right of - Australia. 4. Australia - Emigration and immigration. I. Title.

362.870830994

© Mary Crock

This publication is copyright. Other than for the purposes of and subject to the conditions prescribed under the Copyright Act, no part of it may in any form or by any means (electronic, mechanical, microcopying, photocopying, recording or otherwise) be reproduced, stored in a retrieval system or transmitted without prior written permission. Enquiries should be addressed to the publishers.

Design: Winge Design Studio

Printing: Ralyon Press, Sydney, NSW

A B O U T T H E A U T H O R

Mary Crock BA (Hons) LLB (Hons) PhD (Melbourne University) has worked in the area of immigration and refugee law since 1985. She is an Associate Professor and Associate Dean (Post Graduate Research) in the Faculty of Law, University of Sydney. She is chief examiner in the various Specialist Accreditation programs in immigration law across Australia; and editor of the *Immigration Review* (Butterworths). She has served in executive positions for the Law Council of Australia (International Law Section) and the Refugee Council of Australia; worked as adviser to the Australian Senate (Inquiry into Australia's Refugee and Humanitarian Program, 2000) and as consultant to HREOC (on immigration detention). She helped to establish and run the Victorian Immigration Advice and Rights Centre Inc in Melbourne (1989–1992). Her books include: *Protection or Punishment: The Detention of Asylum Seekers in Australia* (1993); *Immigration and Refugee Law in Australia* (1998); *Future Seekers: Refugees, Asylum Seekers and the Law in Australia* (2002) (with Ben Saul); *Nation-Skilling: Immigration, Labour and the Law* (2003); and *Future Seekers II: Refugees and Irregular Migration in Australia* (2006) (with Ben Saul and Azadeh Dastyari). She was guest editor and author for the *Refugee Issue* of the *University of New South Wales Law Journal* (2000) and for the *Migration, Human Rights and Mental Health* Special Issue of the *International Journal of Law and Psychiatry* (2004). She has written many articles on immigration and refugee issues, including works on judicial review and 'court stripping' (various); immigration detention (2003); interdiction and the *Tampa* Affair (various); and children and refugee status (2004). She teaches administrative law, migration law, refugee law and related subjects for both undergraduate and postgraduate law students at the University of Sydney.

Acknowledgments

This report was funded by (in order of chronological grant): the Myer Foundation, The Australian Research Council's (ARC) Linkage Grants Scheme (Project A4165); and the John D. and Catherine T. MacArthur Foundation. It is part of a larger study comparing policies and practices towards children seeking asylum alone in the United States, the United Kingdom and Australia. The Seeking Asylum Alone project is coordinated by Professors Jacqueline Bhabha of Harvard University and Mary Crock of the University of Sydney.

Jacqueline Bhabha is the Jeremiah Smith Jr. lecturer in law at Harvard Law School, the executive director of the Harvard University Committee on Human Rights Studies and an adjunct lecturer on public policy at the Kennedy School of Government.

The Australian partners in the ARC Linkage project are Australians Against Racism Inc (AAR); A Just Australia (AJA); and the Public Interest Advocacy Centre Inc (PIAC). These organisations have been represented respectively by Eva Sallis (AAR); Howard Glenn and then Kate Gautier (AJA); and Simon Moran, Alexis Goodstone and Anne Mainsbridge (PIAC). The MacArthur Foundation project also involves collaboration with Nadine Finch in the United Kingdom.

In this report the work of my partner, Jacqueline Bhabha is acknowledged specially in two chapters. Chapter 12 of this report has as its conceptual underpinning many ideas that had their genesis in her work, which we have written up in the general report for this project: see Jacqueline Bhabha and Mary Crock, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection: A Comparative Study of Laws, Policy and Practices in Australia, the United Kingdom and the United States of America* (Sydney: Themis Press, 2006) (Chapter 6). Her contribution is acknowledged similarly in the concluding chapter of this report, Chapter 15.

I am indebted to a great number of people for both practical assistance and moral and other support. The following people worked on research and design of fieldwork programs: Cathy Preston-Thomas, Azadeh Dastyari, Courtney Mead, Susan Schmidt, Ben Ward, Louise Pounder, Alison Kesby, Jessie Hohmann, Ed Santow, Carol Elliot, Daniela Gavshon, Leah Friedman, Riz Wakil, Catherine Chang, Chelsea Clark and Rebecca Hinchcliffe.

Cathy Preston-Thomas, Azadeh Dastyari, Jessie Hohmann and Leah Friedman have all made substantial contributions to writing parts of early drafts of this report.

The project could not have proceeded without the assistance of those working with unaccompanied and separated refugee children all around Australia. In this regard, thanks are due to: Mohammed Al Jabiri, Andrew Bartlett, Kaye Bernard, Deslie Billich, Frank Brennan, Jennifer Burn, John Cameron, Christian Carney, Jim Carty, Stephen Churches, Anna Copeland, Clyde Cosentino, Georgina Costello, Camilla Cowley, Stephen Cowling, Pamela Curr, Lisa D'Ambro, Marianne Dickie, Penny Gerston, Nazir Gul, Abby Hamden, Brian Harradine, Parastu Hatami, Libby Hogarth, Mary Anne Kenny, Nitra Kidson, Marion Lè, Karen Lee, Marg Le Sueur, John Lynch, David Manne, David Marr, Jane McAdam, Melissa McAdam, Bernadette McMenamin, Kerry Murphy, Louise Newman, Tiong Nguyen, Younis Noori, Natalie O'Brien, Lowijta O'Donohue, Milivoj Oreb, Margaret Piper, Alanna Hector, Jack Smit, Zachary Steel, Frederika Steen, Marg Straffa, Melinda Tankard-Reist, Charlene Thompson, Michael Walker, Judyth Watkins, Stephen Watkins and Belinda Wells.

Individuals from the following organisations offered assistance in the form of statistics, advice or comments on drafts:

DIMA: Judyth O'Neill, Robyn Bickett, Alan Hutchinson, Robert Illingworth, Karen Douall, Beth Powell.

HREOC: Sev Ozdowski, Graeme Innes, Stephen Duffield, Vanessa Lesnie.

IOM: Keiko Foster, Swaysee Lee, Souvira Kheuphim.

RRT: John Lynch, Stephen Karas, Andrew Kanachowski.

UNHCR: Neill Wright, Ariane Rumery, Alvin Gonzales.

Thanks also for the logistical support provided by Libby and Jonathan Hogarth, Gerard and Jacqueline Crock, Alan Thompson, Elahe and Naser Dastyari, Ron McCallum, Matthew Feeney and Lorien Vecellio.

Special thanks are due to our publisher Chris Holt; copyeditor, Dawn Koester; and to our designer Robin Winge. All have shown patience and skill in equal measure.

The author and publisher gratefully acknowledge the following for permission to reproduce photographs: Australian Centre for Languages, Andrew Bartlett, Kaye Bernard, Camilla Cowley, Tom Mann, Peter Mathew, Phil Oakley, the Human Rights and Equal Opportunity Commission, the National Archives of Australia, the National Library of Australia, the United Nations High Commissioner for Refugees, and News Limited. For assistance with images, thanks are due to Linda Blanchett, Paul Crock, Sylvana Whyte and Robin Winge.

The views expressed in this report are my own and I take full responsibility for any errors that remain.

Contents

Executive Summary | 9

PART ONE

The Phenomenon of Children Seeking Asylum Alone

Chapter 1 | 19

Anatomy of the Project

- 1.1 Lost Children | 19
- 1.2 Structure of the Report | 22
- 1.3 Methodology | 24

Chapter 2 | 31

**Children in Need of Protection:
The Scale and Nature of Movement**

- 2.1 Defining Terms and Identifying Protection Needs | 31
- 2.2 An Overview of Unaccompanied and Separated Child Migrants | 33

- 2.3 The Incidence of Trafficking in Children | 44

- 2.4 A Profile of the Children Studied for this Report | 45

Chapter 3 | 51

Journeys of a Lifetime: How and Why Child Asylum Seekers Travel Alone

- 3.1 The Decision to Leave | 51
- 3.2 The Journey to Australia | 53
- 3.3 Unaccompanied and Separated Children as Refugees: Images and Stereotypes | 57

PART TWO

Frameworks for Protection

Chapter 4 | 61

An Overview of International Standards

- 4.1 Obligations Under International Law | 61

4.2 Other Protections for Smuggled and Trafficked Children | 65

4.3 UNHCR Guidelines | 67

Chapter 5 | 73

Australian Laws and Policies I: Access to Territory — Non-Entrée, Interdiction and Offshore Processing

5.1 Requirements that Refugees Seek Protection Elsewhere | 73

5.2 Interdiction and Deemed Non-Entry | 74

Chapter 6 | 83

Australian Laws and Policies II: The Domestic Asylum System and Protection Outcomes

6.1 The Legislative Regime Governing Immigration Control | 83

6.2 The Refugee System | 84

6.3 Processing Guidelines and Policies | 88

6.4 Anti-Trafficking Measures | 90

6.5 Protection Outcomes: Australia's Temporary Protection Visa Scheme | 93

PART THREE

Australian Law and Policy in Practice

Chapter 7 | 101

Identification and Reception

7.1 Identifying Need and Vulnerability: Spotting Separated Children and Making Age Determinations | 101

7.2 The Guardianship of Unaccompanied and Separated Children | 104

7.3 Reception Arrangements: Detention Experiences | 108

Chapter 8 | 117

Entering the Refugee Status Determination System

8.1 The Training of Decision-Makers | 117

8.2 The Screening-In Process | 119

8.3 Access to Legal Advice and 'Immigration Assistance' | 122

Chapter 9 | 131

The Primary Decision-Making Process: The DIMA Interview

9.1 The Framework of Decision-Making | 131

9.2 Getting the Story: Comprehension and Interpretation Issues | 132

9.3 Concessions for Age, Development and Trauma | 137

9.4 General Interviewing Techniques | 142

Chapter 10 | 147

Challenging Adverse Decisions

10.1 Refugee Status Determination Appeals | 147

10.2 Judicial Review and Applications for Ministerial Intervention | 151

Chapter 11 | 155

Deciding Refugee Status

11.1 Critical Factors: Criteria Relied upon by Decision-Makers | 155

11.2 Language Testing | 157

11.3 Judging Credibility | 160

11.4 The Making and Notification of Decisions | 163

Chapter 12 | 169 WITH JACQUELINE BHABHA

Unaccompanied and Separated Children and the International Definition of 'Refugee'

12.1 'Well-Founded Fear' | 170



- 12.2 'Persecution' | 172
- 12.3 The Convention 'Grounds' | 177
- 12.4 Conclusion | 181

Chapter 13 | 185

**Interdiction and Offshore Processing:
The Deflection of Child Asylum Seekers**

- 13.1 Unaccompanied and Separated Children on Nauru and Manus Island | 186
- 13.2 Identification and Reception | 187
- 13.3 The Processing Arrangements | 188
- 13.4 Legal Challenges | 192
- 13.5 Christmas Island | 193
- 13.6 The 'New' Pacific Strategy | 196

PART FOUR

Protection Outcomes

Chapter 14 | 201

**In Search of Permanent Refuge:
Life on and After the Temporary Protection Visa**

- 14.1 Release from Detention:
Adjusting to Life in Australia | 201

- 14.2 The Temporary Protection Regime and the Transition to Permanent Protection | 205
- 14.3 The 'Re-Application' Process | 212
- 14.4 Complementary Protection: Other Options for Obtaining Permanent Residence | 219
- 14.5 Alienation and Family Problems | 220
- 14.6 What Now? | 223

Chapter 15 | 227 WITH JACQUELINE BHABHA

**Towards the Future:
Conclusions and Recommendations**

- 15.1 The Protection Deficit | 227
- 15.2 The Phenomenon of Child Migrants Travelling Alone | 228
- 15.3 The Identification of Unaccompanied and Separated Child Migrants | 229
- 15.4 Access to Territory | 231
- 15.5 The Reception of Unaccompanied and Separated Children: Guardianship, Care and Control | 231
- 15.6 The Treatment of Trafficked Children | 234
- 15.7 The Provision of Legal Advice and Representation: The IAAAS | 234
- 15.8 Formal Status Determination Processes | 235
- 15.9 Challenging Adverse Decisions | 238
- 15.10 Judicial Review and Other Avenues of Appeal | 239
- 15.11 Use of the Refugee Convention | 240
- 15.12 Protection Outcomes | 242
- 15.13 Conclusion | 243

APPENDICES

Interviews Conducted | 246

Glossary of Terms | 248

Legislation and Cases Cited | 249

Bibliography | 251



Executive Summary

Children have always constituted a sizeable proportion of the world's refugees and displaced persons. However, recent years have seen a remarkable rise in the number of unaccompanied and separated children (persons aged less than 18 years travelling either completely alone or with non-relative adults of some description) seeking protection in foreign lands. Some children move within groups of obvious refugees or asylum seekers as 'smuggled' people. Others travel with unrelated adults in exploitative arrangements as 'trafficked' persons: a form of modern day slavery where children become victims of sexual and physical abuse.

This project was undertaken because not enough attention has been paid to these young and most vulnerable of migrants — either in Australia or overseas.

This report charts the physical, legal and administrative experiences of unaccompanied and separated children seeking refugee protection in Australia. It examines the treatment of children who have arrived on Australian soil, as well as those intercepted and

deflected to either Nauru or Christmas Island. Australia has ratified all the major international human rights instruments, which are relevant to children travelling alone. The results of this research suggest that there is a marked divergence between these standards and the reality of children encountering Australia's border control, refugee processes and general immigration enforcement mechanisms.

Australian decision-makers have also been slow to recognise the need to adopt a child-focused approach. In particular, more attention needs to be paid to forms of persecution that are peculiar to childhood, so as to acknowledge that children may in some cases qualify as refugees for different reasons than adults.

1. The Scale and Nature of Movement

Australia has a long history of admitting unaccompanied children as part of its planned migration programs. In recent years, Australia has been part of a global trend in which between 2 and 5 per cent of asylum seekers present as child migrants travelling without the protection of a parent or adult guardian. Between 1999 and 2003, 4089 children entered Australia without valid visas, of whom approximately 290 were unaccompanied and separated children aged between eight and 17 years. Such children have continued to arrive and to claim asylum in Australia. In this project, special study was made of 85 cases.

Insufficient attention has been paid to the phenomenon of children travelling alone: the available statistical data is poor, contradictory and incomplete. Official figures are at odds with estimates offered by non-government agencies. The failure to identify *any* child trafficking victims since 1994 is a matter of particular concern.

RECOMMENDATION

- The Department of Immigration and Multicultural Affairs (DIMA) should collect accurate statistics on unaccompanied and separated child migrants entering Australia either with or without visas. These should be updated periodically and shared among relevant agencies and authorities concerned with the care and welfare of children and immigration control. The statistics should be available publicly.



2. How and Why Children Travel Alone

A clear majority of the children whose cases were examined in this study appeared to have left their country of origin in response to serious and immediate threats to their life and livelihood.

The evidence collected suggests that most of the 85 participants studied had:

- little or no control over the decision to leave their homes and countries; and
- no access to authorities or facilities that would have enabled them to migrate through regular means.

RECOMMENDATION

- Greater attention needs to be paid to the causes of child migration within government. Consideration should be given to the establishment of a special task force within DIMA to study all aspects of the phenomenon and assist in the formulation of appropriate reception and settlement policies.

3. The Identification of Unaccompanied and Separated Child Migrants

Little information was provided about either the training of government officials or the adoption of specific practices for the identification of unaccompanied and separated child migrants. Evidence from the young people interviewed and from secondary sources suggests identification is reliant on either the visual identification of children travelling without an obvious guardian or on the self-identification of such children.

RECOMMENDATIONS

- The Federal Government should institute specific identification procedures for unaccompanied and separated children to find out: first, whether or not the child is unaccompanied; second, whether the child is an asylum seeker or not; and, third, whether the child is a victim of trafficking. These identification processes should accord with those recommended by the United Nations High Commissioner for Refugees (UNHCR).
- An operation task force to seek out child victims of trafficking should be instituted, targeting ports of entry into Australia and child migrants living in the community.

4. Age Determinations

The recognition that a person is a child is critical to ensuring appropriate treatment. The research revealed that excessive reliance has been placed on either the testimony of children as to their age, and/or physical assessment mechanisms such as bone scans. Age assessments were found to be arbitrary, physically intrusive and unreliable.

Concerns arose also about the way in which determinations were used.

RECOMMENDATIONS

- Age assessment should be based on the totality of available evidence, taking account of: claims made by the child; physical and psychological maturity; documentation held (such as passports or identity cards); evaluation by healthcare professionals; information from family members; and any x-ray or other examinations. Where the outcome of age determination affects decisions about detention, independent experts should make the final determination.
- The accurate assessment of age should be viewed as a child welfare issue, rather than an immigration enforcement issue. The assessment should be used to determine the type of care to be given to the child, rather than the credibility of his or her claim to refugee protection.

5. Access to Territory

In recent years Australia has deliberately denied some unaccompanied and separated children access to its territory for the purposes of seeking asylum. These children have been sent to Nauru and Christmas Island to have their refugee claims determined. In the case of those sent to Nauru, the asylum process offered was markedly inferior to that on mainland Australia. The continuing policy of sending asylum seekers who arrive by boat to Christmas Island or Nauru for refugee processing is a matter of grave concern. As well as increasing the costs of the system, there is considerable potential for abusive processes to develop in these remote locations.

RECOMMENDATION

- The federal government should follow the guidelines set by UNHCR. Unaccompanied and separated children should never be interdicted and deflected from mainland Australia, either by being returned

to their country of origin or sent to an offshore processing centre. Their claims should always be considered under the normal refugee determination procedure.

6. The Reception of Unaccompanied and Separated Children: Guardianship and ‘Screening In’

Under Australian law, the Minister for Immigration is the official guardian of all immigrant children who are in Australia without the protection of a parent or other responsible adult. The law places the minister in a position of impossible conflict of interest because immigration control dominates over child protection issues at every point. Children engaged with immigration authorities often do not have an *effective* guardian for the purposes of either immediate care and control or assistance in negotiating administrative processes.

Unaccompanied and separated children face particular hurdles in trying to access asylum processes in Australia. All those who arrive without a valid visa are subjected to a ‘screening-in’ process which involves ‘questioning’ and then ‘separation’ detention. In order to access Australia’s asylum procedures, a child who enters Australia without a valid visa must demonstrate *without legal assistance of any kind* that he or she is a person in respect of whom Australia owes ‘protection obligations’.

RECOMMENDATIONS

- Children should be appointed an adviser and guardian at the screening-in stage, because the interview is critical in establishing whether a full asylum claim can be made.
- Any screening process should be simply a mechanism for eliciting basic information about a child. It should be designed to be child-sensitive rather than demanding and punitive.

- As virtually every major inquiry has recommended since 2000, immigration policies and practices should be changed so as to require immigration officials to explain to unauthorised arrivals (including children) their rights to seek protection as refugees. This information should be provided to children in the presence of their guardian or adviser in a manner appropriate to a child’s age and stage of development.

7. Detention

Until July 2005, it was normal practice in Australia to make no distinction between adults and children found in Australia without a valid visa. All were placed immediately in immigration detention. For the young people studied, this practice was extremely damaging. Although Australia abandoned the policy of mandatory detention of children in July 2005, State practice in this country still falls short of the benchmarks set by UNHCR, the Human Rights Committee and the Committee on the Rights of the Child. There remains no absolute prohibition on detaining immigrant children.

RECOMMENDATION

- Unaccompanied and separated children should never be detained. Where a child’s age is being disputed, they should be given the benefit of the doubt and should not be placed in immigration detention.

8. The Treatment of Trafficked Children

While most of the smuggled children have been allowed to lodge refugee claims, the same is not true of the one child identified as the victim of trafficking in Australia’s recent past. Initiatives have been taken to combat trafficking in persons in Australia. However, trafficking visas are primarily focused on the prosecution of traffickers.



RECOMMENDATION

- Unaccompanied and separated children should have a right to protection in Australia that is independent of their ability to assist in the investigation or prosecution of a trafficker. Treatment should be determined by what is in the best interests of the child, considering also the wishes of the child.

9. The Provision of Legal Advice

The *Migration Act* 1958 (Cth) contains no provision requiring government officials to inform unauthorised arrivals of their rights. Advisers and application forms are only provided if specific requests are made.

RECOMMENDATION

- Unaccompanied and separated children should have an immediate and automatic right to a government-funded adviser.

Makeshift reception camp on Christmas Island.
Photograph ©Phil Oakley

Australia's policy of funding advisers under the Immigration Advice and Application Assistance Scheme (IAAAS) is laudable. However, the research showed that IAAAS advisers were regarded by many children as government officials, with some unaware that the advisers were there to assist them. This perception may be due in part to the passive role played by the adviser during interactions with immigration officials.

RECOMMENDATION

- IAAAS advisers must be given the time and space to offer full and proper assistance. This is best achieved by ensuring that children have their immigration status resolved outside the environment of detention centres or remote processing locations such as Christmas Island where an intensive 'task force' approach is used.

10. Formal Status Determination Processes

Many of the problems identified in the processing of refugee claims made by unaccompanied and separated children relate back to problems associated directly or indirectly with the detention environment.

The UNHCR Handbook (1997) sets out three key principles for deciding a child asylum seeker's legal status: expert advice on child development; a focus on objective country conditions; and a generous exercise of the benefit of the doubt in favour of children. **All three principles should be adhered to more widely in Australia.**

It is unclear whether appropriate training regimes are in place for either the DIMA officers charged with conducting interviews, or for interpreters. Evidence from the children's interviews suggests that such training, if provided, has been inadequate. The children's poor understanding of the process indicates that they were not kept informed in an age-appropriate manner.

DIMA interviews are supposed to be non-adversarial. However, most participants in the study found the interview process to be very confronting — even where their claims were accepted. The interview transcripts examined and observations made by service providers in this study suggest that some DIMA officials used interview techniques that were insensitive to the age, culture, experience and psychological state of the young interviewees. Few concessions appear to have been made for the possibility of the children having been affected by past experiences of torture or trauma.

Particular concerns were raised about the use of language analysis to determine ethnic identity and origin of applicants.

RECOMMENDATIONS

- DIMA officers and interpreters should be provided with specialist training in:



a) the psychological, emotional and physical development and behaviour of children; and

b) matters relating to cross-cultural understanding and the effects of torture and trauma.

- Interpreters need to be carefully chosen to ensure their linguistic and social compatibility with the child applicant. They need to be screened for competence and impartiality, and the same interpreter should be allocated to a case for its entirety. Interpreters should never be accessed over the telephone but should attend in person during asylum hearings; nor should children meet their interpreter for the first time immediately before being called to give evidence or answer questions in hearings.

11. Challenging Adverse Decisions

Refugee Review Tribunal (RRT) guidelines address the treatment of children giving evidence, demonstrating that some thought has been given to the problems associated with children seeking asylum alone. Priority is given to applications made by children. However, the research suggests that in practice, RRT procedures often made no distinction between adult and child applicants. The shortcomings in the processes observed were due in part to the legislative framework within which the tribunal operates. For example, the closed nature of proceedings was identified as a factor that might explain the culture of defensiveness and introspection observed.

RECOMMENDATIONS

- Children should have a right to be represented in tribunal hearings, and should only be interviewed by the RRT if they have an adviser present. The RRT's guidelines should be amended to address emergent jurisprudence on children as refugees.
- RRT members should be provided with specialist training in:
 - a) the psychological, emotional and physical development and behaviour of children; and
 - b) matters relating to cross-cultural understanding and the effects of torture and trauma.

12. Judicial Review and Other Avenues of Appeal

Unaccompanied and separated children who are unsuccessful in an RRT appeal may seek judicial review of that ruling, but only on very narrow grounds. Few safeguards exist to deal with the particular needs of children. Australian courts have been unwilling to make use of international law to

inform the interpretation of either procedures or law in relation to children.

Legislative time limits have played a role in denying child applicants access to judicial review because of the challenges they face in trying to understand what is happening to them. However, applicants have been assisted by High Court rulings on the constitutional right to have fundamental legal errors corrected.¹

RECOMMENDATIONS

- The federal judiciary should be provided with specialist training in matters related to the legal and procedural entitlements of children in immigration proceedings.
- Consideration should be given to the institution of special measures for the judicial review of decisions involving unaccompanied and separated children. For example, such children should not be subjected to the punitive measures contained in the *Migration Litigation Reform Act 2005* (Cth).

13. Ministerial Discretion

Other mechanisms available to persons who were unable to obtain protection involved the personal intervention of the Minister for Immigration through the exercise of a non-compellable, non-reviewable discretion. IAAAS advisers expressed the view that the formal guidelines for the minister's exercise of discretion are inadequate and that the process remains an arbitrary one, lacking in transparency. The diversity of outcomes produced by the ministerial appeal process supported this view.

RECOMMENDATIONS

- Mechanisms are needed to facilitate the grant of protection in failed refugee claims where applicants have protection rights under other human rights treaties.

- The Federal Government should enact legislation to allow for the grant of complementary protection to persons who are not refugees but who have a genuine fear of returning to their country of origin for reasons that engage the non-refoulement obligations of the Torture Convention or similar human rights instruments.
- The Federal Government should enact legislation to create visas similar to the Special Immigrant Juvenile Status visas used in the United States. These would allow for the grant of permanent residence to children travelling alone who are found to be in a situation of particular vulnerability in Australia.

14. Use of the Refugee Convention

The grant of asylum or permanent protection under the Refugee Convention represents the most protective State response for many unaccompanied and separated children who have reason to fear return to their country of origin. More attention needs to be paid to interpreting the Refugee Convention in a way that is sympathetic to vulnerable children. In particular:

The requirement of demonstrating subjective fear should not be enforced strictly in children's cases. The child's capacity to express fear may be affected by his or her developmental stage as well as particular experiences. Additionally, the child's access to the resources necessary to corroborate the objective claim may be very limited, reducing the child's ability to assemble evidence required to make a compelling case.

Difficulty in accessing the asylum system means that the grant of refugee protection to separated or unaccompanied child applicants often represents the exception rather than the rule, despite compelling evidence of persecution. In the case of children interdicted and sent to Nauru for processing, well

over half (32 of 55) failed in their attempt to gain recognition as refugees and were returned to Afghanistan.

- Consideration needs to be given to the particular way in which children can suffer persecution. Children can face the same harms as adult asylum seekers. Decision-makers seem to be most willing to recognize as refugees children in this category.
- In addition, however, children can suffer forms of persecution that are particular to childhood. Examples are children conscripted as child soldiers, sold into slavery or oppressive marriages, or children suffering persistent discrimination as 'black' (unauthorised) children. The recognition of this type of persecution as a basis for asylum is more uneven.
- Finally, there are forms of persecution that involve harms that are only persecutory in nature because



of the children's minority. These are harms that might cause distress in adults, but prove to be debilitating for children. More consideration needs to be given to interpreting the Refugee Convention through the eyes of the child and in accordance with the Convention on the Rights of the Child.

The failure to effectively articulate a doctrine of child-specific persecution to complement the generic concept of persecution is a reflection of a broader blindness to the needs and interests of children, particularly those who are unaccompanied and separated from their families. It is an instance of the widespread finding that children are practically invisible and inaudible in migration policy and in international law more generally.

RECOMMENDATIONS

- Much greater consideration needs to be given to the categorisation of vulnerable immigrant children as refugees. A more systematic consideration of child-specific needs and vulnerabilities is urgently required.
- Australia should promulgate guidelines concerning children's asylum applications to encourage the development of case law that develops and explores child-specific persecution.

15. Protection Outcomes

In Australia, no child who enters the country without a valid visa can ever receive permanent refugee status at first instance: temporary protection is granted for three years, after which the whole asylum application process must be repeated. The 'seven-day' rule and other changes relating to convictions for certain criminal offences have had the potential of leaving some refugees on perpetual temporary protection visas (TPVs). For unaccompanied and separated children, this process is debilitating

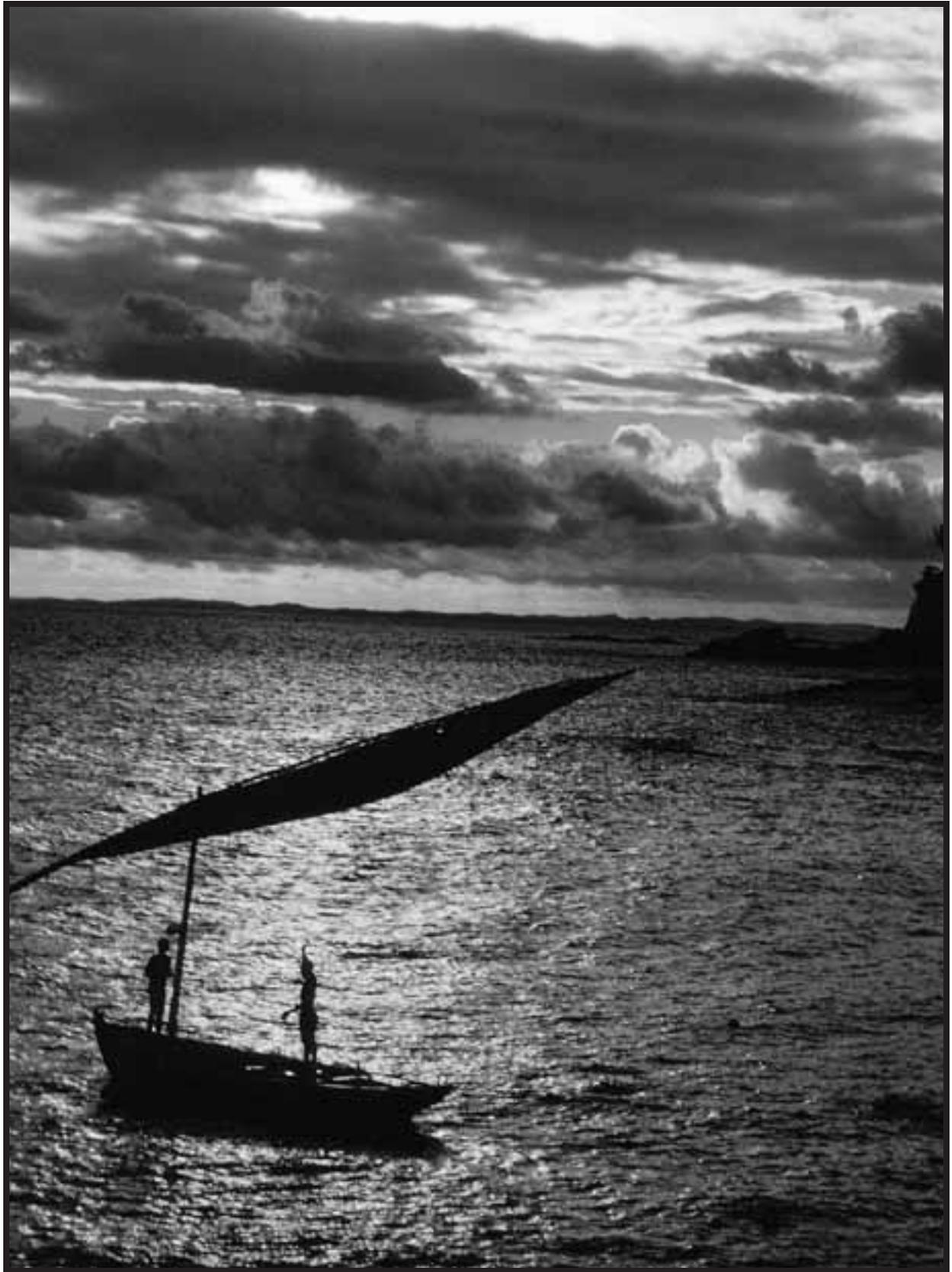
because of the ban on family reunion and denial of access to government-funded education and training (as they are treated as overseas students and subject to high fees).

RECOMMENDATIONS

- The TPV regime should be abolished — most particularly in its application to unaccompanied and separated child refugees.
- Children found to be refugees should be given immediate assistance to find and sponsor family members. The right to family reunification should extend to children who reach their majority during or shortly after the refugee determination process.
- A direct correlation was apparent between access to support networks and the well-being and success of children who seek asylum alone in Australia. Specialist intervention programs should be instituted to assist the development of all unaccompanied refugee children and young adults (to the age of 25).

Endnote

- 1 See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.



Anatomy of the Project

1.1 Lost Children

At the dawn of the new millennium in 2001, two young Afghan children were smuggled into Australia by boat. Both ultimately sought and gained asylum on the basis that they were refugees under international law.

The two were part of a phenomenon relatively new to Australia although now of increasing concern in refugee receiving countries around the world: they were children travelling without the protection of a parent or adult guardian. They were young people who had fled their country in fear of their lives and who faced death, injury or persecution should they be returned.

*Gandhi*¹ was 16 years old when he arrived in Australia, a young Hazara boy who had already faced extraordinary challenges. Newly married, his young wife expecting their first child, he was given a stark choice: get out or live like a hunted animal with the

almost certain knowledge that he would one day be assassinated. *Gandhi* was born into a respected and established farming family: he grew up well educated and well cared for. In spite of the drought in his region, the land was good and the family was surviving well enough until the head of *Gandhi*'s village picked a fight with the Taliban leaders in the region. The leaders were a group of seven brothers: the village head killed one and thereafter became a wanted man. Although the village head escaped the brothers' first revenge attack, his mother was abducted and chopped into pieces. Thereafter the whole Hazara community of that place was subjected to periodic scourges.

Gandhi had the misfortune of bearing a strong physical resemblance to the head villager's son:

“The Taliban were coming to the village in their Toyota jeep with men in the back with machine guns.... I escaped into the wheat fields or small tunnels. The commander's son would hide as well. This would happen weekly and sometimes twice a week.... Nearly all the young boys my age were afraid and would hide.”

Gandhi had lost his older brother — missing, presumed dead — 21 months earlier. He knew of others who had been returned after beatings by the Taliban — crippled, their backs broken. *Gandhi's* brother-in-law was a businessman and had connections. His father sold some land.

In the end, *Gandhi's* father and brother-in-law made the decision: *Gandhi* had to go. *Gandhi* was smuggled out during the night, beginning an odyssey that saw him spending six weeks hidden in a cargo container. It was a voyage the young man would barely survive.

No one is quite sure of *Halimi's* age, or that of her little brother who travelled with her. Birthdays are less culturally significant for Hazara people than are seasons and feast days — and the different calendars used in Afghanistan make the identification of precise dates difficult at the best of times. *Halimi* was told by her grandparents that she was 15, so ‘15’ was recorded as her age when she first arrived in Australia. The best estimate placed her brother at 11 years old at this time. Like *Gandhi*, *Halimi* grew up in the shadow of the Taliban to a life characterised by deprivation and tragedy. Her mother died sometime after giving birth to *Halimi's* brother, leaving the task of raising the two children to *Halimi's* father and grandparents. Because she was a girl, *Halimi* received no education

in Afghanistan. Her life was one of menial chores and making do with very little. As a young Hazara girl, her pretty face, ready smile and gentle manner placed her at special risk of rape and forced marriage. Hazara boys were also targets for the resource- and manpower-hungry warlords. When the Taliban took her father, *Halimi's* grandparents decided that the risks facing the two children were too great. They paid a smuggler and set the children on their way, promising to follow as soon as they were able.

Halimi and her brother spent two months travelling overland to Indonesia, before boarding a fishing boat that took them to Australia. That voyage lasted for two and a half weeks. The two children had never seen a large body of water, let alone set foot on a boat:

“The boat was very small. I was so frightened because I was a young girl and there were people from everywhere on the boat. I was afraid of the men, particularly the Iraqis [because of cultural differences]. It was dangerous because I had no family around. When I came to Woomera camp, I had the same problems with the Iraqi men. They wanted to abuse me and say I was just a girl, why did I come on my own and that I must be looking for a man.”

Halimi has not seen or heard from her grandparents since leaving Afghanistan. She is afraid that they have died — perhaps drowned en route to Australia.

Gandhi and *Halimi* were two of an estimated 290 children under the age of 18 who travelled to Australia between January 1999 and January 2003 without the protection of adult relatives or guardians and without visas to enter the country.² Most were aged between 13 and 17 years when they arrived: only two were under 12 years of age. Although their progress through this system was far from smooth, both *Gandhi* and *Halimi* were found, ultimately, to be refugees and were granted protection visas permitting them to remain in Australia for three years. *Gandhi* has

since gained permanent residence; *Halimi*'s application remained pending until late 2005 when she and her brother were finally accorded permanent status.

The aim of this report is to provide an overview of the physical, legal and administrative journeys of children and young people like *Gandhi* and *Halimi* who have come to Australia in search of refugee protection in recent years. These children will be referred to throughout this report as 'unaccompanied' or 'separated' children.³

While children have always constituted a sizeable proportion of the world's refugees and displaced persons, refugee movements in recent years have been remarkable for the number of children journeying without the comfort of a family group.⁴

This is an experience that Australia has shared as a destination country for asylum seekers. This study has been spurred on by the observation that Australia — like many of its Western counterparts — has not responded particularly well to the challenges presented to it.

One obvious problem is that refugee status determination systems have generally been established with adult asylum seekers as the norm. Within this context, children seeking recognition as refugees in their own right face significant procedural barriers in gaining asylum.

In addition to the cultural and linguistic difficulties experienced by many adult asylum seekers, the age and vulnerability of unaccompanied and separated children place them at a particular disadvantage when attempting to navigate refugee determination systems. Such children can be lost in the midst of a cohort of adult asylum seekers. When assessed, they face obvious disadvantage in both articulating their story and in being heard.⁵



Another barrier faced by unaccompanied and separated children is legal: questions remain as to how well the international definition of refugee accommodates the particular experiences of children. The UN Convention relating to the Status of Refugees and its attendant Protocol (the Refugee Convention and Protocol)⁶ have been criticised as being too political and Eurocentric in their orientation.⁷ This Convention was focused from its inception on problems and conflicts of the Cold War era in Europe, where the label of 'refugee' was applied most readily to the political and intellectual dissidents escaping to the West from the Communist Bloc countries. On its face, the definition of refugee certainly favours adults who are active dissenters of some kind. Article 1A(2) (as amended) provides that the term 'refugee' shall apply to any person who:

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, is unable or, owing to such fear, is unwilling to return to it.

With the growth in the number of unaccompanied and separated children seeking asylum around the world, appreciation has grown of the particular vulnerability of these children.

It is now established that in many countries unaccompanied and separated children face an increased risk of military recruitment, sexual violence, exploitation and abuse, forced labour, denial of access to education and basic assistance, and detention.⁸ At the same time, children travelling alone elicit conflicting emotional responses. While child refugees evoke compassion as objects of pity, unaccompanied and separated children also carry with them the potentially negative image of the unsupervised, uncontrolled child, or the apparently unwanted child — a menace to civil society.

1.2 Structure of the Report

This report is the Australian component of broad-based research into the treatment of unaccompanied and separated children across a range of Western refugee-receiving countries. It is designed to mesh with studies of relevant laws, policies and practices in Europe, the United States and the United Kingdom (see Acknowledgments, page 3). Because Australia's experience of



unaccompanied and separated children has been limited (see Chapter 2), researchers in this country occupy an unusual position — it has been possible to undertake a study of something close to a representative group of young people who have sought asylum in Australia without the support of an adult guardian. It was very difficult to gather information for the project: the statistics released by the government are confusing and people involved in the processing of claims are hampered by confidentiality obligations and an understandable reluctance to 'go public' about their experiences. Access to the young people themselves was difficult to negotiate and great care was required not to place any additional emotional or other pressures on those who still faced an uncertain future. With the passage of time, however, the situation of many of the young people stabilised. As links were forged within the Australian community, it became increasingly possible to locate and to engage directly with them. By the end of 2005, we were able to account in some

way for approximately one third of Australia's youngest and most vulnerable 'solo' asylum seekers who arrived between 1999 and 2003. Because few had their refugee claims rejected, it has also been possible to do an almost comprehensive review of the court cases involving unaccompanied and separated children seeking asylum in Australia between those dates.

Most of the 85 unaccompanied and separated children studied in this report arrived in the middle of the largest wave of asylum seekers ever to make their way to Australia by boat in search of refugee protection. They were caught in what can only be described as a political and psycho-social maelstrom. The Australian Government's blockading of the *MV Tampa* with its cargo of asylum seekers in August 2001, followed closely by the terrorist attacks in the United States on 11 September brought about an abrupt policy change. Virtually all boats carrying asylum seekers after this time were intercepted and deflected from Australia. The flow of refugees to Australia came to an abrupt halt.⁹ Unaccompanied and separated children continue to make their way to this country, but they do so in small numbers and in contexts which make them harder to detect.

This report charts both the treatment of those who arrived on Australian soil and those who were intercepted en route to Australia, having their refugee claims determined offshore on the tiny Pacific Island of Nauru. It examines the laws and experiences of the young people from their departure from their country of origin to the point where their protection claims find resolution. This process can involve applications, administrative appeals, applications for judicial review in one or more courts and/or personal pleadings to politicians and immigration officials.

It will be seen from the outset that the main focus of this report is on unaccompanied and separated children who have been smuggled into Australia,

embedded in a larger group of asylum seekers. Although much harder to research, we also examine the phenomenon of trafficked children — children brought into Australia for abusive purposes such as employment in the sex industry. At time of writing, however, this research is best described as 'academic' in the sense that none of the young people located and studied for the report can be described as 'trafficked'.¹⁰

The report begins in Part 1 by examining the phenomenon of children seeking asylum alone. Chapter 2 defines terms and outlines the available statistics on how many unaccompanied and separated children have been smuggled or trafficked into Australia in recent years. This chapter also sets out the history of child migration to Australia. While few children have come here as asylum seekers, very substantial numbers have come in under organised resettlement programs. There follows in Chapter 3 an account of how and why children arriving as asylum seekers in Australia come to travel alone. The aim is to provide some insight into the physical journeys of the young people studied for the report.

The body of the report is divided into two further parts. Part 2 deals with frameworks for protection, examining in turn the obligations Australia has assumed under international law and the laws and policies framed at a domestic level. Chapter 4 provides an overview of obligations Australia has assumed under international law. Chapters 5 and 6 set out the applicable domestic laws, dealing sequentially with access to Australian territory and asylum processes and the laws and policies governing immigration control and refugee protection.

Part 3 of the report examines the law in practice, evaluating the treatment of unaccompanied and separated children in Australia's refugee status determination system. Chapter 7 focuses on the reception and initial treatment of these children. The primary status determination process is considered in detail

in Chapter 9 and the appellate processes both at administrative review and judicial review levels, in Chapter 10. Chapter 11 examines issues common to both primary and appellate decision-making, covering everything from the provision of legal advice to the reasoning processes used and the notification of decisions. There follows in Chapter 12 a review of the Australian jurisprudence on how the international legal definition of ‘refugee’ has been interpreted in cases involving unaccompanied and separated children.

The report continues in Chapter 13 with an account of how unaccompanied and separated children have fared under Australia’s offshore processing regime. For this section we interviewed children who had been processed on both Nauru and Christmas Island. There follows in Chapter 14 an examination of the second phase in Australia’s refugee protection process: applications for permanent protection. We review the experiences of the young participants as they engaged for a second time with Australia’s refugee status determination process. This chapter examines both the processes followed and the legal issues encountered. The effectiveness of resettlement and guardianship arrangements are considered, providing insight into how the young people studied are faring in their new life in Australia. The report concludes in Chapter 15 with some reflections in lessons that Australia might take from the experiences of the unaccompanied and separated children who sought asylum in Australia between 1999 and 2003.

1.3 Methodology

By late 2005, a considerable amount of material concerning the law, policy and practices governing the processing of refugee claims by children in immigration detention in Australia had made its way on to the public record. This project was assisted in particular by the release

in 2004 by the Human Rights and Equal Opportunity Commission (HREOC) of its seminal report into children in immigration detention.¹¹ This document contains careful analyses of the official data available on the practices followed while children were in immigration detention between 1999–2002. HREOC’s findings are important to this project because all of the young people studied were held in custody while their initial refugee claims were considered: the only variations were the places of incarceration and the periods spent in detention. Just as importantly, the commission records events and practices that preceded the drafting and implementation of special policies and guidelines for the processing of refugee claims made by children. The initial refugee claims of many of the young people interviewed for this report were also finalised prior to the release of such policies. Accordingly, HREOC’s report provides important benchmarks against which to measure the material collected here.

This project has used both quantitative and in-depth qualitative research designs to track the physical, administrative and legal journeys of unaccompanied and separated children through Australia’s asylum process. The criteria for inclusion was that participants:

- were identified by Australian immigration authorities as being under 18 years of age when they arrived in Australia or identified themselves to the researchers as being under 18 at the time of arrival;
- were unaccompanied or separated from a legal guardian when they arrived in Australia;
- were smuggled into the country between 1999 and 2003; and
- had made an application for protection as a refugee after arrival.



New arrivals gather on Christmas Island, 2004.
Photograph ©Phil Oakley.

The project proceeded in several stages and involved both desktop research of legal material that is publicly available and sociological research using a variety of interviewing and information collection techniques.

Unaccompanied and separated children who arrive in Australia without a valid visa are routinely taken into immigration detention where their cases are allocated to named ‘migration agents’ (see 8.3 below). This practice made it relatively easy to identify key immigration service providers with responsibility for assisting unaccompanied and separated children with their asylum claims. At time of writing, interviews had been conducted with representatives of all but one of the firms contracted to provide immigration advice to unaccompanied and separated children held in immigration detention between 1999 and 2003.

Access to the young people after their release into the Australian community was facilitated by a number of remarkable Australians who stood in voluntarily to recreate community and family for these vulnerable children and young people. The refugee advocacy network in Australia is extraordinary in its coverage of the country and in the dedication of its members. Once the project became established,

these networks proved invaluable. Even so, very considerable difficulties were encountered in identifying and gaining access to interview subjects. In spite of participating in focus group sessions, many of the young people approached elected not to be interviewed individually for the project. Some volunteered access to their case files but would not be formally interviewed, while others agreed to be interviewed but could not supply any documentation about their cases.¹² In other instances, time constraints on the researchers limited the ability to conduct formal interviews. These factors and the elapse of time between the dates at which various people were interviewed mean that the collection of comparable data was not always possible.¹³

Armed with a grasp of the law and of the published policies, the research therefore began with the young people themselves, supplemented by interviews with their support persons and key migration agents and lawyers involved in the representation of unaccompanied and separated children.¹⁴ Information (and comment) has also been sought at various stages from the Department of Immigration and

Multicultural Affairs (DIMA, known previously as the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA))¹⁵ and from the Refugee Review Tribunal (RRT). These authorities declined to nominate individuals for formal interview, although the RRT provided written responses to questions submitted to it. DIMA responded to an initial questionnaire by sending copies of applicable legislation and policy guidelines and requested that it be given an opportunity to view the report when completed. This was done: some comments were received during the end stages of writing up both this report and the comparative report. Cooperation was also received from DIMA's statistical section and from the section dealing with offshore humanitarian entry. Because of constraints imposed under relevant memoranda of understanding with DIMA, State welfare authorities also declined repeated invitations to be interviewed or to make contributions to the research. In 2005–2006, the International Organization for Migration (IOM) agreed to assist, providing statistical data on offshore processing operations on Nauru and Manus Island, although data on its Indonesian operations was not available.

In the first year, a special study was made of 14 separated Afghan children, focusing very much on the initial application process. This sample has since been extended so as to account for 85 cases involving unaccompanied or separated children aged 18 years or less at point of arrival.

Where available, participants provided the following documents for analysis:

- documentation constituting the initial protection visa application;
- written submissions made in support of this application;
- correspondence with legal representatives;



- correspondence with DIMA and other service providers (that is, detention contractors; language laboratories or medical service providers);
- tape or transcript of interview with an officer of DIMA at first instance;
- written submissions in support of the application (if any) to the RRT;
- record or transcript of RRT hearing;
- RRT decision;
- court documents and any submissions prepared in relation to any application for judicial review of an adverse RRT decision; and
- court decisions made on application(s) for judicial review.

Correspondence was reviewed for the following purposes:

- to determine the nature of information provided to participants by DIMA;
- to identify any concerns that might have been raised by or on behalf of participants during the application process; and
- to determine the nature of correspondence entered into by legal representatives on behalf of a participant.

As the completeness of transcripts provided by legal representatives could not be assured, they were not analysed for variables such as question type, interview format, emotional responses to the interview, role of the legal representative or to determine the participant's comprehension of the process.

DIMA interviews were analysed so as to identify the following variables (where present):

- question type, including the number and examples of closed questions, open-ended questions, multi-part questions, leading questions, and nonsensical questions;
- comprehension: including incidences where the question and response did not match, where the applicant or interpreter did not understand question, and the complexity of language;
- duration;
- interview format: including interview preparation, rapport building, opportunities for the applicant to describe his or her own story, use of inquiry, and closure;
- emotional responses of applicant and interviewer to the interview, including how responses were managed;
- role of the legal representative at interview; and
- the interviewer's cultural understandings including familiarity with political and social situation, and representations of daily life.

Participants were self-selected. Open invitations to join the study were circulated via service providers and ethno-specific community organisations working with refugees around Australia, and the researchers canvassed the project at community functions. Over time, it was found that word-of-mouth within the small communities of unaccompanied and separated children was the most effective method for

locating interview subjects. A simple record-keeping method was used for collecting basic data about the young people's experiences, supplemented by the assembly of more detailed information gleaned through transcribed interviews and electronically stored court decisions. The information collected was then encoded using the Researchware program for sociological research.¹⁶ Participation was voluntary and there was no financial incentive to participate, although transportation costs were reimbursed where required.

The formal interviews used a semi-structured questionnaire with both closed and open questions that covered the chronological order of events following the decision to leave a country of origin. The questionnaire was designed as a guideline to obtain information, while allowing the young people to express themselves freely.

It was a condition of the Human Ethics Committee at the University of Sydney that the anonymity of all young people interviewed for this report be maintained at all times. Confidentiality was explained to potential participants during recruitment and again at interview. All were made aware of the option to withdraw at any time and care was taken to





emphasise the ability to control the information shared with researchers at the interview. The young interviewees were invited to choose a pseudonym if their stories or comments were to be included in this report. To this end, some circumstantial and/or personal details have been changed or omitted to protect the identity of the participants, for example where a detail is unique to one individual. The anonymity of deponents is also enhanced by the thematic approach adopted: case studies are not presented as separate units. For ease of comprehension, some grammatical errors in quotes have been changed where this has not affected the meaning. In all other respects, however, every effort has been made to allow the participants to be heard using their own words.

The limitations of the methodology adopted in interviewing the young people as a tool of scientific research are readily apparent. At the most basic level, it was not possible to verify the accuracy of the information provided by the participants, particularly as they were asked to recall events that were both temporally remote and infused with traumatic resonances. As many of the participants' files were incomplete, it was not always possible to cross-

reference reports. The small number of interview tapes available for analysis precludes any assertions that the material analysed is representative of any general trends or failings in and of themselves. Having said this, as the research progressed and the number of interview subjects increased, the patterns that emerged in the responses became quite marked. Many of the patterns observed were confirmed in focus group interviews and in the interviews conducted with migration agents and related non-government service providers.

This research has — and continues to be — driven by the conviction that we need to know more about the phenomenon of children seeking asylum alone. Where do the children and young people come from? Who are they? Why did they leave their countries of origin and how did they get to Australia? What happened to them after they arrived? Most importantly, how well did our laws and policies operate to meet their immediate and more long-term needs for protection? These questions are important because the answers go ultimately to the heart of Australia's national interest.

Unaccompanied and separated children have basic and inalienable rights that Australia has contracted to observe as a matter of international law: negligent mistreatment of children is against the law and carries the threat of international embarrassment.

Just as significantly, however, the unaccompanied and separated children recognised as refugees in Australia are all potential citizens of this country.

It is plainly in the national interest to minimise the trauma suffered by these children and to maximise the efforts made to encourage healing and resettlement so as to avoid long-term social problems.

Endnotes

- 1 Each research participant of the study was asked to choose a pseudonym in order to protect his or her anonymity. The names chosen reflect a curious mix of influences: friends, idols and even cartoon characters. *Gandhi* chose the name of a man who was both a strong leader and an advocate of peace and non-violence.
- 2 Senate Estimates Committee, Answers to Questions on Notice by Senator Brian Harradine, DIMA (14) Output 1.2: Refugee and Humanitarian Entry and Stay, 11 February 2003. Note that detailed statistical data was provided in 2005 for the financial years 2000–2002. See further 2.2.3 below.
- 3 See 2.1 below for a discussion on the use of these terms.
- 4 UNHCR Population Data Unit, *Trends in Unaccompanied and Separated Children Seeking Asylum in Industrialized Countries, 2001–2003* (UNHCR, Geneva, July 2004).
- 5 Jacqueline Bhabha, ‘Demography and Rights: Women, Children and Access to Asylum’ (2004) 16 *International Journal of Refugee Law* 227.
- 6 The Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967. The Refugee Convention was done at Geneva on 28 July 1951 (see Aust TS 1954 No 5, 189 UNTS No 2545, 137). The Protocol was signed on 31 January 1967, and ratified on 13 December 1973 (see Aust TS 1973 No 37, 606 UNTS No 8791, 267). The Convention covers events causing a refugee problem before 1 January 1951, while the Protocol extends the definition to events occurring after that date.
- 7 See James Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991), ch 1.
- 8 See Ilene Cohn and Guy Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflicts* (Oxford University Press, Oxford, 1994); Michael Gallagher, ‘Soldier Boy Bad: Child Soldiers, Culture and Bars to Asylum’ (2001) 13 *International Journal of Refugee Law* 310; Bhabha, above n5.
- 9 A great deal has been written on these events. See, for example, Don Rothwell, ‘The Law of the Sea and the *MV Tampa* Incident: Reconciling Maritime Principles with Coastal State Sovereignty’ (2002) 13 *Public Law Review* 118; Mary Crock, ‘In The Wake of The Tampa: Conflicting Visions of International Refugee Law In The Management of Refugee Flows’ (2003) 12 *Pacific Rim Journal of Law and Policy* 49; James Hathaway, ‘Immigration Law is Not Refugee Law’ in US Committee for Refugees, *World Refugee Survey 2001*, pp 39–47; and Chapters 5 and 13 below.
- 10 For a definition of ‘trafficked child’, see 2.1 below.
- 11 HREOC, *A Last Resort? National Inquiry into Children in Immigration Detention* (AGPS, Canberra, 2004).
- 12 Participants processed on Christmas Island and Nauru were in this group.
- 13 The participants were interviewed over an 18-month period, with the result that they were at different stages of the immigration process when considered for study. For example, although in all cases it was possible to track outcomes such as the grant of visas, it was not possible to re-interview cases so as to review the participants’ experiences with the ‘re-application’ process: see Chapter 14 below.
- 14 See Appendix.
- 15 DIMA was re-named the Department of Immigration and Multicultural Affairs in January 2006. To reduce confusion, the reference throughout is to DIMA, although the agency was known as DIMIA at the times most relevant to this study.
- 16 HyperResearch version 2.6, Copyright 1988–2003, Researchware Inc, Randolph MA.



Children in Need of Protection: The Scale and Nature of Movement

2.1 Defining Terms and Identifying Protection Needs

Unaccompanied and Separated Children

The term ‘separated children’ is used in this report to describe children under the age of 18 years who are outside their country of origin and separated from both parents or from their previous legal or customary caregiver.

In international literature on these issues, the term ‘separated’ is now generally preferred to that of ‘unaccompanied children’. Experience shows that many children and young people fleeing situations of conflict and turmoil are not truly ‘unaccompanied’: rather they travel in the care of an adult or extended family member. Separated from their parents, such children face similar risks to those encountered by truly ‘unaccompanied’ refugee children. The use of the category ‘separated children’ reflects this understanding, and draws attention to the similar

protection needs of this vulnerable group. In order to cast the net of this report as broadly as possible, however, reference is made throughout to ‘unaccompanied and separated children’.

In Australia, DIMA uses the term ‘unaccompanied minors’ to describe children who arrive in Australia without a parent or other adult relative to care for them; and those who do not have a parent, but are in the care of a relative over the age of 21.¹ In this respect, the departmental phrase corresponds roughly to the international category of ‘separated children’.

DIMA also makes a further distinction within this category. Children who do not have a parent or relative over the age of 21 to care for them in Australia are referred to as ‘unaccompanied wards’. Those children who do not have a parent, but who do have a relative over the age of 21 are referred to as ‘unaccompanied non-wards’.

While some Australian State legislation distinguishes between a child and a young person,² it is a feature of the federal immigration law and policy that few if any distinctions are made to acknowledge the subtle gradations of childhood.

Indeed, it will be seen that in most respects Australian laws governing refugee protection are characterised most starkly by a failure to make any distinctions at all between child and adult.

The one change that was made in late June 2005 was to stipulate that immigrant children should no longer be detained other than as a matter of last resort (see 7.3 below).

Smuggled and Trafficked Children

This report considers the plight of unaccompanied and separated children who have been either smuggled or trafficked into Australia. The two terms ‘smuggled’ and ‘trafficked’ have different legal connotations. Both involve the movement of persons through the intervention of third parties by what can be illicit means. The popular assumption seems to be that smuggled migrants act voluntarily while trafficked people are coerced or even taken by force (without their consent). In recent years, the terms have been defined in separate Protocols made to supplement the UN Convention Against Transnational Organized Crime.

The Protocol Against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol)³ provides in Art 3(a) that the ‘smuggling of migrants’ shall mean:

the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State party of which the person is not a national or permanent resident.

‘Illegal entry’ is defined as the crossing of borders without complying with the necessary requirements for legal entry into the receiving State.⁴

The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol)⁵ defines trafficking in persons as:

the recruitment, transportation, transfer, harbouring, or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power, of a position of vulnerability, or of the giving or receiving of payment or benefits to achieve the consent of a person for the purpose of exploitation. Exploitations shall include, at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labor or services, slavery, or practices similar to slavery, servitude or the removal of organs.⁶

The Trafficking Protocol makes special provision for children, defined in Art 3(d) as ‘any person under eighteen years of age’. Unlike adults, children will be considered to be trafficked persons regardless of issues of consent, or the use of force or threats:

The recruitment, transportation, transfer, harbouring, or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article.⁷

Although rather new in terms of general international law (and cumbersome in its phraseology), the Trafficking Protocol definition is emerging as the most comprehensive and broadly accepted bench-

mark for identifying trafficked children. In Australia, legislation which adopts the main elements of Art 3 has recently been passed (see further 6.4 below).

On the face of these two definitions, ‘trafficked’ persons — and trafficked children in particular — are distinguished from their ‘smuggled’ counterparts on the basis of the continuing involvement of an abusive party in the persons’ lives after their illicit entry into a destination country. Where the smuggler is paid to deliver a person only, the trafficker seeks to gain continuing advantage from their charge through exploitative activities carried on after the person enters a destination country.

The issue of trafficking in children is one of global concern, described by the first director of the International Labour Organization (ILO) as ‘unbearable to the human heart’.⁸

As the International Programme on the Elimination of Child Labour (IPEC) notes, the variations found in the definitions of trafficking in international instruments should not be seen as evidence of either confusion or discord. Difference in approach is most often a reflection of context or institutional objective rather than a divergence in the overall intention to combat the phenomenon: a modern form of slavery targeting the most vulnerable members of human society.

The divergence in both attitude and rights discourses between smuggled and trafficked migrants is of particular significance in Australia. As will be seen in the following section, the vast majority of separated child migrants arriving in Australia without appropriate visas have been treated as smuggled persons. This is in spite of the fact that many may have carried with them burdens of debt requiring repayment after entry into Australia.⁹ As explored in Chapter 3, the presumption that smuggled persons are consenting and voluntary participants in the

enterprise of gaining illicit entry into another country may also be false in the case of smuggled children. On the other hand, being identified as a victim of trafficking has not guaranteed preferential treatment. Interestingly, while most of the smuggled children have been allowed to lodge refugee claims, the same is not true of children identified as the victims of trafficking in Australia’s recent past. In neither case (smuggled or trafficked children) do issues of complementary protection (outside of the refugee protection regime) appear to have been considered as a matter of course.

2.2 An Overview of Unaccompanied and Separated Child Migrants

Unaccompanied and separated children have long been a feature of asylum-seeker and refugee flows, particularly in the developing world. As Ressler, Boothby and Steinbock document, wars, famines and natural disasters have almost always resulted in children being separated from their families.¹⁰ Children who have been displaced by war and other disasters often travel to



neighbouring countries as part of broader refugee flows. The increasing extent to which civilians are the targets of violence in intra-State armed conflict has undoubtedly added to the numbers of children who lose their homes and families in the midst of war.¹¹

In the developed world, a majority of separated and unaccompanied children have arrived historically in the context of official resettlement programs and have not been associated particularly with refugee status. This has changed in the last few decades, however, as significant numbers of separated and unaccompanied children have found their way to these countries as asylum seekers. Wendy Ayotte cites various factors that might explain why countries in Europe have begun to see more vulnerable children travelling on their own.¹² War and instability in the former Yugoslavia, the former USSR, and elsewhere in Eastern Europe sent waves of refugees into nearby Western Europe. Children have also arrived seeking asylum from much further away. Ayotte points to a worldwide rise in the incidence of trafficking in children; changes in the nature of modern warfare, with the increasing rate of civilian casualties; instability within refugee camps in developing countries; a significant drop in the cost of air travel; and the increasing mobility of both people and information around the world. All of these factors have conspired to make separated and unaccompanied child asylum seekers a truly global — and not just regional — phenomenon.¹³

These aspects of globalisation have also fostered unprecedented growth in the business of human trafficking and smuggling. Separated and unaccompanied children, who by definition travel without primary caregivers and without the resources, contacts, and abilities of adult migrants, often become the clients or the prey in this underground economy.

Group of children at the Fairbridge Farm School at Molong, NSW, 1953. From the collection of the National Archives of Australia.

2.2.1 Past Experiences of Child Migration in Australia

Australia has a long history of taking in groups of unaccompanied and separated children as migrants. History records the presence of such children on the First Fleet.¹⁴ In the early years following Federation — indeed until the end of the Second World War — private (usually religious) organisations undertook the ‘recruitment’, reception, settlement and guardianship of unaccompanied and separated children under programs targeted at Empire settlement and rural development.¹⁵

Child migrants were housed on rural properties run by private organisations and raised to perform rural labour. These aims were realised in the objectives of the Fairbridge Society, founded on a rural farm in Pinjarra (Western Australia) in 1912 to provide training in agriculture for boys and in domestic service for girls. It was a model followed by other service providers. The traditional source countries for child migrants was the United Kingdom. For its part, the United Kingdom appears to have used the child migration programs of Canada and Australia as virtual dumping grounds to rid itself of children from difficult family backgrounds — to the point that children were transhipped on occasion without the consent of their parents.¹⁶



Although of a small scale, child migration played an important role in Australia's development because it provided sparsely populated rural areas with a ready source of cheap, exploitable labour.¹⁷ Arrivals did not compete in the urban (adult) labour markets. This may explain why child migration remained quite popular, even at a time when adult migration became subject to widespread discontent. The children were seen to be fulfilling a need in the domestic market, performing hazardous rural work that adult citizens were unwilling to perform.

In 1921, Barnardos, a Christian charitable organisation of British origins,¹⁸ sponsored its first group of migrant boys, whose average age was 16 years.¹⁹ In 1923, the organisation sponsored its first group of migrant girls. From these humble beginnings, various private bodies became involved, with increasingly ambitious plans, until in 1925 the Salvation Army chartered an entire ship to bring migrant boys to Australia. The ethos of child migration at the time emphasised the provision of opportunities to school-leavers — 'a fresh start in a new country' — as opposed to the relocation or resettlement of very young children.²⁰ This emphasis enabled the child migration program to be promoted as a cheap and exploitable source of able-bodied workers, rather than one which brings in children who need constant care and assistance.

The Catholic Church became involved in child migration programs in the mid-1920s. Until this time, the prominent organisations — the Fairbridge Society, the Millions Club, Barnardos and others — were non-Catholic. Along with strong humanitarian concerns, a sectarian emphasis — the maintenance of Catholic 'numbers' over the dominant Protestants²¹ — caused Catholic groups to take an active role in sponsoring child migrants. The Catholic emphasis was strongest in Western Australia, where the prominent participating organisations were the Christian Brothers and the Knights of the Southern

Cross. These groups attempted to respond to the challenges set by the perceived success of the Fairbridge farm project,²² harnessing child migration programs as a mechanism for countering perceived Masonic and 'Orange' influences in the community.²³ They set about establishing their own farm designed to teach rural farming techniques to migrant children. Between 1938 and 1939, the Christian Brothers brought three groups of children — 114 boys in total — to Australia and settled them in Christian Brothers orphanages.²⁴

Child migration to Australia was suspended for seven years during the depression years of the 1930s, resuming only when it became clear to British authorities that Canada would not take further juvenile migrants.²⁵ With the onset of the World War II, child migration again ceased, in accordance with a general moratorium on migration.²⁶

The programs resumed after the war when the Federal Government approved an ambitious plan, based on post-war strategic and defence concerns and a prevailing ethos of 'populate or perish'. Under an agreement with the United Kingdom, 50,000 child migrants were to be brought to Australia in the three years following 31 December 1946.²⁷ The migrant children would be 'war orphans', sent to Australia from the orphanages of Britain and other devastated European countries. It was the most specific — and arguably, the most radical — migration plan to emerge from the post-war era. It soon became evident that the target of 50,000 orphans could not be reached. European nations, in the wake of wartime devastation, had come to view the protection of orphans as a national responsibility, and recognised the crucial role of young people in satisfying their own substantial post-war reconstruction needs.

The plan was compromised further by a transformation in post-war British childcare thinking.²⁸ Attitudes towards care and settlement were under-

going significant changes. Wartime experiences of evacuation and child separation had demonstrated to researchers the importance of stable parent-child relationships for the psychological wellbeing of children. Among a series of options available to childcare specialists, child migration was widely condemned as the worst possible scenario in the scheme of care.

Until the end of World War II, the Commonwealth Government had very little involvement in child migration. Each Australian State had its own immigration department and managed its own schemes.

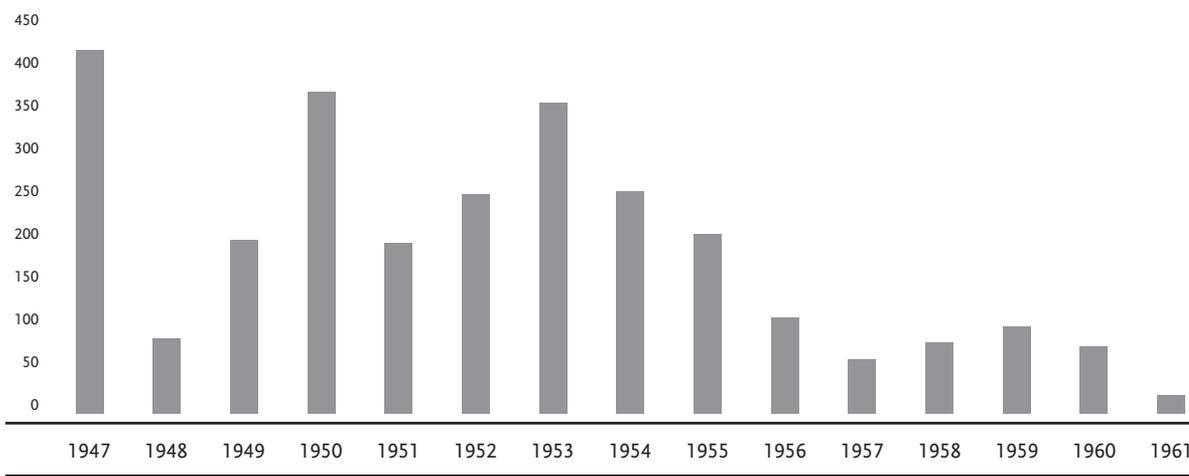
The revival of child migration with Minister Caldwell's grand plan to bring in 50,000 war orphans and displaced children brought with it a realisation that a uniform system was needed for the care and guardianship of migrant children.³⁰ This was the theory behind the passage of the *Immigration (Guardianship of Children) Act 1946 (Cth)* (the *IGOC Act*). This Act designates the federal Minister for Immigration as guardian of all unaccompanied child migrants.

The practice from the outset, however, seems to have been for the federal minister to delegate the guardianship powers to State authorities under the *Immigration (Guardianship of Children) Regulations 2001 (Cth)* (see further 7.2 below).

Australia's first large-scale Federal Government program involved orphaned or destitute children from the United Kingdom living in children's homes or other State institutions. It included children who had lost their parents during World War II. The stories of the 10,000 children taken in under this scheme were tragic. In addition to the sometimes scandalous circumstances in which the young immigrants were selected,³¹ many of the children suffered horrendous physical, sexual and other abuse in the Australian institutions to which they were consigned. Apart from the major resettlement schemes, Australia has also accepted children at various stages from Malta and from the former Yugoslavia. Attempts were also made from as early as 1939 to bring in unaccompanied and separated Jewish children.

The post-war program marked a new focus on the role of government in the international elements

Figure 1: Child and Youth Migration 1947 to June 1961²⁹



of child migration but brought surprisingly few changes on the ground. In spite of the fresh legislative basis for Federal Government involvement in settlement and care arrangements, powers were ceded immediately to State and Territory governments and then outsourced to the same private agencies that had dominated the scene prior to the conclusion of World War II. While the Minister for Immigration appears to have been appointed guardian of post-war unaccompanied and separated children, this was done little more than in name. The day-to-day care of the children was carried out by social welfare agencies. Given free range to manage settlement and care arrangements, private organisations continued to house the children in appalling conditions, subjecting them to systematic abuse and using them as a source of cheap and easily exploitable labour.

The pursuit of justice for victims of these ‘care’ arrangements led to the abandonment of privately administered services in the late 1970s, with a renewed emphasis on government control over all aspects of the child migration program. The treatment of subsequent intakes of unaccompanied children, drawn largely from South-East Asia, came to reflect these priorities.

Australia’s second major experience with the resettlement of unaccompanied child migrants occurred in the years following the war in Vietnam. In 1975, Australia evacuated 2500 refugees from Vietnam and instituted the first of what were to be a series of programs for the admission and resettlement of many thousands of Vietnamese nationals. In the same year the violent civil war in East Timor also led Australia to accommodate a number of evacuees from that conflict, among them unaccompanied or separated children. In 1976 a small boat carrying five refugees from Vietnam reached Australia, the first of 56 boats that were to make the journey to Australia over the next six years. This was



Australia’s first direct experience of ‘boat people’.

Between 1976 and 1981, Australia resettled over 38,000 Vietnamese aged 10 to 19 years. While many entered under the technical guardianship of an adult relative or friend, many children quickly found themselves fending for themselves. It was a challenge that led the federal and State governments around Australia to develop crisis intervention, language and youth education programs for refugees.³² The programs devised during these years included the formation of group homes for refugee youth and very targeted development programs that enjoyed considerable success in integrating and rehabilitating young people who were otherwise at considerable risk of becoming dysfunctional adults.

2.2.2 Unaccompanied and Separated Children as Humanitarian Migrants

Although not a focus of this research, it is worth noting that the practice of bringing unaccompanied and separated children to Australia as migrants has continued to a limited extent through the offshore humanitarian program.

Although programs have been created to offer sanctuary to women at risk,³³ the offshore humanitarian program has no specific program for orphaned or separated children. Even so, there appears to have been a tendency in the years since the *Tampa* affair to target particularly vulnerable groups when selecting migrants under the offshore humanitarian scheme.

In this climate, orphaned and separated children appear to have been beneficiaries, with sharp increases apparent in the number of such children being selected for admission. DIMA provided the following statistics for the years 2002–2005 on the number of ‘Unaccompanied humanitarian minors’ admitted to Australia as permanent residents:

- 2002–2003 program year: 74 admitted
- 2003–2004 program year: 229 admitted
- 2004–2005 program year: 417 admitted

These figures are important because they demonstrate that the issue of unaccompanied child migrants is not one that is limited to a relatively small group who arrived between 1999 and 2003. While the circumstances surrounding the arrival and reception of these young people are different from many of those studied for this report, the issues relating to long-term resettlement and development are the same.

2.2.3 Unaccompanied and Separated Children as Asylum Seekers

For the most part, the unaccompanied and separated children entering Australia without visas in recent years have been treated as smuggled persons, rather than as victims of trafficking. Embedded within groups of people who were or are obvious candidates for protection as refugees, it is perhaps not surprising that most have been processed as asylum seekers. Indeed, the vast majority have been accepted as refugees.



Children have always constituted a significant proportion of the international refugee population: the usual claim is that between 40 and 50 per cent of the world's refugees are under 18 years of age. According to one source, the United Nations High Commissioner for Refugees (UNHCR) offered support to 7.7 million refugee children in 2002, while approximately half of the 25 million people displaced within their own countries in that year were estimated to be under the age of 18.³⁴ The number of unaccompanied and separated children travelling alone both within and outside of settled refugee camps is harder to determine: gaining reliable statistics at both global and country levels is extremely difficult. However, it is generally accepted that the phenomenon of children being forced to move because of violence or unrest in their country of origin is a significant problem.³⁵

The number of unaccompanied and separated children seeking asylum in developing countries has escalated dramatically over the last decade, to the point where such children now constitute at least 4 per cent of the asylum-seeking population in many destination States. In 2000, some States reported that such children constituted over 15 per cent of asylum seekers.³⁶ In 2003, UNHCR reported that 12,800 unaccompanied and separated children applied for asylum in 28 industrialised countries with available data. The top six countries (the United Kingdom, Austria, Switzerland, Netherlands, Germany and Norway) accounted for 73 per cent of such children.³⁷

Compared to these international figures, the number of unaccompanied and separated children seeking asylum in Australia has been very small, largely because Australia receives comparatively few asylum seekers. (In percentage terms, however, the statistics are in line with global averages.) Between 1999 and 2001, Australia experienced an increase in unauthorised boat arrivals. By mid-2001, close to 30

per cent of the total number of such arrivals were children.³⁸ The sudden surge in the number of child asylum seekers coincided with legislative changes in Australia that removed the right of persons recognised as refugees in Australia to sponsor their immediate families under family reunification programs.³⁹ Interestingly, the parallel rise in the number of unaccompanied and separated child asylum seekers over the same period coincided with a spike in the general number of such asylum seekers across industrialised countries around the world.⁴⁰

Australian statistics are not included in the reports prepared by UNHCR in either 2001 or 2003–2004, because Australia was unable to provide data comparable to that collected from other States. This project encountered similar problems in obtaining reliable statistics, with quite marked discrepancies between the numbers provided by DIMA and those furnished by the review authority (the RRT) when approached independently and/or by the HREOC in its report on children in immigration detention.⁴¹ Requests for statistical information from DIMA were made through the Australian Senate's Estimates Committees in February of each year between 2003 and 2005. Answers to the first of these questions yielded statements to the effect that 290 unaccompanied and separated children arrived on the Australian mainland and sought protection as refugees between 1 July 1999 and 28 February 2003. Of these, three arrived by air on a visa, four arrived by air without a visa, and 283 arrived by boat without a visa.⁴²

In 2004 and 2005, more detailed statistics were supplied for individual financial years 1999–2002. DIMA stated:

DIMA systems do not enable reporting on the language of minors; which of the five grounds is claimed for refugee status; the number or percentage represented by counsel; and the number of minors as primary applicants applying for protection raising issues under

the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention).

In addition, it is not possible to extract reports from DIMA systems on whether an adult accompanying a minor applying for a Protection Visa is a parent or another relative. System reports as at 14 April 2004 provide the following information sought in relation to minors who applied for Protection Visas in their own right as primary applicants.⁴³

The DIMA 2004 system reports are reproduced in Tables 1 to 3 below.

Information concerning unaccompanied and separated children in more recent years has been more difficult to obtain. In February 2006, however, refugee advocates estimated that 13 unaccompanied children were being held in community detention, of which five were under guard in hotel accommodation.

These five were reported to be embedded in a group of Indonesian fishermen apprehended for fishing without authority in Australian waters. The report demonstrates that the phenomenon of children travelling alone as migrants, some of whom are in search of refugee protection, is ongoing.⁴⁴

Table 1: Minors Who Sought Refugee Status as Primary Applicants 1990–2000

NATIONALITY	TOTAL	MALES	FEMALES	Age at time of application			Outcomes	
				0–12 YRS	12–14 YRS	15–17 YRS	GRANTED	REFUSED
■ Afghanistan	40	40	0	0	8	32	38	2
■ Iraq	5	5	0	0	0	5	4	1
■ Iran	1	1	0	0	0	1	1	0
■ Palestine	0	0	0	0	0	0	0	0
■ Sri Lanka	1	1	0	0	1	0	1	0
■ Other	4	3	1	0	1	3	3	1
■ Total	51	50	1	0	10	41	47	4

Table 2: Minors Who Sought Refugee Status as Primary Applicants 2000–2001

NATIONALITY	TOTAL	MALES	FEMALES	Age at time of application			Outcomes	
				0–12 YRS	12–14 YRS	15–17 YRS	GRANTED	REFUSED
■ Afghanistan	105	103	2	0	15	90	79	26
■ Iraq	6	6	0	0	0	6	6	0
■ Iran	0	0	0	0	0	0	0	0
■ Palestine	1	1	0	0	0	1	0	1
■ Sri Lanka	0	0	0	0	0	0	0	0
■ Other	7	5	2	0	0	7	4	3
■ Total	119	115	4	0	15	104	89	30

■ **Children sent to Nauru, Manus Island or Christmas Island**

The statistics collected by researchers on the number of unaccompanied and separated children intercepted en route to Australia and detained on Nauru and Manus Island vary considerably.

DIMA’s response to questions asked at the Estimates Committee hearings in February 2005 suggest that between 1 July 1999 and 25 February 2005, 20 unaccompanied minors were intercepted *en route* to Australia and transferred to either Christmas Island Immigration Reception and Processing Centre (IRPC) or Nauru Offshore Processing Centre (OPC). During this period, no

unaccompanied minors were transferred to Manus Island OPC for detention. Sixteen were transferred directly to Christmas Island IRPC. Of the 16, 13 were subsequently transferred to Nauru OPC. These 13 each spent an average of 50 days in detention. Two were granted temporary protection visas (TPVs);⁴⁵ two were resettled in New Zealand; seven were refused visas. Of the seven refused visas, six returned voluntarily to their country of origin. One remaining minor entered Australia as a transitory person and was subsequently granted a temporary protection visa. The remaining four were transferred directly to Nauru OPC. Of those four, one was resettled to New Zealand prior to assessment. The remaining

Table 3: Minors Who Sought Refugee Status as Primary Applicants 2001–2002

NATIONALITY	TOTAL	MALES	FEMALES	Age at time of application			Outcomes	
				0–12 YRS	12–14 YRS	15–17 YRS	GRANTED	REFUSED
■ Afghanistan	62	61	1	2	6	54	52	10
■ Iraq	13	12	1	0	0	13	11	2
■ Iran	2	2	0	0	1	1	2	0
■ Palestine	0	0	0	0	0	0	0	0
■ Sri Lanka	1	1	0	0	0	1	0	1
■ Other	0	0	0	0	0	0	0	0
■ Total	78	76	2	2	7	69	65	13

Table 4: Unaccompanied Minors in Community Detention February 2006



PLACE OF DETENTION	MALES	FEMALES	COMMENTS
■ Detention centre	0	1	Port Augusta
■ House or flat in the community	34	16	8 Unaccompanied minors (UAMs)
■ Private apartment under guard	5	0	All UAMs
■ Total = 56 children in detention	39	17	13 UAMs total

Source: ChilOut, 10 March 2006.

three were denied visas and voluntarily returned to their countries of origin.

According to statistics provided to HREOC, an alleged total of 66 unaccompanied and separated children were deflected from Australia as part of the ‘Pacific Strategy’, including 36 accepted by New Zealand from the *Tampa* and, as at 23 April 2002, 30 redirected to Nauru or Manus Island.⁴⁶ The vast majority of these young people (91.2 per cent) were recognised as refugees over this period.⁴⁷

Finally, in January 2006, the International Organization for Migration (IOM) supplied data on persons registered upon arrival on Nauru and Manus Island as ‘single, unattached minors’. These suggest that 55 unaccompanied and separated children were identified at point of arrival. This figure may not be reliable as it records information at point of registration. Some children were found later to have relatives in the group.

Of greater concern is that the table records 32 young Afghan males as being returned to Afghanistan in 2002–2003. This appears to be at odds with the statistics supplied to parliament’s Estimates Committee in 2005. It suggests that well over half of the unaccompanied children detained on Nauru and Manus Island were sent back to Afghanistan in 2002 and 2003. On this point, IOM pointed out that all returnees departed voluntarily and that only nine of the 32 were still recorded as unattached minors at time of departure (suggesting that many of the young people were aged 16 or 17 at time of arrival). IOM wrote:

Please note that all 9 Afghan unaccompanied minors returned to Afghanistan voluntarily, and their return was facilitated along with the IOM’s guideline for the return of unaccompanied minors. In principle, IOM ensures the following points in assisting unaccompanied children in their return to the home country or a third country:

- *The ‘best interests’ of the child have been considered by all during the whole process*
- *The consent of the legal guardian (in writing);*
- *Sufficient information and counseling of the child and/or the guardian, as applicable;*
- *Agreement of the host and origin countries to the assisted return; and*
- *The family or an appropriate care provider and reintegration mechanisms have been identified in the country of return;*

In practice, the guardians were always located at the receiving end (Afghanistan). IOM contacted them well before their departure, and the written consent was obtained from the guardians for each case. The guardians were also required to come and receive the children at Kabul Airport (they had to provide us a confirmation in writing). If they resided outside Kabul, IOM staff escorted the children to the point where the guardian could receive them. Unless those steps were certainly completed, the return of the children would not have gone ahead.⁴⁸

■ States of Origin and Age upon Arrival

While States neighbouring conflict zones might expect to receive unaccompanied and separated children in search of asylum, Australia’s lack of land borders appears to have isolated it from these types



Table 5: Single and Unattached Minors Held on Nauru and Manus Island 2001–2006 (IOM)

Single Unattached: Both Camps

Less than One Year

NATIONALITY	COUNTRY ARRIVING	FEMALE MINOR	MALE MINOR	TOTAL
■ Afghanistan	Afghanistan	0	3	3
	Australia	0	1	1
	New Zealand	1	3	4
	Afghanistan Total	1	7	8
■ Iraq	Australia	0	1	1
	Iraq Total	0	1	1
Total—Less than One Year		1	8	9

One to Two Years

NATIONALITY	COUNTRY ARRIVING	FEMALE MINOR	MALE MINOR	TOTAL
■ Afghanistan	Afghanistan	0	29	29
	Australia	0	1	1
	New Zealand	0	4	4
	Afghanistan Total	0	34	34
■ Iraq	New Zealand	0	1	1
	Iraq Total	0	1	1
Total—One to Two Years		0	35	35

Two to Three Years

NATIONALITY	COUNTRY ARRIVING	FEMALE MINOR	MALE MINOR	TOTAL
■ Afghanistan	Australia	0	6	6
	Afghanistan Total	0	6	6
Total—Two to Three Years		0	6	6

More than Three Years

NATIONALITY	COUNTRY ARRIVING	FEMALE MINOR	MALE MINOR	TOTAL
■ Afghanistan	Australia	0	4	4
	Afghanistan Total	0	4	4
■ Iraq	Australia	0	1	1
	Iraq Total	0	1	1
Total—More than Three Years		0	5	5
Grand Total		1	54	55

Registered as 'Single-unattached' on arrival. Some migrants turn 18 years old while they were at the camp. Source: IOM, 13 January 2006.

of refugee flows.⁴⁹ The vast majority of asylum seekers in Australia arrive by air with a valid visa, and apply for protection after being immigration cleared.⁵⁰ This route has not been used typically by separated or unaccompanied children because the visa control and the supervision of airline flights is extensive.⁵¹

On the two occasions where the total number of unaccompanied and separated children has risen over an annual trickle — in the 1980s and in the period studied in this report (1999–2003) — flows have been related to the opening up of people smuggling routes by boat for individuals who are typically identified readily as asylum seekers.

Most of the children who arrived illegally by boat in the late 1980s and early 1990s were from South East Asia (specifically Vietnam and Cambodia) and China. More recently, however, the majority of unaccompanied child asylum seekers arriving in Australia have come from Afghanistan (86.7 per cent), Iraq (10.5 per cent), Iran (1 per cent), the Palestinian Territories and Sri Lanka (1.8 per cent). This is consistent with the nationality patterns of adult asylum seekers.⁵² Of these unaccompanied child arrivals, 54.5 per cent were 16–17 years old; 39 per cent were 13–15 years old and 6.5 per cent were below the age of 13. Of these children, only four were female — two from Iraq and two from Afghanistan.

2.3 The Incidence of Trafficking in Children

The official response to the request for information on the number of unaccompanied and separated children identified as victims of trafficking in recent years was that there was one only incident in 1995 involving a 14-year-

old girl from Thailand. The young woman was located by New South Wales DIMA ‘Compliance’ Section in June 1995 at a brothel in Sydney’s Rocks district. She appears to have been removed from Australia without any application having been made for any type of visa.⁵³

This account of Australia’s experience may not be entirely accurate of the actual incidence of trafficking in children in Australia, however. It is certainly sharply at odds with the projected statistics on general trafficking in women given by agencies specialising in this issue, both in Australia and overseas. The two most influential bodies in this regard are the private agency known as ‘ECPAT’, an acronym for ‘End Child Prostitution and Trafficking’, and the United States State Department which produces an annual report on the incidence of trafficking around the world. Its Trafficking in Persons Report places countries in ‘tiers’ that reflect the prevalence of criminal trafficking activity in a country in any given year.

Quantifying the incidence of trafficking within any country is difficult and Australia proves no exception. The Department of Foreign Affairs and Trade admits, ‘Australia is a destination country for a small but indeterminate number of women trafficked for commercial exploitation’.⁵⁴ In February 2003, Chris Ellison, the Minister of Justice, said ‘no significant’ sex-slavery problem existed in Australia.⁵⁵ However, the ECPAT website asserts that international organised crime syndicates traffick ‘up to 300 Thai women to Australia each year’.⁵⁶ Investigative Journalist Natalie O’Brien claims that in 2003 up to 1000 women and young girls ‘were forced to work as sex slaves in Australia’.⁵⁷ Despite this, the Federal Government estimates that there have been only a handful of cases of women trafficked into Australia, only one of whom was under the age of 18 at time of arrival.⁵⁸

The Australian Government is said to have been ‘disappointed’ at being listed as a ‘tier 1 country’ in

the United States Trafficking in Persons Report for 2004.⁵⁹ Tier one countries are those that are deemed to have a significant trafficking problem, but still comply with the ‘minimum standards’ required to tackle the problem. The 2005 Report is due to be released in the coming months and it will be interesting to see if Australia will remain in the category and how the government will react. The investigative team for the 2004 Report ‘found evidence of 60 cases of trafficking networks and 300 victims’ after five weeks in Australia.⁶⁰ The report states:

*Australia is a destination country for Chinese and Southeast Asian women trafficked for prostitution. Many of these women travel to Australia voluntarily to work in both legal and illegal brothels but are deceived or coerced into debt bondage or sexual servitude.*⁶¹

Some of these girls can be ‘indentured by a \$15,000 –\$18,000 debt’ which must be ‘worked off’ in order for them to be released.⁶² Australia was categorised as a tier 1 country based on new information, which indicated the scale of the problem in Australia.

In June 2004, Australia’s Family and Community Services Minister Kay Patterson stated that many of the figures used in the Trafficking in Persons Report were inconsistent with those held by the Federal Government.⁶³ This report, researched and written by the United States State Department, is considered to be ‘the most comprehensive international survey on people trafficking and slavery.’⁶⁴ However, its research is reliant on contacts within the countries studied. In Australia’s case, the available data is thin and is often anecdotal in nature. According to data collected by Bernadette McMenamain of Child Wise, the incidence of child trafficking into Australia has been very low. Reference was made in a 2003 conference to an African boy brought into Australia in 1994 to be sexually abused, to a 13-year-old Thai girl found in a Sydney brothel in 1996 and one case ‘in

the 1990s’ involving teenage boys being brought from the Philippines into Australia.⁶⁵ Without engaging in extensive fieldwork within Australia’s brothels and without infiltrating the country’s underground network of pedophiles — activities that are beyond the scope of this project — more reliable data has been hard to find.

It may be that Australia has escaped and/or is escaping the scourge of trafficking in children that is apparent in a number of Asian countries in its region — and that is well documented in the United States and in the United Kingdom. What is of concern, however, is that no evidence emerged of specific programs in Australia to identify unaccompanied and separated children at point of entry into the country.

Nor, for that matter, were any programs found that involve the targeting of brothels or other workplaces where abuse of children is likely to occur. There has certainly been nothing to match the United Kingdom’s ‘Operation Paladin Child’ which has involved the intensive training of immigration officials in the identification and interception of child migrants deemed to be at risk.⁶⁶

2.4 A Profile of the Children Studied for this Report

By late 2005, 85 unaccompanied or separated children who had sought or were seeking asylum in Australia had been located and/or accounted for in some way. All but three (who travelled by plane) had arrived in Australia by boat, either as stowaways (four) or as part of a cohort of boat people arriving without authorisation (73). Most (77) were fugitives from Afghanistan, with two each from Kenya, Vietnam and China and one each from Sudan and Rwanda.

Among the Afghan children, the overwhelming majority is Hazara, of the Shi'a faith, with only a couple of Tajiks and one Pashtun. Although the regions of provenance within Afghanistan were not recorded in many cases, a sizeable number of the children claimed to have come from known Hazara strongholds — most notably the Jaghourai region in Ghazni province.

The spread of ages between the children was greater, although most were close to reaching their majority:

Table 6: Age at Arrival

NUMBER OF CHILDREN

1	Age 11	16	Age 15
1	Age 12	18	Age 16
9	Age 13	26	Age 17
11	Age 14	3	Less than 17 but unknown

Of the 85 children and young people, only two escaped detention of any kind. A little less than half (41) were detained for less than six months, while 14 were detained for between one and four years.

Table 7: Length of Detention

NUMBER DETAINED

2	Not detained	15*	8–9 months
5	1–2 months	3	1+ years
16	2–3 months	4	2+ years
13	3–4 months	7	4+ years
6	5–6 months	7	Unknown
7	6–7 months	85	Total

* Many of those detained between eight and nine months were released into community detention, with their status remaining unresolved for up to four years.



The young people studied were detained across most of the main detention facilities. These were:

Table 8: Place of Detention

NUMBER OF CHILDREN DETAINED

30	Curtin IRPC	17	Port Hedland IDC
26	Woomera IDC	2	Christmas Island
2	Maribyrnong IDC	4	Nauru

83 Total Detained

Finally, and perhaps most importantly, is the question of how the children fared in their applications for refugee protection and where they are now. Although these matters will be explored in greater detail later in the report, it suffices to note that in December 2005, 58 of the 85 had been granted permanent protection visas (and permanent residence in Australia).⁶⁷ Eleven held temporary protection visas, while 13 held either temporary protection visas or bridging visas and their current status was unknown. In addition, two had left the country voluntarily; two held student visas; and one held a bridging visa with an application to the Federal Court pending.

Endnotes

- 1 DIMA, Fact Sheet 69 'Caring for Unaccompanied Minors', <www.immi.gov.au/facts/69unaccompanied.htm>.
- 2 See, for example, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 3 (definitions) and *Children and Young People Act 1999* (ACT) ss 7 and 8. Similar distinctions are made in other State and Territory enactments.
- 3 Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime, GA Res 55/25, annex III, UN GAOR, 55th Sess, Supp No 49, at 65, UN Doc A/45/49 (Vol I) (2001), entered into force 28 January 2004.
- 4 See Smuggling Protocol Art 3(b).
- 5 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, GA Res 25, annex II, UN GAOR, 55th Sess, Supp No 49, at 60, UN Doc A/45/49 (Vol I) (2001), entered into force 9 September 2003.
- 6 Trafficking Protocol Art 3(a).
- 7 See Trafficking Protocol Art 3(c).
- 8 See International Programme on the Elimination of Child Labour, *Unbearable to the Human Heart: Child Trafficking and Action to Eliminate it* (International Labour Organization, 2002), <www.ilo.org/public/english/standards/ipecc/publ/childtraf/unbearable.pdf> p 3, accessed 29 April 2005.
- 9 While children may not be controlled directly by the persons conveying them into Australia, their families often incur serious debts to ensure their safe arrival. The families of the children can be the subject of ongoing threats and exploitative measures that operate as vicarious pressures on the separated child in Australia. See further Chapter 3 below.
- 10 Everett Ressler, Neil Boothby and Daniel Steinbock, *Unaccompanied Children: Care and Protection in Wars, Natural Disasters, and Refugee Movements* (Oxford University Press, Oxford, 1988).
- 11 Graca Machel, *The Impact of Armed Conflict on Children: Report of Graca Machel, Expert of the Secretary-General of the United Nations* (UN, 1996), <www.unicef.org/graca/>.
- 12 Wendy Ayotte, *Separated Children Coming to Western Europe: Why They Travel and How They Arrive* (Save the Children, London, 2001).
- 13 Jacqueline Bhabha and Mary Crock, *Seeking Asylum Alone: A Comparative Study of Laws, Policies and Practices Regarding Unaccompanied and Separated Children in the United States, the United Kingdom and Australia* (Themis Press, Sydney, 2006).
- 14 See Robert Holden, *Orphans of history: the forgotten children of the First Fleet* (Text Publishing, Melbourne, 2000). It is uncertain whether these children were in fact 'orphans' or were simply taken into British institutional care at a young age.
- 15 Barry Coldrey, *Good British Stock: Child and Youth Migration to Australia, 1901–83*, Research Guide No 11 (National Archives of Australia, Canberra, 1999), ch 3.
- 16 For an account of the grief caused by these programs in the UK, see Margaret Humphreys, *Empty Cradles* (Corgi Books, London, 1983), republished as *Empty Cradles: One Woman's Fight to Uncover Britain's Most Shameful Secret* (Doubleday, London, 1994). The children transhipped under these programs suffered just as badly. See Senate Community Affairs References Committee, *Lost Innocents: Righting the Record — Report on Child Migration*, 30 August 2001 (Senate Inquiry into Child Migration).
- 17 Alan Gill, *Orphans of the Empire* (Millennium Books, London, 1997), p 518.
- 18 Thomas Barnardo was an evangelical Christian who was born and raised in Dublin. He moved to the UK at the age of 24 years to work as a missionary but then studied medicine and worked in orphanages. There, he commenced a plan to send disadvantaged youths to Canada and other nations. See Coldrey, above n15, p 87.
- 19 Senate Inquiry into Child Migration, above n16, p 22.
- 20 *Ibid.*, 2.49.
- 21 Barry Coldrey, *The Scheme: The Christian Brothers and Childcare in Western Australia* (Argyle-Pacific Publishing, Perth, 1993), p 126.

- 22 See generally, Geoffrey Sherrington and Chris Jeffrey, *Fairbridge: Empire and Child Migration* (University of Western Australia Press, Perth, 1998); Geoffrey Sherrington, 'Fairbridge Child Migrants' in Jon Lawrence and Pat Starkey (eds), *Child Welfare and Social Action in the Nineteenth and Twentieth Centuries: International Perspectives* (Liverpool University Press, Liverpool, 2001); Gill, above n17, ch 5; and Philip Bean and Joy Melville, *Lost Children of the Empire* (Unwin Hyman, London, 1989), pp 127–128.
- 23 Senate Inquiry into Child Migration, above n16, 2.51; Coldrey, above n21, p 128.
- 24 Senate Inquiry into Child Migration, above n16, 2.52; Coldrey, above n21, p 128; Bean and Melville, above n22, pp 114–118; Barry Coldrey, *Child Migration and the Western Australian Boys' Homes* (Tamanaraik Publishing, Melbourne, 1991), p 199.
- 25 Canada passed a law in 1925 prohibiting the migration of children aged 14 years or under. See Gill, above n17, pp 57–58; Coldrey, above n21, p 126; Senate Inquiry into Child Migration, above n16, p 14. On prevailing criticisms in Canada at the time, see Gillian Wagner, *Children of the Empire* (Weidenfeld and Nicolson, London, 1982), pp 134–136, 147–161.
- 26 Senate Inquiry into Child Migration, above n16, 2.55.
- 27 See Gill, above n17, pp 50–52; Bean and Melville, above n22, p 110; Coldrey, above n24. Under the *Empire Settlement Act 1922* (UK), which formed the basis for government sponsored British-Australian child migration, the British Government entered into agreements with receiving private agencies in Australia for the sending and receipt of child migrants. In principle, the British Government was designated responsibility for the scheme's supervision and management. In practice, however, it substantially outsourced the tasks associated with child migration to religious and charitable organisations in the Australian States and Territories.
- 28 See Wagner, above n25, ch 12.
- 29 Taken from DIMA Submission (No 47) to Senate Inquiry into Child Migration, above n16, Table 4.3.
- 30 Scandals surrounding the private agencies' handling of child migrants were one factor laying the groundwork for the *IGOC Act* of 1946. See Senate Inquiry into Child Migration, above n16, 2.42.
- 31 See Humphreys, above n16; and *The Leaving of Liverpool*, BBC Television, 1993.
- 32 See Department of Education and Youth Affairs, *Immigrant and Refugee Youth in the Transition from School to Work or Further Study* (AGPS, Canberra, 1983). The statistics are discussed at pp 30–33.
- 33 For a discussion of this program, see Lenore Manderson et al, 'A Woman without a Man is a Woman at Risk: Women at Risk in Australian Humanitarian Programs' (1998) 11 *Journal of Refugee Studies* 267.
- 34 Jason Hart, *Children and Adolescents in Conflict Situations* (Forced Migration Online Research Guide 2001), <www.forcedmigration.org/guides/fm0008/fm0008-01.htm>.
- 35 Graca Machel Report, above n11.
- 36 UNHCR Population Data Unit, *Trends in Unaccompanied and Separated Children Seeking Asylum in Industrialized Countries, 2000* (UNHCR, Geneva, 2001), p 7. The country in question is the Netherlands. In that country, nearly half of the 2193 asylum seekers from Angola were separated or unaccompanied migrants.
- 37 See UNHCR Population Data Unit, *Trends in Unaccompanied and Separated Children Seeking Asylum in Industrialized Countries, 2001–2003* (UNHCR, Geneva, 2004), <www.unhcr.org/cgi-bin/texis/vtx/statistics/opendoc.pdf?tbl=STATISTICS&id=40f646444>. See further Bhabha and Crock, above n13, ch 2.
- 38 These figures are obtained by doing manual calculations of the figures given in relation to individual boat arrivals in DIMA, Fact Sheet No 74A (2002), available formerly at <www.immi.gov.au/facts74A.html>, now at <http://sievx.com/articles/psdp/DIMIA_74a_boatarrivals.pdf>.
- 39 For a discussion of these changes, see Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (The Federation Press, Sydney, 2006), ch 3.
- 40 According to the report of 2003, the number of

- unaccompanied and separated children seeking asylum peaked in 2001, with sharp drops recorded in 2001–2002 (-11% in 21 industrialised countries) and 2002–2003 (-40%). See UNHCR, above n37, p 4.
- 41 See HREOC, *A Last Resort? National Inquiry into Children in Immigration Detention* (AGPS, Canberra, 2004).
- 42 DIMA, response to questions on notice from Senator Harradine, Additional Senate Estimates Hearing (11 February 2003), Commonwealth Government of Australia. For the statistics on appeals from the decisions in these cases see 8.3 and 10.1 below.
- 43 DIMA, response to questions on notice from Senator Bartlett, Senate Estimates Hearing, 17 February 2004.
- 44 Information supplied by ChilOut, <www.chilout.org/>, accessed 28 March 2006.
- 45 For an explanation of these and other visas granted to persons recognised as refugees, see 6.5 below.
- 46 See further Chapter 13 below. Commonwealth Ombudsman, Submission to National Inquiry into Children in Immigration Detention (2002), 2.5, available at <www.humanrights.gov.au>.
- 47 HREOC, above n41, p 71, para 3.5.1.
- 48 Email communication from Keiko Foster to Mary Crock dated 13 February 2006. On file with author.
- 49 The arrival of a group of 43 asylum seekers from West Papua (Irian Jaya) in late 2005 demonstrates, however, that Australia is not immune from the phenomenon.
- 50 DIMA, above n38.
- 51 Measures adopted include the appointment of ‘over-seas compliance officers’ and ‘airline liaison officers’. See DIMA, *Managing the Border: Immigration Compliance 2004–05* (DIMA, Canberra, 2005), chs 1 and 3, <www.immi.gov.au/illegals/mtb/index.htm>.
- 52 HREOC, above n41, p 76 para 3.5.5.
- 53 See Additional Estimates Hearing, 17 February 2004, DIMA Portfolio (50) Output 1.3: Enforcement of Immigration Law (Answer to Question on Notice by Senator Andrew Bartlett).
- 54 Department of Foreign Affairs and Trade, ‘Trafficking in Persons’, 16 June 2005, <www.dfat.gov.au/illegal_immigration/introduction.html>.
- 55 See ‘Stepping up the fight against slavery’, *The Age*, 27 October 2003.
- 56 ECPAT International, <www.ecpat.net>.
- 57 ‘Australia named in sex slave report’, *Sydney Morning Herald*, 16 June 2004.
- 58 Natalie O’Brien, ‘Sex-slave traders in sights’, *The Australian*, 17 June 2004.
- 59 Ibid.
- 60 Ibid.
- 61 US Department of State TIP Report, released by the Office to Monitor and Combat Trafficking in Persons, 14 June 2004, <www.state.gov/g/tip/rls/tiprpt/2004/>.
- 62 ECPAT International, above n56.
- 63 ‘Plan on people trafficking unveiled’, *Sydney Morning Herald*, 17 June 2004.
- 64 *SMH*, above n57.
- 65 This data is cited by World Vision Australia in its submission to the Senate Legal and Constitutional Legislation Committee on *Criminal Code Amendment (Trafficking in Persons) Bill 2004*, 28 October 2004, <www.aph.gov.au/Senate/Committee/legcon_ctte/trafficking/submissions/sub12.pdf>.
- 66 See *Paladin Child: The Safeguarding Children Strand of Maxim funded by Reflex: A Partnership Study of Child Migration to the UK via London Heathrow* Reflex, Metropolitan Police, the United Kingdom Immigration Service, Association of Directors of Social Services, NSPCC, London Borough of Hillingdon, 2004.
- 67 Unfortunately, it has not been possible to update the status of all of the young people studied for this report over the three years of the project.



Journeys of a Lifetime: How and Why Child Asylum Seekers Travel Alone

3.1 The Decision to Leave

“So, you’ve heard about Moses, you know, the prophet? His mother left him alone in the small box in the water. So I’m asking, did his mother not love him? Does his mother not love him to leave him alone in the small box? No of course not — no mother does not love her child. If he was still with her he would get killed from that time. So, also we have the same conditions in our families. So, we left our families.”¹

One of the more pressing questions for authorities interested in predicting or controlling refugee flows is to determine the factors that prompt individuals to leave their countries of origin to seek refuge in a foreign land. In the case of unaccompanied and separated children, a considerable amount of research has been done in Western Europe to track the factors that seem to motivate the movement of children in that part of

the world.² This research suggests that unaccompanied and separated children seek asylum for a range of reasons, most of which involve an immediate threat of some kind to life or livelihood. Children may be at risk of persecution as political activists in their own right, as members of a social group that is being targeted, for being of the ‘wrong’ race or ethnicity (for example, as children of mixed parentage) or religion.

They may be at risk as members of families that are targeted, or they may be threatened to ensure the cooperation of their family. They may also suffer persecution that is specific to their identity as children (see further Chapter 12).

Among any particular flow of child asylum seekers there will be some who cannot easily meet the international definition of refugee: those who are escaping the random destruction of war but cannot prove they would be targeted for who they are; those who are seeking escape from economic and social hardship; or those who are seeking some benefit unavailable in their countries of origin.

What is interesting is that the decision to leave is generally taken in response to a precipitating event, even where the child has been living for an extended period of time in conditions involving difficulties. This would appear to be true of unaccompanied and separated children seeking asylum in Australia. In all of the 85 cases examined, the decision to leave appears to have been taken in response to precipitating events. This was so even where the child had been living for an extended period of time in conditions involving significant menace.

A second remarkable feature among these cases was the lack of involvement of the young person in the decision-making process. In 55 of the 85 cases reviewed, the decision to leave Afghanistan was made by an adult relative or guardian (with the decision-maker unknown in 25 further cases). In only five instances did any of the participants appear to have had immediate control over either the decision to leave or the method of their flight.

While a number of those interviewed showed a fine understanding of what was happening to them and why, others spoke about the circumstances surrounding their departure in ways that reflected strongly their youth, inexperience and general lack of familiarity with the ways of the world.

Overall, the participants displayed an interesting variety of emotions and insights.

■ The Precipitating Event

One of the most distressing aspects of the interviews with the young participants in this study was the recounting of the ‘push’ factors that lead to their departures from Afghanistan.

The most traumatised of the participants had lost their entire immediate families in periods leading up to their flight to Australia.

In *Sam’s* case, this trauma had occurred some two years before his departure from Afghanistan. At time of arrival in Australia, he believed that he was the sole surviving member of his immediate family who were killed in an attack that occurred while he



was away representing the family at a funeral. His odyssey involved a long and harrowing flight within Afghanistan, hiding out in a mosque and with family friends who represented the boy as their own until he could be delivered to relatives. In *Sam*'s case the decision to resort to people smugglers was made by an aunt who asserted that the boy's presence was a continuing risk to her own immediate family. *Sam* is the son of an individual who UNHCR eventually confirmed was killed. The man held a significant position in a political party in the region from which *Sam* claimed to have come. *Sam* was 16 years old when he arrived in Australia.

Of the 14 Afghan participants interviewed in the first year of the project, all were either the oldest surviving children in their family, or the oldest free, surviving children. Eleven had lost older brothers and/or fathers to the Taliban, the family members having been either killed or returned in a gravely injured state. In most cases, the father, mother, aunt or uncle made the decision for the young people to leave in response to an immediate perceived threat. For example, *Adris* was delivered into the hands of a people smuggler after his elder brother was killed and his body dumped on the family doorstep. *John A*'s brother suffered a similar fate, his body being delivered to the local mosque. *Halimi* was sent away after the death of one parent and the arrest of the other. *Galileo*'s father was taken by the Taliban and although freed, did not survive the following winter: the participant's flight was engineered by an uncle together with the uncle's sons who were also perceived to be at risk. *Denzel* (then aged 14) left with a group of some 20 young people from his village.

This picture was reinforced in the later interviews and in the studies made of both case files and court decisions involving unaccompanied and separated children. In 41 of the 85 cases, the participant claimed either direct physical harm or that a relative had been beaten, killed or disappeared. A further 29

voiced fears of forced conscription into a hostile army; 10 alleged fear of persecution on the basis of religious beliefs or the political opinions of family members; 23 on the basis of ethnic conflict and/or persecution based on ethnicity.

3.2 The Journey to Australia

"From all the way when I left my home till I get to, till I get out of that detention centre, I was like lost. I couldn't feel any thing. I just forgot my family... I didn't know where I was going and I don't know what I am doing. I was lost [sigh]. It's terrible. Sad story." — *John A*

■ Choice of Destination and Payment of the People Smugglers

If the participants had little or no control over the decision to leave their homes and country, it is also a common feature of their stories that few had any idea of where they were headed when they left. Among those interviewed face to face, most had never heard of Australia and had no idea of what to expect upon their arrival. Not surprisingly, understanding of the 'business' side of the flight to Australia seems to have been greatest among the older participants and/or among those who travelled with older asylum seekers of similar background or ethnicity.

"My mother sold everything she had, including our land, so I could escape Afghanistan."

— *Galileo*'s first statement

Knowledge of the financial aspects of their travel differed between the young people interviewed. Among the young Afghan participants, the going rate for passage to Australia seems to have been between US\$5000 and \$6000. Many asserted that

family members had sold land or other assets and/or had taken out substantial loans to finance the trip. Again, the information collected from the 14 young Afghans in 2004 seems to have been typical of the experience of unaccompanied and separated children from that country.³ For example, *Galileo* knew that his mother paid US\$5–6000 for him to be smuggled out of Afghanistan. This was partly funded by the sale of their assets and land, and partly from remittances from extended family overseas and contributions from extended family in Afghanistan. *Man*'s father paid the people smuggler US\$4800 to smuggle *Man* out of Afghanistan and gave him US\$500 for his journey. His father sold some of his land and borrowed money from friends to pay for it. *Tony*'s family paid US\$6000. Many spoke of the practice in Afghanistan of using US dollars as currency, because of the instability of the local currencies. Others had no idea about how much their travel cost or how it was financed. Of those interviewed, *Tony* was the only participant who claimed to have been responsible for dealing directly with payments. He stated that he carried with him a suitcase full of Afghan currency, which he delivered unopened to the people smugglers.

The stories told by the participants interviewed suggest that the phrase 'smuggled people' is an apt description for these separated and unaccompanied children. Many claimed that they left their homes under cover of darkness, using a variety of disguises, hiding places and vehicles to escape and make their way out of the country. Given that many had not experienced modern transport, or even seen large bodies of water (much less an ocean), one can only imagine the excitement and terror that the young people experienced in taking trucks, trains, aeroplanes and boats to make their way to Australia.

Gandhi's departure from Afghanistan — in a coffin-shaped space beneath a pile of bricks (strewn with offensive smelling material to disguise any



scent) where he lay motionless for hours — was particularly dramatic. This young man made his way from Afghanistan to Pakistan, then to Singapore in a cargo container, given succour by a crew-member but barely surviving the experience. He spoke of being nurtured back to health in Singapore, where he hid for six weeks before making his way to Indonesia and a boat bound for Australia.

Barry recounted that his journey started at sunset in the back of a truck filled with hay. He travelled on a number of vehicles until he arrived at a house that was full of older men, some of whom were Hazara. At some stage they were given a book that he now thinks was a passport. He later took a commercial flight to Indonesia.

***Man*'s father sent him to a cave in the mountains when the Taliban came to the area to recruit more men. He stayed there with a small group of young men for some nights while his father organised people smugglers to take him out of the country. At midnight on the fourth night, a truck came and *Man* started his journey to Pakistan, crossing the border hidden in the back of a truck.**

At each point, *Man* recalled, a new smuggler took over from the previous one, taking a cut of the money and passing the rest on to the next smuggler.

Tony began his voyage on foot, hiding out by day and walking for two nights before being smuggled by truck into Pakistan where he spent a month cosseted in a hotel. Some were accompanied by family members, and some travelled alone with the smugglers. *Denzel* and his 20 companions travelled together to Pakistan in the back of a truck. *Galileo* left with his young relatives and a few other boys from his village, although he was permanently separated from them en route to Indonesia. *Homer* spoke of being smuggled in the boot of a car over the border to Pakistan. Once in Pakistan he was taken to a hotel with other Hazara of about the same age. *David* was smuggled out alone, hidden among sacks of flour. He was then 14 years old.

Almost all of the young people studied (82 of the 85) were assisted in their escape, being smuggled through neighbouring countries and making their way to Australia by boat. Four arrived as stowaways on large container vessels and the balance came in a flotilla of smaller vessels chartered for the purpose by people smugglers. The exceptions were two Vietnamese who took a more direct route (by boat); two Chinese who entered as students (by plane); and one Afghan who flew in by plane. Most of those arriving by boat transited through Indonesia.

The routes taken and the methods of transport varied considerably. The most remarkable feature in each instance is that the young people made it to Australia, more or less without injury. In most cases, the people smugglers appear to have honoured the contracts or pledges made in far-distant lands, even where the young people were clearly in the most vulnerable of conditions and with no means of protecting their own interests. Again, although the young people were reluctant to discuss these matters, one might surmise that ongoing arrangements

or understandings of some kind existed between the smugglers and relatives at point of departure.

The participants were asked why they thought the people smugglers had delivered them to their allotted destinations. *Man* stated that the risk of the smugglers acting dishonourably was small because his family knew the smugglers' relatives. *Adris* reported that he delivered his father's signet ring to his smuggler upon embarkation in Indonesia for Australia in the expectation that this would be returned to his father as proof that the contract was fulfilled. Some participants were cared for carefully by individuals who provided something close to a door-to-door service. For example, the same smuggler travelled with *Adris* from the time of his departure from Afghanistan to the moment before he got on the boat in Indonesia. Two other young people identified their smuggler as a close family friend. In contrast, the smugglers responsible for *Barry* changed regularly at transit points, and he said he could not tell who the smugglers were. *Gandhi*, on the other hand, did not know the people responsible for his escape but developed a good relationship with one of his smugglers who looked after him for over three months when he fell ill in transit.

Among those interviewed, the participants' freedom of movement varied on the smuggling route. For example, when *Homer* was in Indonesia, the smugglers gave him money to spend and he was allowed to go out into the city by himself. Others said that they were not allowed to go anywhere by themselves, being confined to the hotel or house. *Galileo* stated: 'In Indonesia they locked us in a room and, it was a house not a room, and we were not allowed to go outside because they said if you go outside then "police".'

Some of the younger participants spoke of being left for long periods without supervision in hotels in Pakistan and Indonesia, and of sharing rooms with groups of older men whom they did



not know. As noted earlier, most ended up in Indonesia and from there travelled to Australia by boat. Among the young Afghans interviewed, none had any experience of the ocean. Even for those with a familiarity with the sea, however, the voyage to Australia appears to have been traumatic.

For some participants, the ability to describe their escape was affected adversely by both their age and limited by their awareness of the world. For example, several of the younger boys did not know which countries they had travelled through on the way to Australia. One explained his ignorance by stating simply that he was ‘too young’. Another confided that he should have paid more attention in his geography lessons.

■ **The Dangers of the Voyage**

While some of the participants found aspects of the journey exciting, such as being on a plane or in a car for the first time, for most the journey into

the unknown away from family was overwhelming. *David* said of the aeroplane ride:

“I was afraid, like, I couldn’t understand that time... my head was like headache and I was thinking of different things, like where am I going.”

For many, the boat trip to Australia was harrowing, involving bouts of extreme seasickness and, for some, the terror of violent storms and an unseaworthy vessel. One of those interviewed stated that he became so ill that he started vomiting blood and thought he was close to death; another claimed to have lost consciousness.

“We were [on the boat to Australia] for four days and four nights I think. It was the scariest thing I’ve ever seen cause the boat was small and it was a very stormy night and every wave would come and just push our ship aside and every wave, like, when the

wave used to come one piece of our ship... was breaking, was just breaking apart and we were praying: if you can like take us to some island or anything, 'cause we weren't sure whether it would be in one piece when we reached somewhere. But we were lucky... Some of my friends have told me that actually Customs had told them 'go back, we don't want you people', and they left them for two days like on the same ship." — *Galileo*

The boats were overcrowded. *Homer* estimated his boat was only 8 by 4 or 5 metres, and carried 250 passengers. *Andrew's* boat ran out of water, and then food. He was physically sick on the boat and still suffers from pain in the knee, neck and back that he claims date from the cramped conditions on the boat. He asserted that the psychological distress of his journey, particularly the boat trip, continues to have an adverse effect. Another young participant survived a fire on board his boat, and was eventually given a bravery award for his attempts in trying to save a woman asylum seeker who drowned after the incident. In fact, this young man had tried three times to reach Australia and had survived another sinking.

Some of the boats were unsuitable for the long trip from Indonesia to Australia's Ashmore Reef or Christmas Island. The captain of *Stephen's* boat became seriously lost and they only regained their course because one of the passengers happened to have a compass on his watch. Their water had run out, their engine broke and the boat had started taking on water before an Australian vessel rescued them. *Sylvester* and *Shakespeare* were on board a boat that caught fire and sank, with the loss of two lives. The boat on which *Man* travelled also started taking on water. He said the passengers were very scared, and many children were crying. His account of his own reactions, however, is interesting: he asserted that he did not weep or cry out

because of a consuming rage that his father had sent him into exile when he had wanted to stay and fight his persecutors and defend his family. Another young participant reported an unusual reaction, speaking eloquently of feeling liberated by the forces of nature ranged against him after years of being kept a virtual prisoner by his protective parents:

"I screamed at the storm and felt the wind and rain tear in my hair." — *GS*

3.3 Unaccompanied and Separated Children as Refugees: Images and Stereotypes

These young people, many of whom were still adolescents, faced many obstacles and dangers in their journey. If anything is clear from the accounts provided, it is that many of the stereotypes that have been developed about asylum seekers in Australia have little or no application to these unaccompanied and separated children. The young people emerge as 'refugees' in every sense of that complex word. Their escape stories are dramatic and often harrowing; the dangers they faced real and pressing.

The voyages of the young people to Australia reflect the fact that clearly defined (and sophisticated) people smuggling routes had been opened to this country. Beyond this, however, the various accounts do not sit easily with popular conceptions of asylum seekers as 'queue jumpers' or abusive individuals bent on subverting the immigration laws of the countries through which they pass.

Most of the young participants patently had no control over their flight from Afghanistan. Most were directed to leave and/or had little or no say

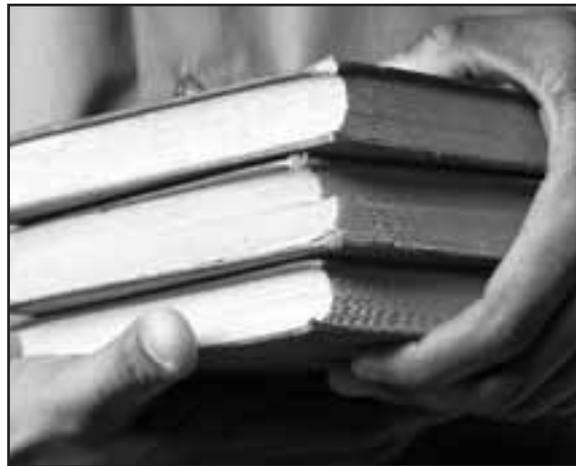
Journeys of a Lifetime | Man's Story

Man doesn't talk much. Although he has some Hazara friends, he often prefers his own company. He told us he was not studying at the moment but had found work in a processing factory: 'I tried studying for a little bit but I got such bad headaches and other pains'. His eyes light up as he talks about his passions: 'I like Karate and Boxing... I also liked gambling... but that gets you in trouble. I don't gamble anymore. I also like history and geography'.

With 12 years of education in Afghanistan, *Man* is one of the most educated in the young cohort of asylum seekers we interviewed. He is the second son of a family with seven brothers and two sisters. His story has a familiar cadence to us. He tells us that his older brother was forcibly recruited by the Taliban. After about two weeks fighting he was injured and fled to Iran where he remained, as it was too dangerous for him to return home. *Man* was then sent away by his father.

Man tells us that he is angry. He is angry with his father for sending him away (although he understands that his father's motive was to save him). He is angry about everything that has happened to him since his escape from Afghanistan.

'I understand that all countries have rules about immigration and that those rules must be



followed...but I think everyone should get a permanent visa when they're found to be refugees. Australia should listen to the UN. Rich countries should help poor countries, shouldn't they?'

in the timing and manner of their departure. Many were placed in the hands of people smugglers who controlled every aspect of their voyage. Of the participants interviewed, few seem to have had any foreknowledge of where they were headed, although all stated that their expectation was that they were heading for a Western country where they would know peace and freedom.

All expressed surprise, disappointment and/or bitterness in what awaited them upon their disembarkation in Australia.

Some sources have suggested that unaccompanied and separated children are used as 'anchor children', their parents sending them to a safe country for the purpose of applying for family reunion. International research has found, however, that very few

unaccompanied and separated children are granted family reunion and, in most cases, they lose contact with their parents.⁴ Among participants in this study, there was no evidence that any were intended primarily as ‘anchors’, although the sponsorship of family may have been understood as a desirable sequelae. The clear intention in each case was to save the child from immediate threat. Interestingly, a minority of the (older) participants manifested a sense of resentment against their families both for making the decision to send them away and because of the way they had been treated after arrival in the country. These participants seem to have viewed their departure from their kith and kin as a form of exile.

This is a point emphasised by solicitor and refugee advocate, David Manne (Principal Solicitor, Refugee and Immigration Legal Centre (RILC), Melbourne). He said:

“At times there has been a rather...disturbing line or position taken by the Department of Immigration about the reasons why there were substantial numbers of unaccompanied young males arriving in Australia. This position says it was a cynical ploy to use children as anchors in order to get the whole family out here. [This] presupposes that they’re not



refugees but rather cynically using these processes to mask the fact that they are actually kind of migrants. It is disturbing because it goes against all the evidence about what was actually happening in Afghanistan and why [the children] were fleeing unaccompanied.”⁵

Migration agent and veteran Immigration Advice and Application Assistance Scheme (IAAAS) adviser, Michael Walker, made comments to similar effect:

“[The DIMA officers handling the children’s cases] ...reminded me of an old schoolmaster who was dealing with insolent children in a lot of cases.... I can’t say that it applies in every case — but the impression I often got was the decision-maker clearly had the impression this child has been sent here to gain sympathy so, in other words, they think it’s going to be a push-over, they’ll get their visa and then they’ll start bringing their parents over.”⁶

Endnotes

- 1 Unaccompanied child found to be a refugee, testimony given to HREOC: see HREOC, *A Last Resort? National Inquiry into Children in Immigration Detention* (AGPS, Canberra, 2004), p 71.
- 2 Wendy Ayotte, *Separated Children Coming to Western Europe: Why They Travel and How They Arrive* (Save the Children, London, 2001).
- 3 The IOM has undertaken a study of trafficking that is instructive in this regard. See IOM, *Trafficking in Persons: An Analysis of Afghanistan* (2003), <www.iom.int/iomwebsite/Publication/ServletSearchPublication?event=detail&id=2992>.
- 4 See Astrid Renland, *Trafficking of Children and Minors to Norway for Sexual Exploitation* (ECPAT Norway/ Save the Children Norway, 2001).
- 5 Interview with Mary Crock, 3 March 2005.
- 6 Interview with Mary Crock, 2 March 2005.



An Overview of International Standards

4.1 Obligations Under International Law

Australia's obligations under international law are drawn from the 'hard' (binding) law of international treaties and conventions and from the 'soft' (non-binding) law of international guidelines and the recommendations and general comments of international organisations such as the UN Human Rights Committee, the UN Committee Against Torture and the UN Committee on the Rights of the Child.

In the case of children travelling alone and in need of protection, the most significant obligations are to be found in the UN Refugee Convention. While an increasing number of States are becoming aware of the challenges both faced and presented by child migrants, it is unfortunate that many of the principles developed at international law are regarded by States as aspirational only. The absence of enforceable prin-

ciples of international law has been particularly marked in Australia where domestic laws and practices have often shown scant regard for obligations ostensibly owed under international law.

The problems with the enforcement of norms of international law in Australia owe much to the country's constitutional structures. The inclusion in the Australian Constitution of an express power to

make laws with respect to ‘aliens’¹ has resulted in parliament assuming something close to a ‘plenary’ or unlimited power to make laws affecting non-citizens. Again, the Australian Constitution contains no Bill of Rights and the few rights that are provided for expressly have been interpreted narrowly. Although a number of rights have been implied from the ‘text and structure’ of the Constitution — including a limited freedom from legislatively imposed detention² — the courts have always been careful about the extent to which these rights are extended to non-citizens.³ In recent years, challenges to the constitutionality of Australia’s mandatory immigration detention laws have all failed.

The breadth of the power to legislate with respect to ‘aliens’ has made the Australian courts reluctant to distinguish between adults and children when considering the validity of migration legislation. It has also discouraged the courts from seeing Australia’s international obligations as relevant qualifiers. The unfettered character of the power to legislate with respect to ‘aliens’ and the absence of any form of Bill of Rights seem to lie at the heart of many procedural obstacles encountered by unaccompanied and separated children.

Australian courts are entitled to apply international law in a limited number of circumstances where the relevant principle has not been enacted into domestic law.⁴ Two accepted principles are relevant. The first is that statutes will be construed to accord with Australia’s international obligations. The second is that there exists a presumption against a legislative intention to abrogate fundamental rights and liberties.

The first principle assumes that where a statute is ambiguous or ‘silent’ on a particular matter, it will be given a construction that accords with Australia’s obligations under international law.⁵ The main difficulty with this principle — and indeed the area in

which most subjective judicial discretion turns — is in the identification of ambiguity. While it is accepted that international law may fill legislative ‘gaps’, profound disagreement prevails in relation to the level of uncertainty required before recourse may be had to international law for this purpose. During the 1990s, the High Court took a broad approach to identifying ambiguity, ‘approving application of the principle to limit the scope of general words and to favour a construction in conformity with international law “as far as the language...permits”’.⁶ However, the court’s position on the role of international law in this context has since narrowed. In a number of decisions in 2004–2005, a majority of the High Court stressed that international law will not be capable of tempering the exercise of parliament’s broad and plenary power with respect to aliens (see further 4.1.1 below). Absent stronger constitutional guarantees, including a Bill of Rights, the protection afforded by international law will continue to elude unaccompanied children seeking asylum in Australia.

4.1.1 The Convention on the Rights of the Child (the CRC)

Children enjoy the benefits and entitlements enshrined in the many generic human rights instruments — among these instruments such as the International Covenant on Civil and Political Rights⁷ and the UN Convention against Torture and Other Cruel and Inhuman and Degrading Treatment or Punishment.⁸ In recognition of the special place of children in human society, however, the international community devised what is in many respects a ‘super’ human rights instrument designed specifically for the protection and nurture of children: the UN Convention on the Rights of the Child.⁹ The UNHCR expressly recognises the CRC as providing the normative framework for its work with refugee children.¹⁰

The CRC should be the international instrument of most immediate relevance to unaccompanied and separated children (wherever they are in the world). The Convention was ratified by Australia in December 1990 and became binding on the Australian Government on 14 January 1991. The rights contained in the CRC extend by virtue of Art 2 to every child within the jurisdiction of a State party without discrimination of any kind and irrespective of the legal status of the child or of his or her parents or legal guardians. That is, the Convention applies to all people under the age of 18 years within Australian jurisdiction, including child asylum seekers who enter the country without authorisation, and those children whose applications for refugee status are refused.

The centre-piece of the CRC is Art 3 which provides that the best interests of the child must be a primary consideration in all decisions affecting children. The plight of unaccompanied and separated children is also given specific attention in Art 20, which places obligations on State parties to provide ‘special protection and assistance’ to the child ‘temporarily or permanently deprived of his or her family environment’.

Of equal importance for older children is Art 12, which provides for the full participation of children in all decisions affecting their lives. Pursuant to Art 22, States must ensure that:

[A] child who is seeking refugee status or who is considered a refugee... shall, whether unaccompanied or accompanied... receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth [in the CRC and] in other international human rights or humanitarian instruments to which the said States are parties.



In view of the debates that have arisen about the characterisation of asylum seekers, it is noteworthy that Art 22 makes no distinction between children who are formally recognised as Convention refugees and those who are seeking such recognition (as asylum seekers). This provision also spells out the entitlement of unaccompanied children. Special provisions on the trafficking of children were also inserted. Article 35 of the CRC requires State parties to take all appropriate measures to prevent ‘the abduction of, the sale of or traffic in children for any purpose or in any form’. Also relevant is Art 37, which provides that detained children must have access to legal assistance and the right to challenge their detention.

In June 2005 the Committee on the Rights of the Child, the treaty body overseeing the CRC, issued a General Comment on unaccompanied and

separated children.¹¹ This calls on States to take seriously their obligations under the CRC not to discriminate against these children on the basis of their alienage and lack of legal standing. The Committee called on States to accord these children access to the same services and benefits afforded to vulnerable local children in matters such as health, housing and education. The General Comment also addresses directly the care and assistance of unaccompanied and separated children within domestic administrative processes. It recommends the appointment of both guardians and adequate legal advisers and stresses the importance of taking into account at all times the expressed wishes and views of the children themselves. The issue of immigration detention is addressed with the observation that many States continue to detain children in inappropriate circumstances. States are urged also to prioritise the reunification of refugee families, either in the State of origin (where this is safe and feasible) or in the destination country. The Comment warns against the repatriation of children into situations where the child could face harm or lack of support structures. Finally, the Comment criticises State parties for failing to collect data relating to unaccompanied and separated children — a pervasive symptom of the general failure to see and cater for these most vulnerable of travellers.

In many respects the CRC represents an international Bill of Rights for children. However, as Australian law contains no rights regime for its general population, it may come as no surprise that Australian courts have resisted the attempts to use Australia's signature and ratification of the CRC as a mechanism for the de facto creation of a domestic Bill of Rights for children. In 2004, the High Court overruled the Full Bench of the Family Court of Australia which had used references to the CRC in its legislation as a basis for assuming supervisory jurisdiction over children held in immigration



detention. The court confirmed that the words used did not have the effect of enacting Art 3 of the CRC into Australian domestic law.¹² In another case, a challenge was made to provisions of the *Migration Act 1958* (Cth) mandating the detention of all 'unlawful non-citizens' (without discrimination as to age, infirmity or any other matter). The High Court again rejected attempts to invoke the 'best interests of child' principle in the CRC to limit the Australian Parliament's legislative power.¹³

Australia's failure to legislate the terms of the CRC into its domestic law means that unaccompanied and separated children have not been able to invoke this Convention directly in any quest for protection. As McAdam argues, if the terms of the CRC were to be observed fully, such children would have no need to invoke any other international instrument.¹⁴

4.1.2 The Convention relating to the Status of Refugees

The reality, however, is that the CRC does not have the legal force that its international popularity and sweeping terms would suggest. The legal starting point for many children who are outside their country of origin and who cannot or do not wish to return for fear of personal harm is the same as that of any asylum seeker: the Refugee Convention

and its attendant Protocol. These instruments create a protection framework that represents an exception of sorts to the sovereignty principle that in the normal course gives States the right to determine who enters or remains on their territory.

With few qualifications, persons who gain official recognition as ‘refugees’ must be granted protection because of the obligation not to *refoule* or return refugees to a place where they would face persecution on one of the five Convention grounds.¹⁵ The Convention also prohibits State parties from punishing refugees who enter the country illegally.¹⁶

In light of the unprecedented number of unaccompanied and separated children seeking refugee status all over the world, increasing attention is being paid to the manner in which the definition of refugee contained in Art 1A(2) of the Convention is interpreted in cases involving children. As explored in Parts 3 and 4 of this report, a preliminary analysis of Australian practice and case law suggests that the definition has tended to be interpreted in this country from an adult-centred perspective, marginalising the experiences of persecuted children. This reflects similar findings in countries such as the United States and in Europe where the procedures for processing unaccompanied and separated children as refugees has been subjected to greater scrutiny.¹⁷ The Separated Children in Europe Project, for example, found that child-specific forms of persecution, such as child selling and the recruitment of child soldiers, are rarely recognised in refugee status determination: ‘a child who claims to be afraid of forced recruitment into the army is sometimes considered as no more than a draft dodger’.¹⁸

For children travelling alone and in need of protection, the Refugee Convention offers few enough guarantees. A central problem for children,

as for adults, is that the Convention enshrines no right to enter another country for the purposes of seeking asylum. This shortcoming has been particularly acute for children intercepted by immigration authorities before gaining access to Australian territory (see further 13.1 below). This instrument has also been of limited assistance to children caught up in Australia’s asylum determination system. For example, the Convention contains no safeguards for children entering the administrative process involved in gaining recognition as a refugee. It contains rather weak provisions relating to the detention of refugees generally and makes no special provision for children. The principle that refugees should not be penalised for their irregular entry into a country has also proved relatively easy to ignore or to read down or interpolate.¹⁹ Children seeking asylum alone have been both detained as a matter of course and denied equal access to education and other forms of social support.

4.2 Other Protections for Smuggled and Trafficked Children

In both the Smuggling and Trafficking Protocols, the focus is on the prevention and punishment of activities carried on by smugglers and traffickers (see 2.1 above). In both, State parties are enjoined to offer protection to smuggled and trafficked persons — the victims of the perpetrators of the crimes. Special attention is paid to the needs of women and children.²⁰ A cursory review of the two instruments, however, demonstrates that trafficked persons are identified much more forcefully as victims than are smuggled persons. The Smuggling Protocol requires State parties to take ‘all appropriate measures’, consistent with obligations assumed under international law, to ‘preserve and protect the rights’ of smuggled persons, in particular the right to life and the right

not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment (Art 16(1)). The Trafficking Protocol, on the other hand, contains provisions requiring States to provide a range of protections to trafficking victims (Art 6); and even to consider the immigration status of such victims (Art 7) and qualifies the circumstances in which such victims should be repatriated to their countries of origin (Art 8).

Both smuggled and trafficked children are protected in theory by international human rights laws of general application. Of these the two most significant in the Australian context are the International Covenant of Civil and Political Rights (ICCPR) and the Torture Convention. The latter convention defines torture and confirms that torture is a crime against humanity such that all State parties are enjoined to prosecute perpetrators found within their territory. Australia has ratified the optional protocols under both of these Conventions, allowing individual complaints to be made respectively to the UN Human Rights Committee and the Committee Against Torture.²¹

Apart from the CRC, Australia is party to many other international conventions and declarations that include prohibitions relevant to the trafficking in persons. The 1926 Slavery Convention defines slavery as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.²² This definition is deliberately broad, so as to include emergent forms of slavery in addition to traditional notions of forced labour, trafficking and sexual slavery.²³ The International Labour Organization Convention concerning Forced or Compulsory Labour (1930)²⁴ also aims to suppress all forms of forced or compulsory labour (Art 1), defined as work ‘for which the said person has not offered himself voluntarily’

Sudanese child at Action for Peace Rally, Canberra, 2001. National Library of Australia.

(Art 2). The 1948 Universal Declaration of Human Rights contains articles prohibiting slavery and cruel and degrading treatment.²⁵ The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), ratified by Australia in 1983, seeks to suppress all forms of trafficking in women.²⁶

Having said this, there are significant international instruments that Australia has yet to ratify. These include the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.²⁷ This Convention includes in the definition of ‘child labour’: slavery, trafficking, debt bondage and offering a child for prostitution (see Art 3). It has signed but not yet ratified the Convention (and Protocol) on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.²⁸

In the context of the present study, there is an interesting discrepancy between the way smuggled and trafficked migrants are treated — both at international and domestic level. Both Protocols contain savings clauses stating that nothing in the Protocols will affect rights and obligations under the Refugee Convention.²⁹ However, whereas trafficked persons are entitled to a range of protections outside of this



Convention, smuggled migrants are not even guaranteed protection against *refoulement*. Article 15 of the Smuggling Convention operates for States who are parties to the Refugee Convention (as amended) but is silent on the obligations of those which have not subscribed to that instrument.

Australia ratified the Smuggling and Trafficking Protocols in August 2005, enacting legislation to criminalise the activities involved in both smuggling and trafficking in persons.³⁰ In practice, the findings of this study suggest that it has adopted quite markedly different approaches to the treatment of smuggled and trafficked children in two respects. In the very few cases identified as involving trafficking, visas are now available to facilitate temporary stay in Australia. Second, while there appears to be no program for monitoring the return of smuggled migrants to their countries of origin, Australia has instigated programs for the reintegrated and rehabilitation of victims of trafficking (see 6.4.2 below).

4.3 UNHCR Guidelines

Taking the CRC as its point of departure the UNHCR has issued various guidelines on appropriate and effective treatment and assistance for asylum seeker and refugee children.³¹ Having acceded to the Refugee Convention, these guidelines are of obvious relevance to Australia, even if they may not have the status of binding obligations.

UNHCR's Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (1997) require that appropriate systems be put in place for the identification, registration and documentation of unaccompanied and separated children.³² They also advocate the appointment of a guardian or adviser as soon as a separated child is



identified. The guardian should have necessary expertise in the field of child caring, so as to ensure that the interests of the child are safeguarded, and that the child's legal, social, medical and psychological needs are met. The guidelines also state that children's refugee applications be given priority and determined promptly and fairly. Children should also be provided with a legal representative; interviewed in an age-appropriate manner by specially qualified and trained officials; and represented by an adult who is familiar with his or her background and interests and who would protect the child's best interests.

In assessing the child's refugee claims, UNHCR guidelines also recommend that 'particular regard should be given to circumstances such as the child's stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her vulnerability'.

Finally, the guidelines stress the importance of identifying and implementing durable solutions. For those children granted asylum, solutions mentioned include either local integration or resettlement in a third country, normally on the grounds of family reunification. For those whose claims are rejected, the guidelines state that a solution in the best interests

of the child should be determined as soon as practicable after the negative result of his or her application has been confirmed.

The content of these guidelines are mirrored in standards and recommendations made by the UNHCR Executive Committee³³ and other international bodies.³⁴ For instance, the Global Consultation study recommended that border officials be trained on appropriate identification and registration of children, including age- and gender-sensitive interview techniques.³⁵ All emphasise the need for States to appoint an independent guardian or adviser, ‘well-trained in child welfare matters, who promotes decisions in the best interests of the child and assists them in the asylum process’.³⁶

In assessing the refugee claims of unaccompanied and separated children, the Separated Children in Europe Program has also recommended that decision-makers have regard to:

- the age and maturity of a child and their stage of development;
- the possibility that children may manifest their fears differently from adults;
- the likelihood that children will have limited knowledge of conditions in their countries of origin;
- child-specific forms of human rights violations, such as recruitment of children into armies, trafficking for prostitution, female genital mutilation and forced labour;
- the situation of the child’s family in their country of origin and, where known, the wishes of parents who have sent a child out of the country in order to protect her or him.³⁷

The UNHCR Global Consultation study recommended that failed child asylum seekers ‘should only be returned after final determination that they are not in need of international protection, and subject to the identification of an appropriate family member or caregiver in the country of origin, willing to receive and care for the child’.³⁸

Notwithstanding the existence of these elaborate obligations, a failure of implementation has undermined the effectiveness of this regime. DIMA did not issue any guidelines to assist primary decision-makers dealing with claims by unaccompanied and separated children until September 2002 (see 6.3 below). The backgrounds of some DIMA officials meant that some officers undoubtedly had a good grounding in international refugee law. However, the researchers found no evidence that training was provided for DIMA officers on the specific challenges of child refugee claimants before the introduction of the guidelines.

If the Australian courts have been reluctant to see treaty obligations assumed by Australia as binding in domestic law, they have also been unwilling to enforce the standards contained in international guidelines.

In this context, an issue of particular import has been the extent to which UNHCR guidelines should inform the procedures followed in proceedings concerning unaccompanied and separated children. The Federal Court has confirmed that the UNHCR handbook on procedures and criteria for determining refugee status has no force in Australian law. Accordingly, a failure on the part of the RRT or the Minister for Immigration to refer to model procedures will not amount to an error of law in Australia.³⁹

The courts have made these findings while recognising that Australia’s treatment of unaccompanied and separated children has diverged from

the standards contemplated by UNHCR guidelines. In *Jaffari v MIMA*, French J commented:

*The question of unaccompanied minors seeking asylum is a pressing, current issue... The [Migration] Act provides little in the way of the kinds of protections contemplated by the UNHCR guidelines. At the very least, there is a case for considering the provision of legal advice and assistance to unaccompanied minors up to and including the point of judicial review. It is of concern that the application for judicial review in this case was lodged by a 15-year old non-citizen and lodged out of time thus depriving him of such limited rights of review as he would otherwise have enjoyed.*⁴⁰

Although broad in their compass, rules and principles of international law and guidelines published by international organisations provide insufficient protection for unaccompanied and separated children seeking asylum in Australia. As explored below, patchy implementation, inadequate accountability mechanisms and difficulties associated with the enforcement of guidelines and standards have rendered these valuable resources ineffective.

Sadly, it would appear that Australia is not the only country in which the implementation of international guidelines and principles appears to be inadequate.⁴¹ The basic problem with much of the international jurisprudence and expository material such as guidelines and standards is the absence of effective international enforcement mechanisms.⁴² It is for this reason that the critical determinant of a child asylum seeker/refugee's rights is often not the standards set at international law, but the extent to which such standards are incorporated or otherwise respected in the domestic law and jurisprudence of the asylum seeker's 'host' State. This problem springs in part from the legal regime for the protection of refugees itself. The Refugee Convention and Protocol do not speak to the procedure that States

should employ in making a determination of refugee status. The instruments move responsibility of refugee protection into national hands and ask that signatories devise their own system for handling asylum applications.⁴³ As will be seen in the following chapter, a generalised failure to distinguish between adults and children in the domestic implementation of international law, and the reluctance of domestic courts to implement Australia's international obligations, have produced a regime that is largely blind to the particular needs of child refugees.

Endnotes

- 1 See Australian Constitution s 51(XIX).
- 2 *Kable v DPP* (1996) 189 CLR 51.
- 3 See *Chu Kheng Lim v MIEA* (1992) 176 CLR 1; *Al-Kateb v MIMIA* (2004) 219 CLR 561; *MIMIA v Al-Khafaji* (2004) 219 CLR 664; and *Behrooz v MIMIA* (2004) 219 CLR 486.
- 4 Note that an international treaty to which Australia is a party will not form part of Australian law unless it is incorporated domestically by statute: *MIEA v Teoh* (1995) 183 CLR 273 at 287. See also *Chu Kheng Lim v MIEA* (1992) 176 CLR 1 at 74, *Dietrich v The Queen* (1992) 177 CLR 292 at 200–201 and *Kruger v Commonwealth* (1997) 190 CLR 1 at 161, to name a few instances. However, administrative decision-makers may need to take account of the legitimate expectations generated by treaties that Australia has entered into, but not incorporated into domestic law: *MIEA v Teoh*, id at 316 (cf *Re MIMA; ex p Lam* [2003] HCA 6, 12 February 2003).
- 5 See for instance, *Chu Kheng Lim v MIEA* (1992) 176 CLR 1 at 153, 166.
- 6 Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423 at 460; *MIEA v Teoh* (1995) 183 CLR 273 and *Kruger v Commonwealth* (1997) 190 CLR 1 (Dawson J). This broad approach was applied most recently in *Al Masri v MIMIA* (2002) 192 ALR 609; *MIMIA v B* (2004) 219 CLR 365.

- 7 See GA Res 2200A (XXI), 21 UN GAOR, Supp No 16, at 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976 (the ICCPR).
- 8 See GA Res 39/46, annex 39, UN GAOR, Supp No 51, at 197, UN Doc A/39/51 (1984), entered into force 26 June 1987 (the Torture Convention).
- 9 The Convention on the Rights of the Child was adopted by the UN General Assembly in 1989 and has been signed or ratified by all but two of the UN nation states. See UN Doc A/RES/44/25 (1989).
- 10 UNHCR Policy on Refugee Children, Executive Committee of the High Commissioner's Programme, 44th Sess, Subcommittee of the Whole on International Protection, 23rd meeting, EC/SCP/82, 6 August 1993, para 17.
- 11 Committee on the Rights of the Child, General Comment No 6 Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6 (2005).
- 12 The High Court found that the Family Court did not have power to order the children's release from detention or to regulate the conditions of their detention or to regulate the conditions of their detention. Kirby J, in particular, identified a clear and unambiguous intention on the part of parliament *not* to differentiate between adults and children for the purpose of immigration detention. This clear intention, expressed in successive amendments to the *Migration Act*, obligated the courts to refrain from differentiating between adult and child detainees. For the purpose of determining parliament's power in this context, their status as children was irrelevant. See *B & B v MIMIA* [2003] FamCA 451 (19 June 2003). For a brief summary, see Richard Chisholm and Patrick Parkinson, 'The Immigration Cases' (2003) 17 *Australian Journal of Family Law* 219; High Court of Australia, Press Release, '*MIMIA v B & B*', 29 April 2004; and Ian Freckelton, 'Migration law, the Family Court and therapeutic jurisprudence' (2003) 11 *Journal of Law and Medicine* 133.
- 13 *MIMIA v Al-Khafaji* (2004) 219 CLR 664.
- 14 See, for example, Jane McAdam, 'Seeking Asylum Under the Convention on the Rights of the Child: A Case for Complementary Protection' (2006) 14 *International Journal of Children's Rights* (forthcoming).
- 15 See Refugee Convention Arts 1a(2) and 33; and Protocol Art 1(A)(2).
- 16 See Refugee Convention Art 31.
- 17 See, for instance, Jacqueline Bhabha, 'Boundaries in the Field of Human Rights: International Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights' (2002) 15 *Harvard Human Rights Journal* 155 at 175–180.
- 18 Sandy Ruxton, *Separated Children Seeking Asylum in Europe: A Programme for Action* (Save the Children, Stockholm, 2000), pp 79–80.
- 19 See Guy Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection', October 2001, article prepared at the request of the Department of International Protection for the UNHCR Global Consultations, <www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3bcfdf164>. See also, Geneva Expert Round Table, 'Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees — Revised', 8–9 November 2001, <www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3bfef474>. These conclusions were based on discussions centred on Professor Goodwin-Gill's paper, together with written contributions that included a paper by Michel Combarnous for the International Association of Refugee Law Judges. See also Mary Crock, 'You have to be stronger than razor wire: Legal issues relating to the detention of refugees and asylum seekers' (2002) 10 *Australian Journal of Administrative Law* 33. Compare DIMA, *Interpreting the Refugees Convention: An Australian Contribution* (DIMA, Canberra, 2003).
- 20 See Smuggling Protocol Art 16; Trafficking Protocol Arts 6–8.
- 21 See Hilary Charlesworth, 'Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights' (1991) 18 *Melbourne University Law Review* 428.
- 22 Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, 60 LNTS 253, entered into force 9 March 1927 (the Slavery Convention), Art 1(1); *The Slavery Report of the Special Rapporteur of*

- the Sub-Commission on the Prevention of Discrimination and Minorities, updating the 1966 Report on Slavery of 1966* (UN, New York, 1984).
- 23 Slavery Convention Art 1(1); *The Slavery Report*, *ibid*.
- 24 Convention concerning Forced or Compulsory Labour (ILO No 29), 39 UNTS 55, entered into force 1 May 1932.
- 25 Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810 at 71 (1948), Arts 4 and 5 respectively.
- 26 Convention on the Elimination of All Forms of Discrimination against Women, GA Res 34/180, 34 UN GAOR, Supp No 46, at 193, UN Doc A/34/46, entered into force 3 September 1981, Part I, Art 6.
- 27 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No 182), 38 ILM 1207 (1999), entered into force 19 November 2000.
- 28 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, GA Res 54/263, Annex II, 54 UN GAOR, Supp No 49, at 6, UN Doc A/54/49, Vol III (2000), entered into force 18 January 2002.
- 29 Smuggling Protocol Art 15; Trafficking Protocol Art 13.
- 30 See *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth).
- 31 UNHCR, Policy on Refugee Children, 1993, E/SCP/82; UNHCR, Refugee Children: Guidelines on Protection and Care (1994); UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (February 1997).
- 32 UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (1997).
- 33 *Ibid*; UNHCR Executive Committee, Conclusion 44 on detention of refugees and asylum seekers; Guidelines on Refugee Children (1988); UNHCR, Refugee Children: Guidelines on Protection and Care (1994); UNHCR, Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers (1999); UNHCR and Save the Children, ‘Statement of Good Practice’ of the Separated Children in Europe Programme (Save the Children/UNHCR, Geneva, 2000).
- 34 See UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (1985); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988); UN Rules for the Protection of Juveniles Deprived of their Liberty (1990); UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) (1990); UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) (1990).
- 35 Global Consultations on International Protection, Refugee Children, 4th Meeting, EC/GC/02/9, 25 April 2002, at 3.
- 36 *Ibid*. See also Statement of Good Practice, above n33, p 8.
- 37 *Id*, p 13.
- 38 UNHCR, Global Consultations, above n35 at 3.
- 39 *VEAA v MIMIA* [2003] FMCA 389 (12 September 2003) at [44].
- 40 *Jaffari v MIMA* (2001) 113 FCR 524 (French J).
- 41 Global Consultations, above n35.
- 42 The Human Rights Committee does not have the power to enforce its decisions in any direct way. Rather, its efficacy is reliant on the States who are party to the Convention respecting the decisions it makes, or, at a more pragmatic level, paying heed to the opprobrium of other members of the international community if its rulings are ignored. Transnational bodies such as the European Court of Human Rights, and domestic courts and tribunals can make rulings that are normative in their effect on domestic practice. For example, see the ruling by a Belgian tribunal that the detention of an asylum seeker and her newborn baby constituted inhuman and degrading treatment in breach of the European Human Rights Convention Tribunal civil (Ref)-Bruxelles, 25 November 1993, No 56.865, DD and DN c/ Etat Belge, Ministère de l’Interieur et Ministère de la santé publique, de l’Environnement et de l’Intégration sociale.
- 43 See James Hathaway, ‘A Reconsideration of the Underlying Premise of Refugee Law’ (1990) 31 *Harvard International Law Journal* 129.



Australian Laws and Policies I: Access to Territory — Non-Entrée, Interdiction and Offshore Processing

The two greatest obstacles facing asylum seekers all over the world are gaining physical access to another country and legal access to asylum procedures. Although Australia is bound by the Refugee Convention not to send refugees back to countries where their life or freedom would be threatened, access to the domestic law is not always straightforward.

Australia has adopted legal and practical measures to restrict the number of people who are eligible to claim asylum in the country. Physical barriers have also constrained the numbers able to make landfall in Australia as asylum seekers.

5.1 Requirements that Refugees Seek Protection Elsewhere

Australia is not unusual in its creation of administrative barriers in the form of its comprehensive and tightly drawn visa

system. Unless a young person is eligible to enter the country as a student or as a tourist (an unlikely option for a child travelling alone), gaining a visa to enter Australia legally can be extremely difficult. At the turn of the 21st century, however, the surge in the number of unauthorised arrivals lead to measures that have made it even more difficult for children travelling alone to gain access to Australian soil. These include the tightening of visa requirements and controls on nationals of refugee producing regimes; the imposition of carrier sanctions on airlines and shipping companies found to have conveyed undocumented

migrants to the country; and the positioning of intelligence and policing.

Visas operate as permission to travel to a country. As explained further in Chapter 6, complex regulations have been made that make it more difficult for individuals from refugee producing countries to gain admission through temporary entry schemes such as those created for tourists, students or business purposes. Statistical data is collected on overstay rates and the numbers of people seeking to change their immigration status through asylum or other means. This is then used to determine the ‘risk factor’ profile of applicants for student, tourist or temporary business entry.¹ It has imposed penalties on airlines and shipping companies who carry undocumented migrants into the country since 1979. This scheme encourages cooperation between travel companies and government departments charged with immigration control. Networks have also been established between countries so that international movements of individuals between countries can be the subject of information exchange.²

All such schemes obviously make it more difficult for unaccompanied and separated children to gain access to territory. For its part, Australia has adopted all of the restrictive measures developed in both Europe and the United States. Its laws now include provisions that bar applications from individuals travelling from certain countries deemed not to be refugee-producing countries.³ ‘Safe third country’ provisions operate to block applications from persons who enjoy effective protection from a State other than their State of origin and persecution, either because they hold more than one nationality or because they have an unrestricted right to enter and remain in the safe country.⁴ Moreover, broad ranging provisions further limit Australia’s ‘protection obligations’ in respect of any person who spends seven days or more in a country

where he or she *could have sought protection* from either the State or from the offices of UNHCR. These constraints apply to both onshore asylum applicants and to persons seeking admission overseas through Australia’s offshore humanitarian programs.⁵

‘Safe third country’ rules are not the only bars to asylum access for children. Australia has also engaged in direct action to prevent the movement of asylum seekers both in the countries from which the people are travelling and at strategic points in their emigratory journey.

5.2 Interdiction and Deemed Non-Entry

Australia has had a very generous program for the resettlement of refugees for many years. Indeed, since the end of the Second World War, it has taken in over 620,000 refugees and displaced persons through managed migration programs.⁶ However, its experience of asylum seekers — refugees who arrive without documents or other authority to enter the country — has been very limited. Although there were isolated cases involving high profile asylum seekers in the post World War II period,⁷

Australia did not really begin to experience the phenomenon of mobile refugee claimants until after the fall of Saigon in 1976. Geographical isolation, small, concentrated urban centres and the tight regulation of immigration processes have delivered Australia a level of control over human movement into the country that is the envy of many nations.⁸

One by-product of this ‘culture of control’⁹ has been a concern about the arrival by boat of ‘unauthorised’ asylum seekers that is longstanding and

best described as intense. At the height of the exodus of refugees from Vietnam after the war in that country, 2087 refugees made it to Australia as ‘boat people’.¹⁰ From the end of the 1970s onwards, there was a real resistance to granting asylum to individuals who were either perceived to have other countries in which they could seek asylum or who could be deflected to other countries for processing. Australian concern with asylum seekers who came to the country directly rather than through the offices of UNHCR is certainly one of long standing.

In 1979, the establishment of the first (non-statutory) refugee status determination regime was matched with amendments to the *Migration Act* 1958 (Cth) that provided for the apprehension and detention of persons arriving at the border without authorisation. Section 36A was added to this Act,¹¹ giving legislative force to the notion that a person arriving without authority could be deemed not to have entered the country. Section 36A(8) provides:

A person shall not, for the purposes of this Act, be deemed to have entered Australia by reason only of his having been taken from a proclaimed airport for the purpose of being kept in custody at a place outside a proclaimed airport in pursuance of subsection (1), (2) or (3).

The provisions echoed a popular view that the obligations imposed by the Refugee Convention could be controlled to some extent by a receiving State — to the point that they might not apply until an individual had ‘entered’ Australia as a matter of law. In as late as 1987, background papers on Australia’s asylum policy (although not ‘official policy’) were stating:

The obligation not to ‘refoule’ (Article 33 of the Convention) does not apply to a person claiming refugee

*status who arrives in Australia without authority and who is aboard an aircraft/vessel which is neither a flag carrier/ national airline of the alleged persecuting state, nor bound to the alleged persecuting state.*¹²

Writing in 1989, Crawford and Hyndman identified as ‘heretical’ both this view and the notion that Australia was not obliged to entertain an asylum claim where the claim ‘might more appropriately and with equal moral force be the responsibility of another signatory to the 1951 Convention’.¹³

Asylum seekers from Vietnam in the late 1970s were generally accepted and processed without incident — if they made it to Australia. However, one former departmental officer serving in the post-Vietnam period alleged to an ABC reporter that officers engaged in what would now be described as ‘disruption’ activities. These involved the interception at sea of boats carrying asylum seekers, and ‘assisting’ the boats to land in countries other than Australia by rendering the boats unseaworthy. The officer claims that he and his colleagues would take a ‘brace and bit’ (drill) to the boats with the result that the boats would take in water and sink — forcing the occupants to seek refuge in the adjacent country.¹⁴

This history provides an interesting context for more recent initiatives to actively prevent asylum seekers from making their way to Australia.

Put simply, the mantra of the Australian Government (echoed also by the main Opposition Labor Party) is that the Australian Government will determine which non-citizens will enter the country and on what terms.¹⁵ The measures taken have included no concessions for children travelling alone in search of refugee protection. Nor has any regard been shown for the obligations of the Minister for Immigration under the *Immigration (Guardianship of Children) Act* 1946 (Cth).

In this context, Indonesia is one country of particular significance to Australia because of its geographic proximity to two Australian territories: Christmas Island (approximately 340 kilometres from the Indonesian Island of Java) and Ashmore Reef (approximately 150 kilometres from the Indonesian Island of Roti). In the late 1990s, Indonesia became the transit point for asylum seekers from Afghanistan, Iraq and Iran delivered to these external Australian territories. Australia responded by entering into a 'regional cooperation arrangement' with Indonesia in 2000 pursuant to which Indonesia is paid to intercept asylum seekers before they can travel to Australia. The International Organization for Migration (IOM) is then funded to interview the people taken into custody and inform them of their options. The agreement with Indonesia also allows Australia to intercept boats and force them to return to Indonesia. Should asylum seekers in Indonesia wish to return voluntarily to their home countries, Australia pays the IOM for the cost of voluntary removal. Those who wish to make a refugee claim are referred to UNHCR for assessment and resettlement. Australia bears the cost of UNHCR's assessment and processing and the cost of detaining asylum seekers in Indonesia. Asylum seekers who are recognised as refugees by UNHCR must wait in Indonesia until a signatory country to the Refugee Convention accepts them for resettlement.

Evidence has emerged that initiatives may have been taken in Indonesia to sabotage boats that were to carry asylum seekers to Australia, forcing them to abort the illicit journey.¹⁶ Although not proven, some have claimed that such actions may have either caused or contributed to at least one major maritime disaster in which 353 asylum seekers drowned in the seas off the southern coast of Indonesia in October 2001.¹⁷

It is not known how many separated and unaccompanied children have been caught up in



the ongoing 'disruption' activities in Indonesia.¹⁸ However, when the Australian Government took dramatic action in 2001 to stop the flow of refugee boats to Australia,¹⁹ such children were most definitely affected. According to press reports, there were 40 separated and unaccompanied children taken on board the *Tampa* who were resettled in New Zealand in January 2002.²⁰

The drama of the *Tampa* Affair was followed by a full-blown interdiction and deflection operation that was code-named 'Operation Relix'. Boats carrying asylum seekers bound for Australia were intercepted by Australian naval and customs vessels. Those deemed seaworthy were towed or accompanied back into Indonesian waters. Together with the 'rescuees' from the *Tampa*, asylum seekers who could not be returned to Indonesia were sent to two islands in the Pacific: Nauru and Manus Island in Papua New Guinea.

Under what became known first as 'the Pacific Solution' and later the 'Pacific Strategy', IOM and UNHCR agreed to assist Australian officials in the

assessment of refugee claims made by the interdicted asylum seekers. In the face of Australian insistence that it would take no refugees from the interdicted boats, UNHCR agreed to resettle any asylum seekers found to be refugees through its global resettlement program.

In the result, Australia's near neighbour, New Zealand, agreed immediately to take 131 unaccompanied and separated children and families from among those rescued by the *Tampa*. According to statistics collected by IOM, as of December 2005, Australia had agreed to take 564 people recognised after processing as refugees out of a total of 1548 asylum seekers (431 from Nauru and 133 from Manus Island). The total population of the offshore processing centres comprised 1232 on Nauru and 369 on Manus Island, of whom 54 were transferred to Nauru. In December 2005 only two persons remained on Nauru.²¹

As noted earlier, although UNHCR arranged for the transfer of most of the unaccompanied and separated children on board the *MV Tampa* to New Zealand, the Australian Government did not exempt such children from its deflection operations. On the contrary, a freedom of information request by *WACJ/PI*'s solicitors uncovered an Operational Planning Minute to the Immigration Minister dating from December 2001 that suggests that a deliberate decision was taken to move such children to Nauru. The document states at paragraph 16 that there were '31 male unaccompanied minors on Christmas Island in the two detention facilities; twenty one 16 and 17 year olds. All claim to be Afghani'. What follows suggests that the decision to move the young asylum seekers to Nauru may have been a deliberate attempt to shut out HREOC, which was then well into its inquiry into children in immigration detention. In *WAJC v MIMA*, French J made the following comment, beginning first with

the relevant passage from the memorandum to the Minister for Immigration:

17. As you know HREOC is currently investigating all minors in Detention. There is going to be a particular focus on the discharge of your responsibilities under the IGOC Act. We are currently obtaining legal advice as to the implications of transferring unaccompanied minors in your care to another country. Nevertheless, you would have to make a decision as their guardian to relocate the 30 unaccompanied and unattached minors from Christmas Island to Nauru.

The 'IGOC' Act is a reference to the Immigration (Guardianship of Children) Act 1946. Under the heading 'MINISTER'S ACTION' there was an entry which read; 'UAMS TO GO/UAMS TO REMAIN ON CI'. That is a reference to unaccompanied minors. Neither option was crossed out but in handwriting there are words below which appear to read 'as logistically required'. The handwriting is difficult to read. The Minister's signature follows.²³

Interestingly, the reference to '30 unattached minors' corresponds with the statistics given to HREOC on the number of unaccompanied and separated children sent to Nauru. However, these numbers are somewhat different to those supplied to researchers for the purpose of this report (see 2.2.3 above).

For those unaccompanied and separated children who made it to the Australian mainland without a visa,²⁴ all were taken immediately into immigration detention, whereupon they were considered for inclusion in refugee status proceedings. The treatment of the young people deflected to Nauru and Christmas Island is considered below in Chapter 13. As noted in 13.6 below, the experience of the young people deflected to Nauru took on a special significance in May 2006 with the introduction of

Australian Laws and Policies | The *Tampa* Affair ²²

Agreements with Indonesia in 2000 did little to curb the number of boats arriving on Australian shores. The Australian Government's concerns about the continuing arrival of boat people peaked in August 2001, with Prime Minister Howard intervening personally to put a stop to the developing trend. The immediate impetus for the government's action was the discovery on 26 August of a boat carrying 433 asylum seekers. The ship was in distress and apparently on the verge of sinking in the ocean 140 kilometres north of Australia's Christmas Island.

At the request of the Australian search and rescue authorities, the asylum seekers were taken aboard by a 49,000-ton Norwegian container ship named the *MV Tampa*. (right) The captain, Arne Rinnan, moved initially to return the rescuees to Indonesia, but set a course for Christmas Island when the rescuees objected. The Australian Government then formally requested Captain Rinnan to take his human cargo to Indonesia, and ordered the ship to remain outside of Australian territorial waters. The captain refused — citing the medical condition of some of the rescuees and his inability to feed and care for 433 people on a vessel equipped to house 30 people and licensed to carry no more than 50 people. (The rescuees included three pregnant women and one person with a broken leg. Early reports suggested that many of the fugitives were dehydrated and that some were unconscious.) When the ship came within four nautical miles of Christmas Island, the Australian Government sent 45 Special Air Services (SAS) troops to board and take control of the *Tampa*, preventing any of the occupants from disembarking. The island's port was closed, with barriers erected to prevent the ship from docking.

Amid the blaze of publicity that surrounded these dramatic events, legal actions were instituted in the Federal Court of Australia by the Victorian Council for Civil Liberties and by a private Solicitor, Eric Vadarlis. The applicants asked the court to order that the rescuees be brought into Australia's migration zone; that they be told of their rights under the *Migration Act*; and that they be permitted to make refugee claims. The applicants also sought the release of the rescuees on the ground that their detention was unlawful, since they were detained



on the ship without any legislative basis. The court gave leave to Amnesty International and the Human Rights and Equal Opportunity Commission to intervene as friends of the court ('amicus curiae').

Justice North of the Federal Court found that the applicants did not have the right to ask the court for orders about the rights of the rescuees under the *Migration Act*. He ruled that the applicants' inability to get direct instructions from the rescuees was fatal to this part of the action. (With the SAS in control of the *Tampa* and the owners of the vessel unable or unwilling to act as intermediaries, none of the litigants was allowed to communicate with the rescuees). However, he held that the rescuees were being detained by the SAS troops, and that the detention and proposed expulsion from Australian territory were illegal under Australian law. The judge ordered that the *Tampa* 'rescuees' be returned to Australia and that they be permitted to lodge refugee claims.

When the case was appealed to the Full Federal Court, Justice North's ruling was overturned by two of the three appeal judges, giving victory to the government. Leave to appeal to the High Court by the Vadarlis team was denied on the basis that the removal of the rescuees to Nauru and New Zealand had rendered the case moot.

The *MV Tampa*. Photograph ©Phil Oakley.



The distressed KM *Palapa* carrying 433 asylum seekers pulling alongside MV *Tampa*. ©Newslimited.

legislation that would have the effect of requiring all asylum seekers arriving in Australia without authorisation by boat to be processed ‘offshore’. If enacted into law, the legislation will apply both to persons intercepted en route to Australia and those who make landfall on mainland Australia.

Endnotes

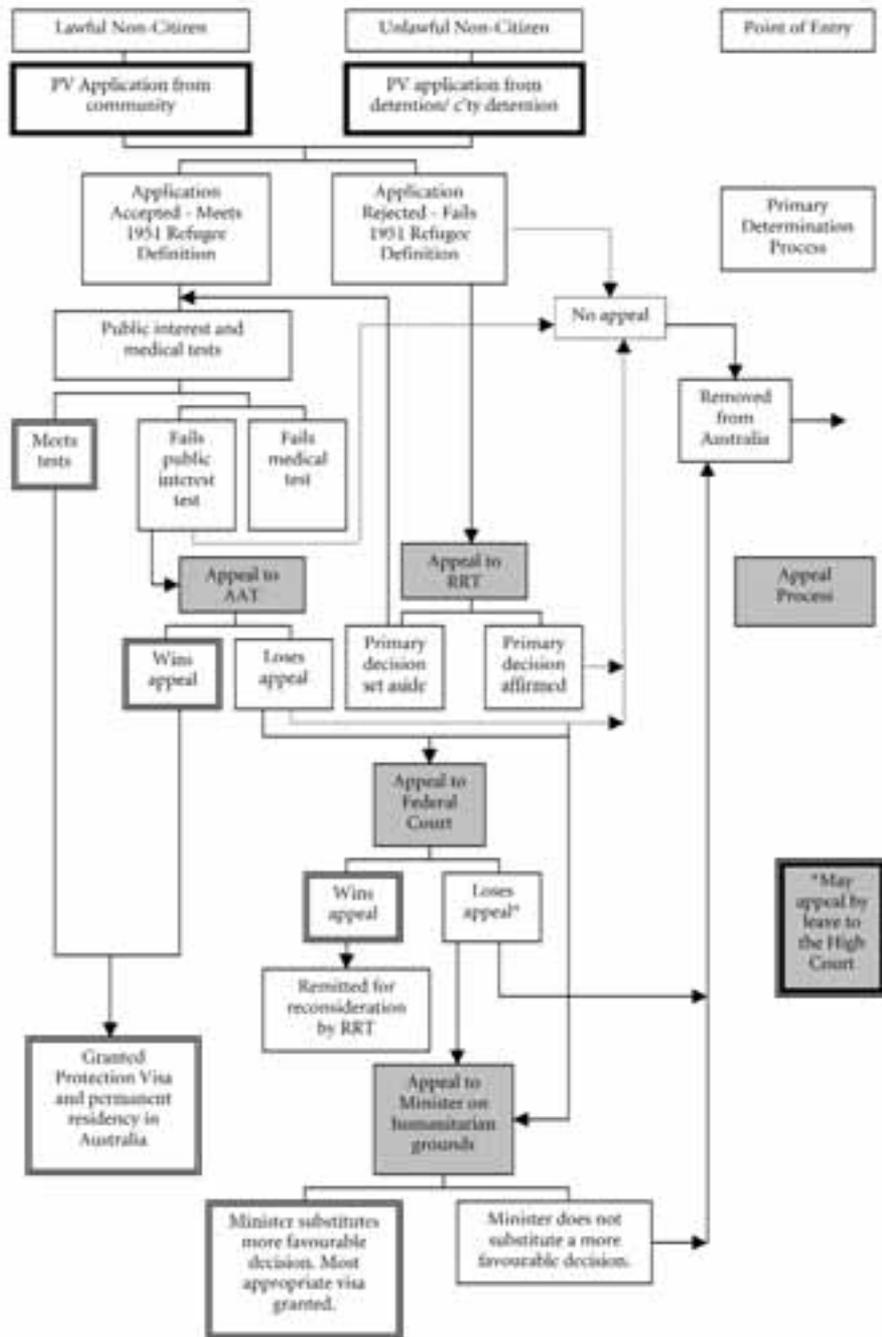
- 1 See DIMA, Fact Sheet 86 ‘Overstayers and People in Breach of Visa Conditions’, <www.immi.gov.au/facts/86overstayers_1.htm>, accessed 10 October 2005.
- 2 In Australia, see for example DIMA, Fact Sheet 77 ‘The Movement Alert List’, <www.immi.gov.au/facts/77mal.htm>; and ‘Border Control’, <www.immi.gov.au/illegals/border.htm>, accessed 10 October 2005.
- 3 See *Migration Act* s 91A–91C and s 36(3)–(6).
- 4 See *Migration Act* s 91D–91G and s 36(3)–(6).
- 5 See *Migration Act* s 91M–91Q and s 36(3)–(6).

- 6 See DIMA, Fact Sheet 4 ‘More than Sixty Years of Post-war Migration’ (2005) <www.immi.gov.au/facts/04fifty.htm>.
- 7 Perhaps the most famous asylum seekers were the Petrovs, the Russian defectors kidnapped and then allowed to defect in 1954. See Nicola Connell, ‘Conflicts and resolutions arising from the Petrovs defections’, 2003, <www.naa.gov.au/education/challenge/2003_winner.html>. In January 1979, another fugitive from the former USSR, an 18-year-old Ukrainian woman, Lillian Gasinskaya, jumped from a ship in Sydney Harbour, clad only in a red bikini. She sought and was granted asylum. See <www.abc.net.au/archives/timeline/1970s.htm>.
- 8 Although approximately 260 million people move across Australia’s borders each year, the population of illegal migrants is estimated at 51,000. See <www.immi.gov.au/facts/86overstayers.htm>. See generally, Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (Federation Press, Sydney, 2006), chs 2–4.
- 9 Kathryn Cronin, ‘A Culture of Control: An Overview of Immigration Policy-making’ in James Jupp and Maria Kabala (eds), *The Politics of Australian Immigration* (AGPS, Canberra, 1992).



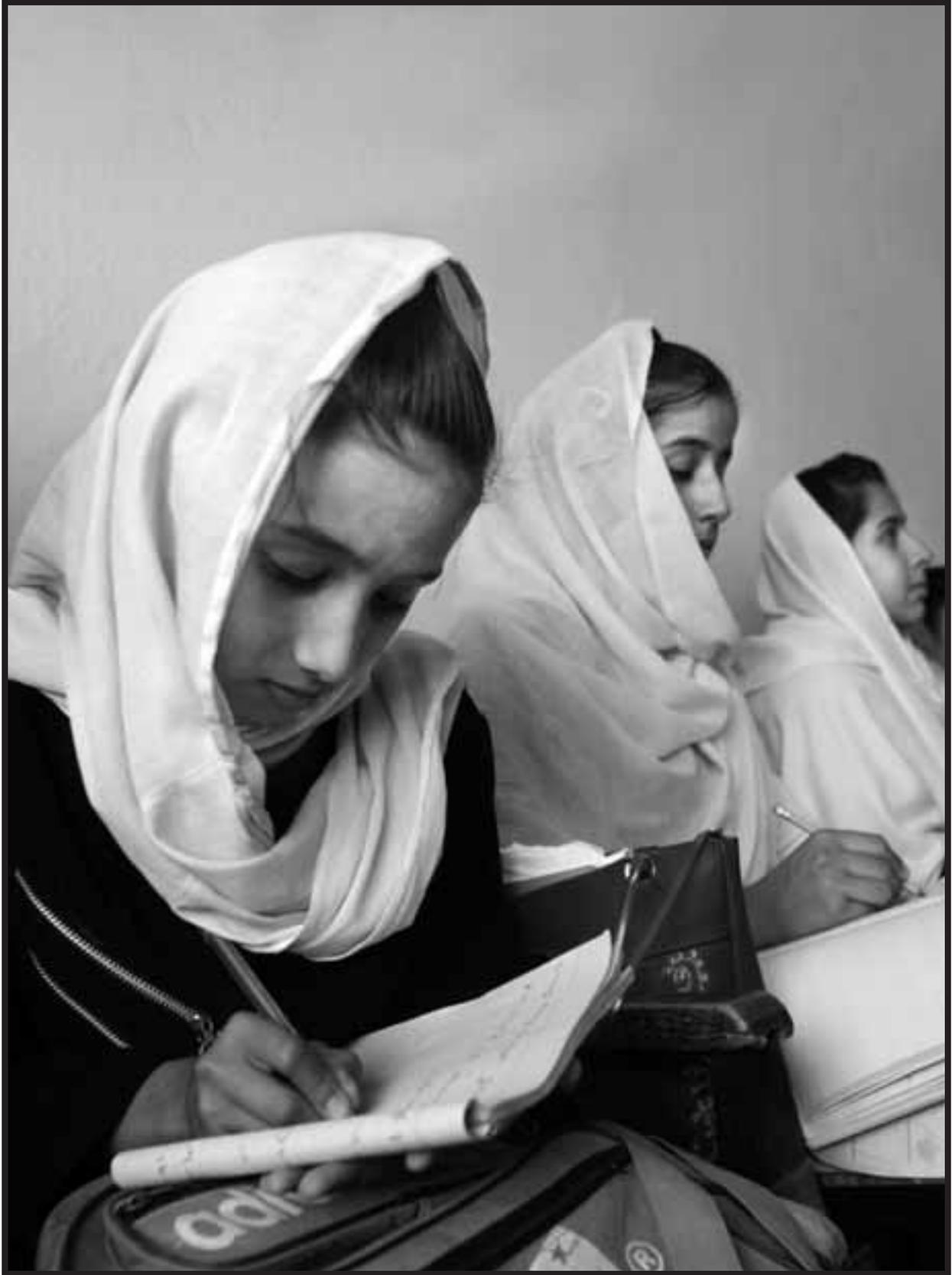
Tampa Paparazzi. Photograph ©Phil Oakley.

Figure 2: Current Refugee Determination Process²⁵





- 10 These are the figures given by Storer and Faulkner as arrivals between 27 April 1976 and April 1981. See Des Storer and Arthur Faulkner, 'Out of the Shadows: A Review of the 1980 Regularisation of Status Program in Australia', International Migration For Employment ILO Working Paper (ILO, Geneva, 1982).
- 11 See *Migration Amendment Act 1979* (Cth), which amended s 36 and added s 36A into the *Migration Act 1958* (Cth).
- 12 See Department of Immigration and Ethnic Affairs (DIEA), *Refugee Policies and Refugee Status Determination Procedures: Background Paper* (Mimeo, 1987), p 22. The policy is reproduced in James Crawford and Patricia Hyndman, 'Three Heresies in the Application of the Refugee Convention' (1989) 1 *International Journal of Refugee Law* 155 at 167. The authors note that the paper was not official policy, but indicative merely of attitudes adopted by some decision-makers on some occasions.
- 13 See DIEA, id, p 28; and Crawford and Hyndman, id.
- 14 See the comments made by former a departmental official in the ABC/ Film Australia documentary, *Admission Impossible* (1992).
- 15 See John Howard, Campaign Launch, 2001.
- 16 For a discussion of the issue of possible sabotage of refugee boats, see David Marr and Marianne Wilkinson, *Dark Victory* (Allen & Unwin, Sydney, 2003), pp 41–43.
- 17 Tony Kevin, *A certain maritime incident: the sinking of SIEV X* (Scribe Publications, Melbourne, 2004), p 131 and ch 7 generally.
- 18 In response to questions about these operations, IOM in Australia stated that they were not able to assist with statistics or any other information. Email to the author from Keiko Foster, dated 13 February 2006.
- 19 See the *Tampa* Affair, Box Story, below.
- 20 See, for example, 'Life After Tampa: Calling NZ home' in *The Age*, 24 March 2004, <www.theage.com.au/articles/2004/03/26/1079939851279.html>.
- 21 Statistics supplied by IOM, on file with author. See also DIMA, Fact Sheet 76 'Offshore Processing Arrangements', <www.immi.gov.au/facts/76offshore.htm> (23 May 2005).
- 22 Extract from Crock et al, above n8, ch 7.
- 23 See *WJIC v MIMIA* [2002] FCA 1631 (23 December 2002) at [4].
- 24 The treatment of those who were sent to Nauru and Christmas Island for processing is considered below, Chapter 13.
- 25 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Processes* (Canberra, June 2000), p 111 (with adaptations), <www.aph.gov.au/SENATE/committee/legcon_ctte/completed_inquiries/1999-02/refugees/report/contents.htm>. Note that this regime only applies to persons who arrive within Australia's migration zone.



Australian Laws and Policies II: The Domestic Asylum System and Protection Outcomes

6.1 The Legislative Regime Governing Immigration Control

In Australia, almost all aspects of the refugee determination process are governed by the *Migration Act* 1958 (Cth) and the *Migration Regulations* 1994 (Cth). The *Migration Act* and Regulations implement, to a limited extent, the provisions of the Refugee Convention and Protocol, including the definition of ‘refugee’ (see 4.1.2 above).

Otherwise, the legislation makes few distinctions between adult and child applicants. No special provision is made for unaccompanied and separated children.

One of the greatest challenges facing asylum seekers in Australia is the statutory requirement that all non-citizens in the country hold a valid visa. The inability to acquire a visa is the most effective barrier for anyone seeking access to Australian territory. For children travelling alone, who by definition are

eligible for very few classes of visa, the requirement narrows dramatically the legal options for admission. This administrative bar has been reinforced over time by physical impediments in the form of border control, deflection and interdiction measures (see Chapter 5 above).

Those entering without a visa, like those in the country whose visas expire or are cancelled *must* be detained until they either leave the country or are granted a visa.¹



The scheme is known informally as Australia’s ‘mandatory detention’ regime. It operates to require the incarceration of persons who hold no visa and who are not eligible for the grant of a visa, even where there is no reasonable possibility that the person might be deported or removed to another country.²

While children arriving without authorisation are eligible for release from immigration detention when this is in their best interests,³ the general practice until late 2003 was to keep all un-visaed children — whether accompanied or not — in custody.⁴ In fact the principle that children should only be detained as a matter of last resort (see Art 37(b) CRC) was not acknowledged in Australian law until late June 2005.⁵ The policy of detaining unaccompanied and separated children meant in turn that they were subject to the same restrictive processing regime as adults. This is so in spite of the legislation conferring on the Minister for Immigration the role of legal guardian under the Immigration (Guardianship of Children) Act 1946 (Cth).⁶

India Compound, Woomera, South Australia. Photograph obtained from the Human Rights and Equal Opportunity Commission’s National Inquiry into Children in Immigration Detention.

The *Migration Act* contains no provisions requiring government officials to provide ‘visa assistance’, and actually stipulates that non-citizens have no right to an application form or to a lawyer unless they request it.⁷ The practical ramifications of this regime are that, in order to access Australia’s asylum procedures, a child who enters Australia without a valid visa must demonstrate *without legal assistance of any kind* that he or she is claiming asylum and that the claim is not manifestly unfounded (see further 8.2 below).

6.2 The Refugee System

6.2.1 Initial Status Determination Processes

Newly arrived detainees are subjected to a ‘screening-in’ interview during which they are required to tell their story with the aid of an interpreter. As

HREOC notes,⁸ the onus placed on asylum seekers to articulate their need for protection is of particular concern in the case of unaccompanied and separated children who may not know to use the language or ‘trigger’ words that officers are looking for (see further 8.2 below). Government funded advisers⁹ are only appointed to assist the detainee to make a refugee claim if the finding is made that the detainee has ‘engaged’ Australia’s protection obligations in this closed interview. On its face, this regime makes no distinction between adults and children.

The legislation poses special challenges for children because of the emphasis that it places on applicants telling the truth, and the association it makes between lying and lack of credibility. The ‘screening’ interview is recorded and any later changes in an applicant’s story can be used to question an applicant’s credibility. Section 91V(4) of the *Migration Act* empowers interviewing officers to require detainees to make an oath or declaration to the effect that everything they said was true. The legislation provides further that where a detainee refuses to make such an oath or declaration or where the Minister for Immigration ‘has reason to believe’ that the detainee was being ‘insincere’ because of the detainee’s ‘manner’ or ‘demeanour’, ‘then, in making a decision about the non-citizen ..., the Minister may draw any reasonable inference unfavourable to the non-citizen’s credibility’.¹⁰

6.2.2 Administrative Appeals

Where the Minister for Immigration refuses an application for a protection visa, the applicant can seek a review of that decision, on the merits, from the Refugee Review Tribunal (RRT).¹¹ The departmental officer must tell them about this right of appeal. The RRT is an independent statutory review body whose members are appointed by the Immigration Minister on contracts that generally extend

for three to five years. Cases are heard by one RRT member who may or may not have training as a lawyer. The aim of the RRT is to provide ‘a mechanism of review that is fair, just, economic, informal and quick’.¹² An application for review must be made within seven days of notification of the primary decision for people in detention.

Unaccompanied and separated children have a right to assistance in their application to the RRT through the Immigration Advice and Application Assistance Scheme (IAAAS) (see 10.1 below), although government funding does not cover the actual tribunal hearings. RRT statistics suggest that not all such children have had IAAAS advisers to assist in their appeals.¹³ If advisers do attend hearings, the legislation dictates that they play a passive role in the proceedings: they may only address the tribunal on behalf of their clients in exceptional circumstances and at its invitation.¹⁴ The remoteness of the detention centres means on many occasions that interviews were conducted using video conferencing facilities. In these situations, unaccompanied and separated children have sometimes had to cope with the double remove of the RRT member and interpreter in one State and an adviser in another, both equally disembodied. The RRT does have guidelines on the giving of evidence by children (see further 10.1 below). Again, however, these are recent in their provenance and are not legally binding.

According to the *Migration Act*, the RRT decision is the end of the refugee status determination process.¹⁵ However, failed asylum seekers do have a limited right to seek judicial review in a court. They can also make an application for the minister to exercise his or her residual discretion to grant a visa on humanitarian grounds.

6.2.3 Judicial Review

Unaccompanied and separated children, like all protection visa applicants, may seek judicial review

of an RRT decision in the Federal Magistrates Court, Federal Court and High Court, but only on very narrow grounds. The right to the judicial review of any action taken by an ‘officer of the Commonwealth’ (interpreted to include immigration officials and even the Immigration Minister) is one of the few guarantees contained in the Australian Constitution.¹⁶ The role of the courts is different from the role played by the RRT. While the RRT can review the facts and all the circumstances of a case leading to the grant of a protection visa, the court can only review the legality of a decision. Courts cannot make rulings that lead directly to the grant of a protection visa. The court can only direct that an application be reassessed by the RRT.

Since 1992, Australian governments have consistently enacted legislation aimed at reducing the power of the courts to review migration decisions.¹⁷ Constraint on the federal judiciary — actual or perceived — is a theme that pervades many of the cases in which the claims of unaccompanied and separated children have been litigated.

This is because an apparently comprehensive privative clause was introduced into the migration legislation scheme in 2001, at the height of the influx of boat people in which many of the young people studied for this report were embedded. Section 474 of the *Migration Act* (as amended) defined a ‘privative clause decision’ as a decision of an administrative character made, proposed to be made or required to be made under the Act. A privative clause decision¹⁸ is to be final and conclusive. It may not be challenged, appealed against, reviewed, quashed or called in question in any court. It is not subject to the writs of prohibition, mandamus, injunction, declaration or certiorari.

The rationale for the restrictive provisions was

that they would give ‘effect to the Government’s long-standing policy commitment to restrict access to judicial review in migration matters in all but exceptional circumstances.’¹⁹

Privative clauses, which nominally take away the jurisdiction of courts to review administrative decision-making, have long been used by the Australian legislature to curtail judicial review of administrative action.²⁰ On their face these clauses breach the constitutional separation of powers by rendering a decision of the executive final and conclusive. However, they have been found by the High Court to be constitutionally valid on the basis that they do not prevent a court from intervening in cases where a decision is affected by a fundamental legal error. According to one long-standing authority, an administrative decision would be protected from judicial review under a privative clause provided the decision complied with three requirements:

- i) It was a *bona fide* exercise of power;
- ii) It related to the subject matter of the act under which it was made; and
- iii) It was reasonably capable of reference to the power given to the decision-maker.²¹

The operation of s 474 (as amended in 2001) was challenged successfully in the High Court in 2003.²² The Applicant in *Plaintiff 157/200* argued that s 474 could not prevent the intervention of a court where the decision-maker committed a ‘jurisdictional error.’²³ Earlier jurisprudence indicated that a jurisdictional error would occur where an administrative tribunal fell into an error of law that:

caused it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken



conclusion, and the tribunal's exercise or purported exercise of power [was] thereby affected, it exceed[ed] its authority or powers.²⁴

In *Plaintiff S157*, the High Court spoke of jurisdictional errors as defects in decision-making that involve the failure to respect ‘inviolable limitations’ imposed by a legislative scheme. The court included in this category the failure to comply with basic rules of procedure. The decision benefited child applicants by abandoning the three part *Hickman* test in favour of a more holistic approach to determining legal error. Even so, the courts retain a good deal of discretion in determining whether or not a jurisdictional error has occurred in any given case.

The difficulties for applicants have been further compounded by the imposition of inflexible time limits. Under the *Migration Act*, strict time limits apply on appeals and applications for judicial review. For example, under s 412, applicants are

given 28 days in which to appeal to the RRT from the time of notification of an adverse decision. Time limits also apply for applications for judicial review. This regime poses challenges for most asylum seekers in detention.²⁵

The inability of the courts to hear applications lodged out of time has deprived many asylum seekers of their right to review, even in cases where the failure to lodge an application was manifestly the fault of DIMA or detention centre staff. For unaccompanied and separated children, the default is particularly acute because of the additional challenges they face in trying to understand what is happening to them.²⁶

6.2.4 Other Avenues of Appeal

Australian migration laws provide for two further mechanisms for individuals who fail in a conventional bid to gain a protection visa. Both involve the personal intervention of the Minister for Immigration. If new circumstances come to light that may indicate that an individual is in need of protection as a refugee, an application can be made under s 48B of the *Migration Act* for permission to lodge a fresh refugee claim if the minister considers it is in the public interest to do so. This process is handled exclusively within the immigration bureaucracy. In practice, immigration officials will examine new evidence that is presented and ministerial permission will be granted or refused according to the strength of the new claims (and/or other factors that might operate to bring the matter to the personal attention of the minister). Permission to lodge a fresh claim will result typically (but not invariably) in the grant of a protection visa.

The second mechanism for having an adverse appeal result overturned is to appeal directly to the Minister for Immigration under s 417 of the *Migration Act*. This section provides that the Immigration

Minister, *acting personally*, may substitute for a decision of the RRT a decision that is ‘more favourable to the applicant, whether or not the Tribunal had the power to make that other decision’. The s 417 discretion is described as ‘non-delegable, non-reviewable and non-compellable’ because while the minister must table in parliament a statement explaining when the power is used, the exercise of the power is expressed to be a matter for the discretion of the minister alone, that cannot be judicially reviewed. The non-compellable nature of the power was articulated in *Ozmanian v MIMA*,²⁷ where the Full Federal Court stated:

*[Section] 417(7) makes it clear that the Minister is not under a duty to consider whether to exercise the power under s 417(1) in respect of any decision, whether or not the Minister is requested to do so by the applicant or any other person, or in any other circumstances.*²⁸

The Full Federal Court affirmed this position in *Re Bedlington; ex p Chong*.²⁹ It found that the ‘no duty to consider’ provision³⁰ contained in the minister’s related discretion under s 48B was intended to excuse the minister from any obligation of considering whether to exercise the s 48B power. There is nothing in s 48B which requires any matter to be drawn to the attention of the minister.

The non-reviewable nature of s 417 is manifest in the legislative direction that ministerial decisions cannot be appealed and in the fact that it is practically impossible to judicially review a decision that a minister cannot be compelled to make.³¹

The Full Federal Court in *Ozmanian* held that, based on former s 485(1), the Federal Court has no jurisdiction to review antecedent conduct of DIMA officers in s 417 matters.³² However, the High Court has taken a different approach in relation to the decisions of DIMA officers not to refer matters to

the minister for consideration. While no ground for review was made out on the facts of the case, in *Re MIMIA; ex p Applicant S190 of 2002* Kirby J expressed the view that the decision of an officer not to refer a matter to the minister could be subject to judicial review.³³ Having said this, seeking relief in the High Court is only an option where it is possible to demonstrate serious legal error — ‘jurisdictional’ errors going to the authority and power of the decision-maker to do what was done.³⁴ Constitutional writs, and associated relief, are not available to allow a merits review of ministerial review of ministerial or administrative decisions or decisions of federal courts.³⁵

6.3 Processing Guidelines and Policies

Governmental policies regarding the interpretation of the *Migration Act* and the *Migration Regulations* are set out in the Procedures Advice Manual 3 (PAM) and the Migration Series Instructions (MSI — a form of interim policy direction) as well as in various Gazette Notices and Releases. The PAMs and MSIs are guidelines addressed to officers administering migration law, in particular decision-makers who are delegates of the Immigration Minister.

The first occasion on which DIMA outlined the specific care arrangements required for unaccompanied and separated children in policy guidelines was in September 2002. This was some two to four years after the arrival of most of the children who have sought asylum alone in recent years. As noted earlier, there were no published policies in place when most of the participants in this study first claimed asylum in Australia. The September 2002 guidelines (MSI 357)³⁶ clarified the ambit of delegation made by the minister to the

State authorities by stipulating that State agencies have guardianship powers and responsibilities once an unaccompanied or separated child had been released from detention on a visa or when they are transferred to home-based care.³⁷ Decisions relating to the daily care of unaccompanied and separated children were placed in the hands of the department manager. It noted, however, that the department manager was expected to consider recommendations by child welfare specialists, including detention centre staff.³⁸

Policy manuals, instructions and guidelines now address the special needs of unaccompanied and separated children seeking asylum in Australia. MSI 370 was issued on 2 December 2002,³⁹ replacing MSI 357. The instruction outlines procedures for ‘unaccompanied wards’ in immigration detention (that is, unaccompanied and separated children under the guardianship of the Minister for Immigration). The guidelines cover the duties and responsibilities of both the minister and the detention service provider to unaccompanied and separated children in immigration detention. The guidelines make it clear that the policies apply to



both children who have travelled alone and those who are separated from parents or caregivers. This acknowledges the fact that children arriving without visas have been detained while a parent or caregiver is in the Australian community (on a visa) and that others have been rendered ‘separated children’ by the hospitalisation or incarceration on criminal charges of a parent or guardian.

The care of unaccompanied and separated children in immigration detention is now controlled by the Immigration Detention Standards (IDS). These standards are spelt out in the contract between DIMA and relevant detention centre management companies.⁴⁰ These stipulate that ‘[t]he special needs of particular groups or individuals must be identified and addressed’⁴¹ Unaccompanied and separated children constitute one such group. As noted earlier, the big change since June 2005 is that detention is now regarded as an option of ‘last resort’ for children: the presumption now is that children will be placed in community accommodation of some description.

Procedures Advice Manual 3 (PAM 3),⁴² released in August 2003, contains a section on ‘minors’, which addresses the position of children under the age of 18 who make claims for protection in their own right rather than as part of a family unit. These policy guidelines cover such matters as applications for a protection visa, processing claims for protection, assessing claims, determining age and post-decision appeals. The guidelines now stipulate (as was the case in MSI 370) that all minors (including unaccompanied wards) should be received by staff with appropriate expertise in child welfare. The guidelines also state (at 7.1ff) that ‘mentors’ in the form of a ‘suitable adult’ may be appointed from within the detainee community to provide ‘guidance and support’ for a child. These mentors are not responsible for the ‘care and safety’ of the unaccompanied ward.

Although a good idea in theory, the fact remains that children are still not appointed a formal guardian apart from the Immigration Minister or centre manager during the initial reception process. Nor do the guidelines provide for the appointment of a legal adviser, or for anyone to explain the nature of the process to the child, until after the 'screening-in' process is completed.

In the context of the appellate proceedings conducted by the RRT, guidelines applicable to unaccompanied and separated children were made in 2002.⁴³ The guidelines address the giving of oaths, the competency of minors to give evidence, rights of representation, the elicitation of evidence, the assessment of evidence and the particular issues associated with child witnesses.⁴⁴

It will be argued that policy makers in Australia need to be more aware of the evolving jurisprudence on refugee claims lodged by and on behalf of children. Both the DIMA and RRT guidelines stand out for the dearth of analysis in this regard. Apart from a brief statement at paragraph 40.2 that the definition of refugee makes no special provision for children, the RRT guidelines say nothing at all about how children's claims can and/or should be treated as a matter of law. The Refugee Convention makes no mention of women as asylum seekers. Yet this has not prevented the evolution of a rich jurisprudence on women as refugees (see further Chapter 12).

Policy guidelines and instructions are not legally binding on the delegates of the minister because they do not have the status of law. However, they may give rise to a reasonable expectation that in the ordinary course they will be observed, and that the minister will ensure that they are observed. As explored further in Part 3 of this report, the difficulty of enforcement leads inevitably to uneven compliance. If policy guidelines are now having an impact on the treatment of young people in the

immigration process, they were introduced too late for many of the unaccompanied and separated children who arrived before 2002.⁴⁵

6.4 Anti-Trafficking Measures

In 2003 the Australian Government announced a \$20 million package to combat trafficking in persons.⁴⁶ The initiative includes the establishment of a 23-member Australian Federal Police mobile strike team to investigate trafficking and sexual slavery; the posting of a senior immigration official at the Australian Embassy in Bangkok to investigate people trafficking; increased regional cooperation to overcome the issue of trafficking and people smuggling; the introduction of new visa arrangements for potentially trafficked people; the establishment of a 'comprehensive' victim support scheme; the initial development of federal offences to criminalise trafficking in persons; and the establishment of reintegration assistance to trafficking



victims who are repatriated. After ratifying the Trafficking Protocol the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth) created a series of new offences relating to the trafficking in persons.⁴⁷ In the words of Senator Chris Ellison, ‘the Bill comprehensively criminalises all aspects of this abhorrent crime by introducing a number of new and extended trafficking in persons offences.’⁴⁸ Included in the new range of offences is the offence of trafficking in children. Section 271.4 establishes a penalty of 20 years imprisonment for persons who traffic children into Australia, while s 271.7 criminalises similar behaviour within Australia. The two provisions are intended to reflect Art 3(c) of the Trafficking Protocol.⁴⁹

6.4.1 The ‘Trafficking’ Visas

Australia’s migration laws now include two visa classes (class UM and class DH) which provide ‘witness protection’ for trafficked victims who have ‘made a significant contribution to, and cooperated closely with, the prosecution’ of an alleged trafficker.⁵⁰ These visas provide for temporary stays of two years which can be converted to permanent residence where the need for protection for a trafficked person is ongoing. Although a welcome initiative, there is still an unfortunate tendency to link the protection afforded to trafficked persons with the prosecution of traffickers. In other words, a trafficking victim will only be offered protection if they agree to cooperate with authorities in the prosecution of their traffickers. The practical effect of this can be seen by the detention in 2004 of two Thai girls who were unable to provide information that was sufficient to prosecute alleged traffickers.⁵¹

The connection between prosecution and protection is seen in the criteria governing the grant of the trafficking visas. To obtain a two year class UM visa, an applicant must be the holder of a criminal justice stay visa,⁵² the visa available for witnesses

in a criminal trial whose presence is required in Australia. Criminal justice visas are given to persons helping with an investigation of an alleged trafficking offence, or who are needed to testify if a matter proceeds to trial. It is a criterion of both class DH and class UM visas that the minister is ‘satisfied’ that the trafficking victim contributes significantly to, and cooperates closely with, the prosecution of an alleged trafficker. A person can only get the permanent class DH visa if the minister is satisfied that the person would also be in danger if they returned to their home country.

These visas are primarily focused on the prosecution of traffickers. The focus is on the criminal, not the victim. There is no permanent or temporary visa granted for trafficking victims who fall outside these regulations, that is, victims who decline to assist in the investigation or prosecution of a trafficker.

The shortcomings of the current trafficking visas were addressed in submissions to the Senate inquiry of early 2005. Many submissions pointed out, for example, that trafficked persons will often be constrained in their ability to cooperate with police action against traffickers because of fears for their own personal safety or of the safety of family members in their country of origin. The knowledge of how criminal networks operate can frequently outweigh the assurances given by an (unknown) law enforcement or immigration officials.

Trafficking victims comprise some of the most vulnerable in society. Some come from countries where their governments cannot be trusted. Assisting a foreign government can therefore be even more daunting and create even greater anxiety.⁵³ Furthermore, the vulnerable person, particularly a child, is uncertain and may be afraid of any possible repercussions they may face from assisting in prosecuting a trafficker. There are many cultural and situational differences and sensitivities that must be considered in interactions with trafficking victims.

The prospect or fear of even worse consequences may prevent a person from cooperating with the prosecution of a trafficker, but it should not prevent them from being granted protection in Australia.

Submissions to the Senate inquiry also suggested that visa eligibility should be extended to children and siblings of trafficking victims. Along with a more general dis-association of visa eligibility from the provision of prosecution testimony, this would avoid the suggestion that people fabricate evidence in an attempt to obtain a visa and accompanying support.⁵⁴ The committee acknowledged this problem but made no formal recommendations on this point.

6.4.2 Victim Support

The link between prosecution and the treatment of victims has been applied to the operation of victim support schemes in Australia. In reality, the only people able to access victim support services in Australia are those people assisting police investigations or prosecutions. The Office for the Status of Women coordinates the support for victims of people trafficking.⁵⁵ Of the \$20 million government initiative, \$5.6 million has been allocated for victim support over a four-year period.⁵⁶ Under the scheme, victims are assisted with living expenses and expenses related to their general wellbeing, including income support, access to accommodation, basic legal advice, medical treatment, counselling, training and social support.⁵⁷ The two stated aims of this victims' support package are to rehabilitate a highly vulnerable group of people and to apprehend and convict those responsible.⁵⁸ In spite of the apparent dual focus, the package is not accessible to all victims, however. As it currently stands, the support services extend only to 'victims who agree to stay in Australia to assist trafficking investigations'.⁵⁹

For trafficking victims who are returned to their countries of origin (the preferred outcome if

this can be achieved), the Australian Government has also committed funds for reintegration and protection projects. AusAID, the administrator of Australian aid overseas, allocated \$4.7 million between 2000 and 2004 'for the implementation of the IOM project Return and Integration of Trafficked Persons in the Mekong Region'.⁶⁰ Australian Federal Police located in Thailand are also running such programs specifically for trafficked women returned from Australia: such projects are part of the \$20 million anti-trafficking package. They include 'capacity building' exercises. These are cooperative ventures designed to enhance the 'capacity of referral agencies to support and reintegrate suspected victims of trafficking who return to their country of origin'.⁶¹

6.4.3 Trafficking and Immigration Procedures at Point of Entry

DIMA policies note that: 'Points of entry to Australia provide opportunities for identifying possible victims of people trafficking and their escorts'.⁶² In addition to the legislative changes, the Australian Government has instituted training programs to ensure that border guards become alert to people fitting trafficking activity profiles.⁶³ Examples of indicators include groups of young girls travelling with one or two men, few items of luggage, with the male carrying all the travel documents. The MSI guidelines recognise that it is often difficult to identify trafficking victims upon arrival. Victims may be unaware that they are being trafficked; they are often coached by their traffickers in responses they should provide to officials; and there is limited time for officers in immigration clearance to identify trafficking indicators.⁶⁴ In addition, officers at entry points 'have an obligation to return suspected *non-bona fide* visitors as soon as possible' leaving, at most, a few hours for suspected victims to be interviewed prior to their removal from the country.⁶⁵



Although the training programs and policy guidelines are welcome developments, Australia does not appear to have instituted anything comparable to the operational initiatives taken in England.⁶⁶ The very fact that the guidelines stress a putative obligation to remove trafficking victims is a worrying indication that immigration control measures are being allowed to dominate over child protection or true anti-trafficking measures. As noted earlier, DIMA statistics suggest that no child victim of trafficking has been identified in Australia since 1995. No attention appears to have been paid at all to the possibility that victims of trafficking — were they to be identified — may be eligible for protection as refugees (see further 8.1 below).

6.5 Protection Outcomes: Australia's Temporary Protection Visa Scheme

One final aspect of Australia's migration laws affecting refugees that is worthy of comment is the regime for granting temporary visas to persons recognised as refugees.

The temporary protection visa (TPV) scheme was first introduced in October 1999 and applies to Convention refugees who seek asylum after coming to Australia without the authorisation of a visa. Prior to this time, all persons found to be refugees after arrival in the country were eligible for immediate permanent protection (and all the benefits that flow from that status⁶⁷).

The TPV scheme is a reflection of the Federal Government's domestic political agenda relating to the deterrence of 'onshore' asylum applications by persons arriving without authorisation.

In the words of the then Minister for Immigration and Multicultural and Indigenous Affairs, Phillip Ruddock, the visa aimed to:

“remove incentives to forum shoppers who might otherwise have considered Australia as their country of protection over closer and more logical alternatives. The legislation will prevent unauthorised arrivals from obtaining permanent protection visas and the benefits, particularly family reunion, which appear to attract traffickers and forum shoppers.”⁶⁸

In order to deter 'unauthorised' asylum seekers, some of the benefits afforded to permanent protection visa holders were removed. For example, TPV holders are denied access to a range of government-funded settlement and welfare services (see Table 9 below).

Table 9: Bridging, Temporary Protection and Permanent Protection Visas

Visa Types	Settlement Support	Employment	Social Security
<p>■ Bridging Visas</p> <ul style="list-style-type: none"> • Bridging Visa E, subclass 051 (BVE) Unauthorised arrival, released from detention before completion of refugee status determination 	<p>Bridging Visas n/a</p>	<p>Bridging Visas No work rights unless ‘exceptional circumstances’</p>	<p>Bridging Visas Not eligible</p>
<p>■ Temporary Visas</p> <ul style="list-style-type: none"> • Temporary Protection Visa 785 Onshore unauthorised arrivals • Secondary Movement Relocation (Temporary) Visa 451 Intercepted international waters • Secondary Movement Offshore Entry (Temporary) Visa 447 Arrived excised offshore place 	<p>Temporary Visas Only eligible for the Early Health Assessment and Intervention.</p>	<p>Temporary Visas Until 1 January 2003, ineligible for employment assistance programs, except for basic services.</p>	<p>Temporary Visas Restricted entitlements Special Benefit, Rent Assistance, Family Tax Benefit, Child Care Benefit, and Maternity Allowance.</p>
<p>■ Permanent Visas</p> <ul style="list-style-type: none"> • Permanent Protection Visa 866 Onshore authorised arrivals • Permanent Humanitarian Visas 200–204 Offshore 	<p>Permanent Visas <i>Permanent Protection Visa</i> Only eligible for Early Health Assessment and Intervention.</p> <p><i>Permanent Humanitarian Visa</i> Eligible for assistance through the Integrated Humanitarian Settlement Strategy, including: Initial information and orientation assistance; Accommodation support/ household formation; Early health assessment and intervention; Community Support for refugees</p>	<p>From 1 January 2003, eligible for limited employment assistance programs.</p> <p>Permanent Visas Right to work. Access to all employment assistance programs.</p>	<p>From 1 January 2003 required to meet activity testing requirements.</p> <p>Permanent Visas Eligible to apply for the full range of social security benefits.</p>

Source:
HREOC *A Last Resort?* (2004),
pp 821–823.

Health	Mental Health	English Tuition for Adults	Education for Children	Legal Assistance for Visa Applications
<p>Bridging Visas Not eligible for Medicare</p>	<p>Bridging Visas Not eligible under Cth scheme.</p>	<p>Bridging Visas Not eligible.</p>	<p>Bridging Visas Generally at the discretion of the States to waive fees.</p>	<p>Bridging Visas Eligible for government-funded legal assistance.</p>
<p>Temporary Visas Eligible for Medicare. Prior to 29 August 2000 TPV holders not automatically eligible for Medicare.</p>	<p>Torture and trauma counselling under State schemes</p>	<p>Temporary Visas Only eligible for the Language, Literacy and Numeracy Program if receiving Special Benefit. Fees payable for TAFE.</p>	<p>A Bridging Visa E can be issued with a condition that denies permission to study.</p>	<p>Temporary Visas Can receive government-funded legal assistance in preparing fresh visa application if experiencing financial hardship and disadvantaged, for example because of non-English speaking background or disability as a result of past torture and trauma.</p>
<p>Permanent Visas Eligible for full range of health services provided through Medicare.</p>	<p>Permanent Visas Eligible for torture and trauma counselling.</p>	<p>Permanent Visas Access to 510 hours of English language training (free tuition under the Adult Migrant English Program, eligible for Advanced English for Migrants Program), with a further 100 hours if necessary.</p>	<p>Temporary Visas From 1 July 2002 eligible for funding through the New Arrivals Program.</p>	<p>Unaccompanied minors who are wards of the Minister for Immigration are entitled to legal assistance funded through the Immigration Advice and Application Assistance Scheme (IAAAS) administered by the Department of Immigration and Multicultural Affairs.</p>
			<p>Permanent Visas Eligible for intensive English training through the Commonwealth-funded New Arrivals Program.</p>	<p>Permanent Visas n/a</p>

A number of rights were also withdrawn. Most crucially for unaccompanied and separated children, the TPV holder has no rights to family reunion, travel or re-entry should she or he leave Australia. A TPV confers protection for a limited period — in most cases, 36 months. If the TPV holder wishes to apply for further protection (as every one of the participants assessed in this study has done), they were or are eligible to have a second application for protection considered 30 months after the date of the grant of their first TPV.⁶⁹

In September 2001, at the height of the public panic that accompanied the *Tampa* affair⁷⁰ and the terrorist attacks in America, further changes were made to this temporary protection regime. First, the *Migration Act* was amended to introduce what has become known as the ‘seven-day rule’. That legislation now reduces Australia’s protection obligations with respect to any individual who spent seven days or more in a country where he or she could have sought protection as a refugee before entering Australia.⁷¹ Individuals who are convicted of crimes with *penalties* that total 12 months imprisonment can also be denied permanent protection.⁷² In essence, refugees caught by these provisions can be ineligible to ever obtain permanent protection as refugees. The impact of the laws was softened to some extent in 2004 with the creation of ‘mainstream’ visa possibilities for refugees willing to live in rural areas. Even so, the seven-day rule and the rule involving penalties has the potential of having a devastating impact on unaccompanied and separated children because of the bar on family reunification (see further 14.2 below). Sydney Legal Aid solicitor Liz Biok noted that law officers have no discretion in relation to the penalties counted for even minor offences. In the result, she asserts, young refugees convicted of traffic offences, assault and affray charges and minor credit card offences are losing their ability to transfer to a permanent protection visa.⁷³

TPV holders who are again recognised as having protection needs are granted either a permanent protection visa (subclass 866) or (if caught by the seven-day rule) another temporary protection visa (subclass 785). People who have their refugee status withdrawn will be in Australia unlawfully and will be detained and/or removed if they fail to leave Australia voluntarily.⁷⁴

As noted earlier, by December 2005, at least 58 of the 85 young people studied for this report had acquired permanent residence status (see 2.4 above).

Endnotes

- 1 See *Migration Act* 1958 (Cth) ss 189 and 198.
- 2 *MIMIA v Al-Kateb* (2004) 219 CLR 561. See, however, that a special visa was introduced in response to this ruling to enable the release of long-term detainees. See *Migration Regulations* Sch 2 subcl 695.
- 3 See *Migration Act* s 4AA, ‘The detention of minors to be a last resort’. The Act makes it clear that ‘detention’ does not include reference to a ‘minor’ residing at a place in accordance with a ‘residence determination’.
- 4 Note, however, that some young people were released during this period while their visa applications were pending.
- 5 See *Migration Amendment (Detention Arrangements) Act* 2005 (Cth) s 3 and Sch 1.
- 6 For a discussion of the legal frameworks governing the guardianship of unaccompanied and separated children, see 2.2.1 above and 7.2 below.
- 7 Section 256 of the *Migration Act* states: ‘Where a person is in immigration detention under this Act, the person responsible for his or her immigration detention shall, at the request of the person in immigration detention, give to him or her application forms for a visa or afford to him or her all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention’.



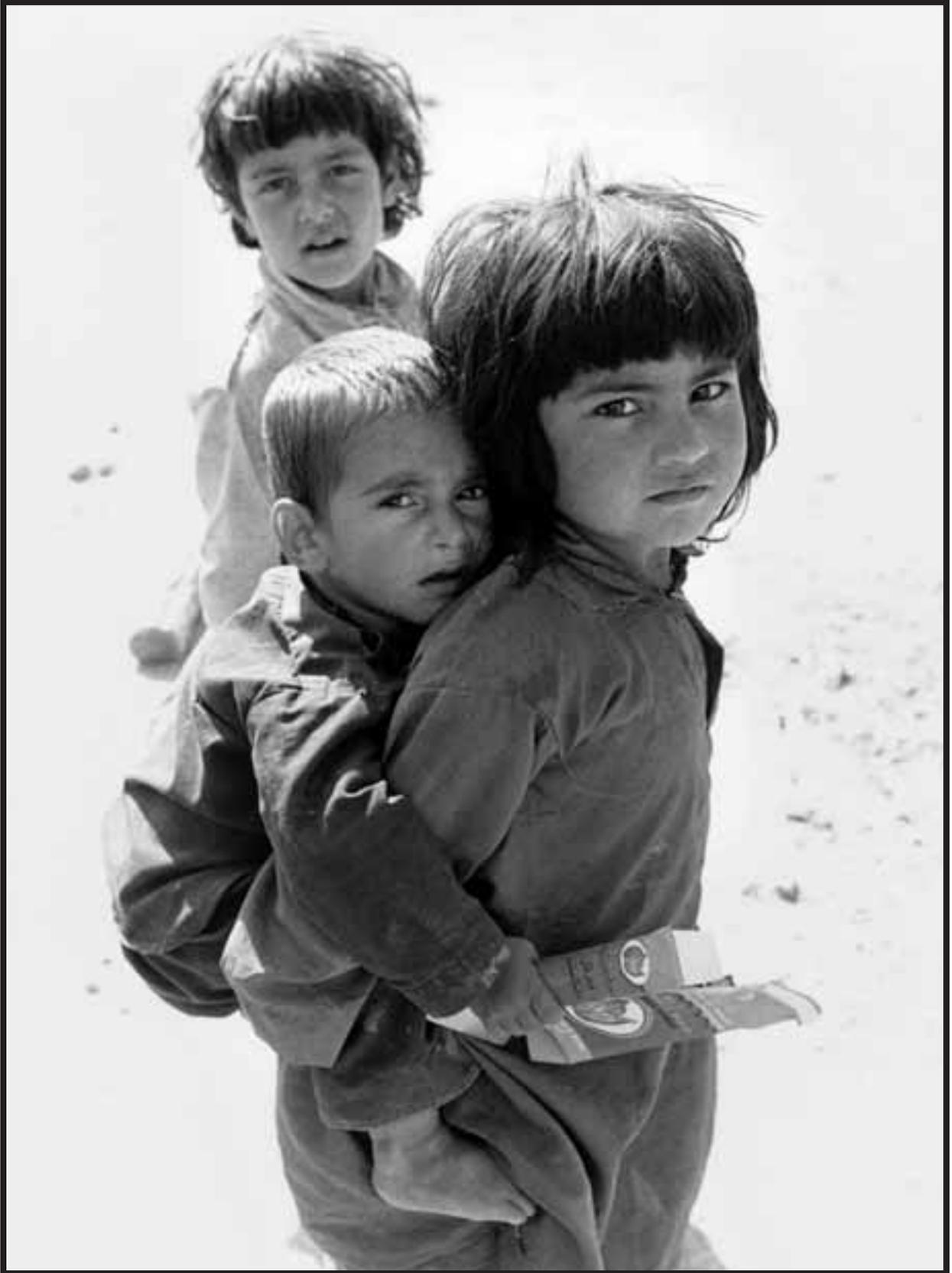
- 8 See HREOC, *A Last Resort? National Inquiry into Children in Immigration Detention* (AGPS, Canberra, 2004), p 239.
- 9 The scheme is known as the Immigration Advice and Application Scheme (IAAAS). Advisers are appointed through a tendering process which sees the successful tenderer paid on a per case completion basis. There is no requirement that advisers have legal qualifications or training.
- 10 *Migration Act* s 91V(5) and (6).
- 11 In certain circumstances, the appeal will be made to the Administrative Appeals Tribunal (AAT). Cases involving allegations made against refugee claimants involving human rights breaches (Art 1F of the Refugee Convention) are heard in the AAT, as are cases of special juridical significance. The referral of such test cases occurs very rarely.
- 12 *Migration Act* s 420(1).
- 13 See Table 10 at 8.3 below.
- 14 In practice, advisers are invited to speak towards the end of hearings. It is at this point that discussions take place, for example, on issues of law relevant to a case.
- 15 See s 5(9) of the *Migration Act* which defines the 'final' determination of an application as the end of the administrative appeal process.
- 16 See Australian Constitution s 73 and s 75(iii) and (v)
- 17 See Mary Crock and Edward Santow, 'Privative Clauses and the Limits of the Law' in Matthew Groves and Hoong Phun Lee, *Australian Administrative Law: Fundamentals, Principals and Doctrines* (Cambridge University Press, Melbourne, forthcoming 2006) ch 19.
- 18 Defined to include any decision granting, making, cancelling, revoking or refusing to make an order or determination in relation to a visa.
- 19 DIMA, Fact Sheet 71 'New Measures to Strengthen Border Control', <www.immi.gov.au/facts/71border_1.htm>, accessed 17 February 2005. Note that legislation is incorrectly dated as a 1998 Act.
- 20 See Crock and Santow, above n17 and Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Law Book Co, Sydney, 3rd ed, 2004), pp 858ff.
- 21 *R v Hickman; ex p Fox and Clinton* (1945) 70 CLR 598 at 615.
- 22 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
- 23 *Ibid* at [76].
- 24 *Craig v South Australia* (1995) 184 CLR 163 at 179.
- 25 Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Processes* (Canberra, June 2000), pp 82–85.
- 26 See, for example, the case of *Jaffari v MIMA* (2001) 113 FCR 10 (French J, 26 July), discussed 11.4 below.
- 27 *Ozmanian v MIMA* (1996) 137 ALR 103.
- 28 *MIMA v Ozmanian* (1996) 141 ALR 322 at 336; see also *Morato v MILGEA* (1992) 111 ALR 417.
- 29 *Re Bedlington: ex p Chong* (1998) 157 ALR 436.
- 30 See *Migration Act* s 48B(6), and correspondingly s 417(7).
- 31 In *Kolotau v MIMA* [2002] FCA 1145 (5 September 2002) Tamberlin J ruled: '[r]elief cannot be available under s 39B of the *Judiciary Act* 1903 (Cth) by reason of the Minister's failure to consider a matter which the *Migration Act* specifically says that he is not obliged to consider.'

- 32 *MIMA v Ozmanian* (1996) 141 ALR 322 at 345. This principle has been applied by the Federal Court in cases since *Ozmanian* to analogous provisions of the Act. See *Baldev Singh v MIEA* [1997] 472 FCA (30 May 1997) regarding s 351; *Re Bedlington and MIMA; ex p Chong* [1997] 1416 FCA (15 December 1997) regarding s 48B. It can thus be argued that s 485 excludes judicial review by the Federal Court of all actions taken pursuant to those sections referred to by s 485.
- 33 *Re MIMIA; ex p Applicant S190 of 2002* [2002] HCA 39 (19 August 2002) at 13.
- 34 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 208–209, 226–230 [78]–[89]; *Re RRT; ex p Aala* (2000) 204 CLR 82 at 131 [132], 133–135 [137]–[141].
- 35 For example, *MIEA v Wu Shan Liang* (1996) 185 CLR 259 at 272, 291.
- 36 DIMA, Migration Series Instruction (MSI) 357, Procedures for Unaccompanied wards in immigration detention facilities, 2 September 2002, para 3.3.7.
- 37 *Ibid.* See also *id.*, 14.1ff.
- 38 *Ibid.*, paras 3.4.1, 3.4.3. See also MSI 370, paras 3.3.1ff.
- 39 DIMA, MSI 370.
- 40 The management of the immigration detention facilities in Australia was privatised in late 1997 in a quite major policy change after the coalition Liberal-National Party came to power. During the period relevant to the young people in this project, the contractor was Australian Correctional Management Limited (ACM), a subsidiary of the global Group 4 Falck Global Solutions. In 2003–2004 a new tender was called and let to Global Solutions Limited (GSL) (Australia), then Group 4 Falck Global Solutions; see <www.gslpl.com.au/gsl/contracts/contracts.asp#ds> and <www.hreoc.gov.au/human_rights/asylum_seekers/>, both accessed 7 February 2006.
- 41 See <www.immi.gov.au/detention/group4/002_schedule_2.pdf>, [1.10], accessed 11 February 2005.
- 42 DIMA, Procedures Advice Manual (DIMA, Canberra), P 16/7/2003–27/8/2003.
- 43 See Refugee Review Tribunal (2002) ‘Guidelines on Children Giving Evidence’, <www.rrt.gov.au/publications/



- RRT%20Guidelines%20on%20Children%20Giving%20Evidence.pdf>.
- 44 On the practices adopted by the RRT, see 10.1 below.
- 45 This point is made in HREOC, above n8, p 722.
- 46 See <www.dfat.gov.au/illegal_immigration/introduction.html>, accessed 25 March 2005.
- 47 See also the Act’s Explanatory Memorandum, 1. For the Act and submissions made in respect thereto, see <www.aph.gov.au/Senate/committee/legcon_ctte/trafficking/info.htm>, accessed 25 March 2005.
- 48 Senator Chris Ellison, Second Reading Speech, <http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=1050905&TABLE=HANSARDS>, accessed 25 March 2005.
- 49 Article 3(c) provides that the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered trafficking in persons, even if it does not involve any of the means set forth in subpara (a) of this Article.
- 50 *Migration Regulations* reg 2.07AJ(3)(c)(i) and reg 2.07AK(3)(c)(i).

- 51 See Natalie O'Brien, 'Sex slaves are victims of crime, senator says', *The West Australian*, 10 March 2005.
- 52 *Migration Regulations* reg 2.07AJ(3)(b).
- 53 See, for example, submission by Project Respect, 17 February 2005, <www.aph.gov.au/Senate/committee/legcon_ctte/trafficking/submissions/sub06.pdf>, 19, accessed 24 March 2005.
- 54 Ms Moyle, HREOC, Committee Hansard, 23 February 2005, p 9.
- 55 See <www.osw.dpmc.gov.au/international/combating_people_trafficking/index.htm>, accessed 6 July 2004.
- 56 See <www.osw.dpmc.gov.au/publications/womensnews/2004/jan_feb_2004/wnews0104_victims_trafficking.htm>, accessed 6 July 2004.
- 57 See <www.osw.dpmc.gov.au/international/combating_people_trafficking/index.htm>, accessed 6 July 2004.
- 58 Minister Assisting the Prime Minister for the Status of Women, Senator Kay Patterson, <www.osw.dpmc.gov.au/publications/womensnews/2004/jan_feb_2004/wnews0104_victims_trafficking.htm>, accessed 6 July 2004.
- 59 See <www.osw.dpmc.gov.au/publications/womensnews/2004/jan_feb_2004/wnews104_victims_trafficking.htm>, accessed 6 July 2004.
- 60 See <www.dfat.gov.au/illegal_immigration/ausaid.html>, accessed 7 July 2004.
- 61 See *ibid*; also discussion between Mary Crock and AFP Liaison Officer, Melissa Northam, Bangkok, Thailand, 26 April 2005.
- 62 Migration Fraud and Investigations, 'People Trafficking' MSI-391: *People Trafficking* 13 February 2004, p 15.
- 63 See Michele Clark, 'Trafficking in Persons: An issue of Human Security' (2003) 4(2) *Journal of Human Development* 247.
- 64 Migration Fraud and Investigations, above n62, p 15.
- 65 *Id*, p 16. Note that the *Migration Act* s 198 requires that persons who have no visa or other authority to remain in Australia must be removed 'as soon as practicable'.
- 66 See *Paladin Child: The Safeguarding Children Strand of Maxim funded by Reflex : A Partnership Study of Child Migration to the UK via London Heathrow* Reflex, Metropolitan Police, the United Kingdom Immigration Service, Association of Directors of Social Services, NSPCC, London Borough of Hillingdon, 2004.
- 67 See Table 9 at 6.5 below.
- 68 See Minister Ruddock, 'Ruddock Announces Tough New Initiatives' Media Release, 13 October 1999.
- 69 If their case has not been finalised after the expiry of the 36-month period, and their TPV expires, they are automatically granted a subclass XC visa, which will allow them access to the same services as the subclass 785 and will last until the application is finalised. Finalisation is defined in s 5(9) of the *Migration Act* as the conclusion of any merits review (that is, RRT) proceedings. If a former TPV holder seeks to challenge the ruling of the RRT in the courts, a 'bridging visa' will usually be granted on terms that permit the holder to continue to work and receive limited government benefits.
- 70 See 5.2 above.
- 71 The *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act* 2001 (Cth) introduced a threshold test on TPV holders accessing a permanent protection visa (PPV) which will apply to those people who did not lodge an application for a PPV before 27 September 2001 and who fall within the following category which is set out in new reg 866.215: 'Since leaving their home country, they have resided in a country for a continuous period of seven days or more; and they could have sought and obtained effective protection either from: that country; or from the offices of the UNHCR located in that country.' The minister has a discretionary power to waive this requirement if it is in the public interest to do so. People who fall within this category will not be eligible for permanent visa but only further temporary protection.
- 72 See *Migration Regulations* Sch 2 subcl 866.222A. Note that the reference to penalties applies to the maximum that can be imposed. Refugees do not have to spend 12 months in prison.
- 73 Interview with Mary Crock, 1 April 2005. Also in attendance: Geraldine Read and Bill Gerigianis.
- 74 DIMA, Fact Sheet 68 'Temporary Protection Visa Holders Applying for Further Protection', p 1, <www.immi.gov.au/facts/68tpv_further.htm>, accessed 7 February 2006.



Identification and Reception

The foregoing discussion suggests that the laws and policies applicable to unaccompanied and separated child migrants are not particularly attuned to the challenges posed by the phenomenon of children travelling alone.

In this and the following parts of this report, the legislation and policies are considered from an operational perspective. The picture that emerges is of an administration that has generally been blind to children. While things may have begun to improve, major problems are still apparent in many areas. This chapter begins with a discussion of key issues relating to how unaccompanied and separated child migrants are identified — both as children and as children travelling alone. This is followed by consideration of how such children should be treated upon arrival in Australia. Part 7.2 addresses the issue of guardianship of migrant children, while Part 7.3 looks at the impact of immigration detention.

7.1 Identifying Need and Vulnerability: Spotting Separated Children and Making Age Determinations

Early identification of unaccompanied separated children is one of the key factors in addressing their protection concerns.¹

The project uncovered two potential problem areas at the crucial first step of identifying unaccompanied and separated children. The first was in the recognition of children travelling without the protection of a responsible adult. The second relates to the way in which age or childhood is determined.

Even in the days when the detention of all children was virtually automatic, the identification of a person as a child had consequences.

As a general rule, unaccompanied children were placed in separate compounds within the detention centres along with family groups. Children are also given welfare support upon release from detention.

As noted earlier, the fact that no child victim of trafficking has been identified since 1995 in Australia is a matter of grave concern. While it may be that Australia's border control laws are operating as an effective barrier against this aspect of child abuse, groups such as Child Wise were more sanguine in their assessment of the situation. Researchers found no evidence of any coordinated program to either train officials in the identification of child victims of trafficking or to orchestrate a campaign designed to both screen children arriving at major places of disembarkation and to seek out potential victims of child trafficking within the Australian community. To the extent to which Australia has engaged with the global phenomenon of trafficking in persons, much of the focus appears to be on the abuse of foreign children overseas (with the issue of child sex tourism). In practice, the identification of children travelling alone appeared often to be based on children either presenting as obvious solo-travellers or on children and/or non-relative adults volunteering information about the child's unaccompanied status.

While identifying the separated status of a child may present difficulties, determining the age of young people (so as to acknowledge minority status) can also pose problems. The participants in this study were probably typical of both their young peers and of many asylum seekers in that none of those who arrived without visas appear to have carried with them any documentation identifying who they were and what age they were.

All the young people interviewed for the study



reported that the immigration authorities, at least initially, relied on them to identify their own age. Some of the participants knew their date of birth. For example, *Sam* and *Halimi* were both told their dates of birth by a relative before they left, and were instructed that it was important that they remember them. *Tony* also knew his age but was given an incorrect date of birth when he arrived because the translator did not understand him. He informed DIMA later of the error but was reportedly told that they could not change it.

If an opinion on age was not forthcoming from the young people studied, an estimate appears to have been made based on the participant's appearance. The available policy guidelines are remarkably silent on this point. Reference is made to the importance of using the reception process to identify and record all 'unaccompanied wards'. Staff are enjoined to 'ask families and other detainees whether they are caring for children other than their own and whether they know of any children who are separated from their parents or relatives'. The guidelines state (at 5.3.3) that the detention service provider 'should focus on identifying children who are under

18 years and who are not accompanied by a parent or relative who is over 21 years', adding at 5.3.4:

*In identifying unaccompanied wards, officers should be aware that some families may attempt to conceal family linkages in order to take advantage of special services for unaccompanied wards.*²

Other participants show that reliance on self-assessment and reporting did not guarantee accuracy. When *Man* was asked his age, he asserted that he was 20, although he was probably at least three years younger and therefore a minor. *Man* explained that he did this because he did not want to be treated like a child. This was never corrected, and his original status as a separated child has not been recorded. In the result, he was placed within the general (non-segregated) section of his detention centre and was released into the community without any support services at all. Unsurprisingly, he presented with noticeable life management problems.

Some participants did not know their ages, or did not know the exact day of birth because (as several participants asserted) birthdays have less significance in their culture than is the case in Australia. In these cases, determining age became somewhat haphazard. For example, when *GS* arrived in Australia and did not know his age, he relied on the suggestions of other people on his boat and picked an arbitrary date. The suggestion was made that the birth dates allocated to unaccompanied children could depend on the interpreter assigned to the child. Some interpreters were described as 'lazy' or uncaring, ascribing random dates such as 1 January or 31 December in a given year as the date of birth: it took time to translate actual birthdays where the child could only refer to the Islamic calendar or to broadly described seasons or feasts.³

At least one of the young people studied presented with papers that recorded date of birth as

0/0/year — a configuration that posed problems for the young man when attempting to access social services after his release from detention. Another produced a case file showing papers where an identified case officer had struck out the written age of 17 on an application, replacing it with the annotation '19 years'. The annotation was at odds with the age ascribed to the young man in the various written decisions made.

Sydney Legal Aid solicitor, Liz Biok, complained that DIMA officers seem to rely heavily on Telephone Interpreting Service interpreters during initial screening processes. These interpreters often lack the expertise necessary or are hampered by poor technology and by their physical absence from the interviewing room.⁴

In contested cases, there appears to have been a practice of referring individuals to radiologists who typically performed a bone scan of the person's wrist. For example, *GS*'s birth date was adjusted after such a bone scan. Some wrist x-rays were carried out well after the reception (and detention) of the young person. *Sam*, *Tony*, *Halimi* and at least five of the 14 young people studied in 2003 underwent such procedures.

UNHCR Guidelines state that if the assessment of a child's age is necessary, the following principles should be observed:

- a) *Such an assessment should take into account not only the physical appearance of the child but also his/her psychological maturity;*
- b) *When scientific procedures are used in order to determine the age of a child, due allowance should be made for a margin of error. Such methods must be safe and respect human dignity; and*
- c) *The child should be given the benefit of the doubt if the exact age is uncertain.*⁵

In this study it was not evident that the UNHCR Guidelines on age determination were complied with by DIMA. No attempt appears to have been made to make a holistic assessment of the young people by having regard to their overall physical development and psychological maturity. The regime for bone scanning could not be described as respectful of the human dignity of the children.

However, in a number of cases, the worst aspect of the practice was that an important objective for determining age was the collection of credibility evidence. In other words, the finding that a child was older than claimed was used to support conclusions that the claimant was disingenuous, manipulative or otherwise not to be believed. In many of the cases where the child's origin was questioned — and the child was subjected to language testing — they were also forced to undergo bone scans to test their age. From the child's point of view, adverse findings on both age and country of origin are extremely difficult to challenge.⁶

While age determination is vital to identify children in greatest need, using age as evidence of credibility is as unfair as it is unsafe.

Where a child comes from a culture that does not mark or celebrate birthdays or from a culture that uses a non-Western calendar, it is to be expected that a child may not place as much emphasis on the date of his or her birth as someone raised in an age-sensitive culture.

A child's inability to give an accurate estimate of age says little about the child's claims for refugee status. Making contradictions between stated age and objective (physical) evidence an issue is plainly at odds with UNHCR's recommendation that children in these circumstances be given the benefit of the doubt.

7.2 The Guardianship of Unaccompanied and Separated Children

If the phenomenon of unaccompanied and separated children seeking asylum is relatively novel in Australia, the notion of non-citizen children travelling alone is not (see 2.2.1 above). The central problem seems to be that the legislation passed to create a protective scheme for these children did not envisage situations where the interests of the child and those of the government might differ or even be in open conflict.

While Australian immigration law makes no distinction between adults and children, guardianship laws do confer protection on immigrant children, to the extent that any person under the age of 18 years, with no parent or relative to care for them, must have a legal guardian. The guardianship requirement applies to immigrant children whether they are in detention or released into the wider community on protection or bridging visas. In spirit and in form, the domestic legislation is supposed to implement the care and assistance obligation contained in the CRC and repeatedly emphasised by UNHCR.

Guardianship is the legally recognised relationship between a competent adult and a disadvantaged person who does not have the legal capacity to exercise some or all of her or his rights.⁷ A guardian has a range of powers, rights and duties at common law and in equity. The guardian has two essential duties. The first is to exercise rights on behalf of the child; and the second is to protect the interests of the child. UNHCR recommends that a guardian be appointed for an unaccompanied or separated child as soon as he or she is identified. Around half of the children examined in this study were over the age of 16, mature adolescents who do not require daily care and assistance. Such young people do, however, require mentoring and guidance in an unfamiliar



Child from Kosovo, East Hill Safe Haven, Sydney, 1999.
Photograph ©Penelope Iredell. National Library of Australia.

environment in relation to their schooling and vocational activities. Under the CRC, all persons under the age of 18, irrespective of their maturity or level of education, are entitled to their rights under the Convention. The age of 18 is not an arbitrary dividing line. That is the point at which an individual obtains his or her majority and gains entry into adult society, the ability to exercise all of the rights and duties exercisable by an adult.⁸ As is evident from the children studied, the amount and type of care and assistance required by a person under the age of 18 will vary significantly from case to case.

What is clear is that each case ought to be dealt with individually, ensuring that the best interests of child are kept paramount in every decision relating to the child. For older children the principle that children should be able to participate fully in any process affecting their lives is of equal importance.

As noted earlier (see 2.2.1 above), the framework for the guardianship of unaccompanied children

residing in Australia is found in the *Immigration (Guardianship of Children) Act 1946* (Cth) (the *IGOC Act*). This Act applies to any person under the age of 18, who enters Australia without a parent, intending adoptive parent or relative over 21 years of age,⁹ and who intends to become a permanent Australian resident. Under this Act, the Minister for Immigration is deemed to be the legal guardian of every child so defined until the child reaches majority, leaves Australia permanently or otherwise ceases to fall within the provisions of the Act.¹⁰ The Federal Court has interpreted this provision as conferring on the minister all of the rights, duties and obligations of a guardian at general law.¹¹ In theory, this means that the minister is able to incur both equitable and statutory liability. The potential for tort liability also exists where the minister fails to provide a reasonable standard of care to a child under her or his care. Where the other elements of a tort action are made out (loss consequential upon the wrong), the minister may be required to pay damages.¹²

The *IGOC Act* does not discriminate between children on the basis of their method or point of entry into Australia. As a result, it applies to all children, irrespective of where or how they enter Australia. The provisions therefore include all unaccompanied and separated children who have entered Australia to seek permanent residency, whether in ‘excised offshore places’,¹³ in Australian territorial waters, in detention or in the community. With respect to the effect of policies and legislation comprising the ‘Pacific Strategy’, the minister has argued that these guardianship obligations cease as soon the child lands in one of the ‘declared countries’ of Nauru or Papua New Guinea.¹⁴

The *IGOC Act* has always permitted the Minister for Immigration to delegate most guardianship responsibilities to State authorities. Successive delegations have occurred since 1992. Many of the

minister's delegates are officers of the child welfare authorities in each jurisdiction. However, the minister also delegates responsibility to the DIMA manager and other staff at each detention centre for the duration of each unaccompanied child's detention. While the original object of the delegation was to permit the national coordination of State child welfare services, the Immigration Minister retains supervisory powers and retains ultimate responsibility for the welfare of these children.

The potential for conflicts of interest is implicit in the three roles played by the minister: as guardian, as the final decision-maker in visa applications and as the instigator of detention for those children who arrive without authorisation. Though possible, it is difficult to reconcile the minister's decision-making functions with the fiduciary obligations attaching to the role as guardian, particularly the obligation to act in the best interests of the children under ministerial care.

The minister was also compelled by statute to detain these children until June 2005 (when a presumption in favour of release was introduced). This role is even more difficult to reconcile with the fiduciary obligations of a guardian. The minister would appear to be constantly at risk of breaching her or his duties with respect to these children.

At the height of the surge in the number of unaccompanied and separated children seeking asylum in the late 1990s, some lawyers and migration agents drew attention to the conflict in the roles of the Minister for Immigration. Among other things, they asked questions about the legal capacity of young people to lodge asylum claims in their own right: one unaccompanied child was eight or nine years of age when he arrived. Lawyer David Manne (of RILC) commented:

“[W]e...made a bit of a nuisance of ourselves because we raised a preliminary problem when we realised that we were dealing with 13, 14, 15 year olds...on their own. We wanted to know who the guardian was. We said our role is not to be guardian, our role is as legal adviser. We were concerned to have a guardian to get instructions from or to assist with relevant matters. This involved a rather interesting process, an unusual one in my experience. When I conveyed this as the team leader to the Department of Immigration on site that we had a problem because so far as we understood under the Act [children did not have the legal capacity to make refugee claims],...we were met with surprise. In fact there was a profound surprise and clearly no solid view as to the position of the department. So it was basically referred to Canberra...They came back with an option that, wait for it, the person with the delegated power from the minister, the person from the Department of Immigration delegated the power who was working at [X detention centre] could sign as guardian on behalf of the applicant.”¹⁵

The clash of interests embodied in the multiple roles conferred on the Minister for Immigration was demonstrated starkly in the cases of two Kenyan boys who entered Australia in April 1998 as stowaways on board a cargo ship. The Federal Court gave the pair the designations *X* and *Y* to protect their identity in view of their refugee claims and their youth. The two were refused refugee status and steps were taken to remove them from Australia before the statutory period of 28 days allowed for appeal to the Federal Court had expired. The ensuing drama saw the young men flown to Singapore and back,¹⁶ then returned to immigration detention. The minister's actions were challenged as a contempt of court and as a breach of his obligations as guardian under the *IGOC Act*.¹⁷ It was



alleged that the minister was obligated to care for the two through the provision of everything from accommodation, health care and living expenses to the grant of appropriate visas.

The minister's response to these claims was to argue that if the young men *were* minors, the pair had no legal capacity to bring a legal action on their own behalf. On the other hand, Order 43 r 4(3) of the *Federal Court Rules* prevented the minister from acting as a tutor or guardian *ad litem* for the purposes of bringing the action, because, being the Respondent in the proceedings, he had an interest adverse to the applicants.¹⁸

North J reasoned in *X v MIMA* that the conflict of interest inherent in the Immigration Minister's multiple roles should not operate to frustrate the capacity of a child to initiate legal action to protect his or her interests, drawing support for his analysis from both the common law and the 'best interests of the child' principle enshrined in the CRC. His Honour set out the factors that should be considered in deciding how to proceed:

"It will be necessary for the Court to take into account the age, understanding and capacity of the child to determine the extent to which the child requires guidance and assistance. The Court will also evaluate the nature of the rights asserted and the urgency attending the determination of those rights. It will take account of the ease or otherwise of the child finding a tutor to act. An important consideration against the requirement that a tutor be appointed would be that such a requirement would stifle the litigation. The Court will also assess whether there will be undue prejudice to the opposite party if no tutor is appointed to be responsible for costs in the event that the proceedings fail."¹⁹

His Honour's finding that unaccompanied and separated children can have the legal capacity to bring actions on their own behalf has been confirmed in a number of subsequent cases.²⁰ As the litigation for *X* and *Y* presaged, however, the assertion of this 'right' in young asylum seekers has done little to address the substantive disadvantages children face as litigators: most attempts to construct legal rights to be represented or otherwise assisted before the courts have been unsuccessful.²¹

Some aspects of the conflict have been addressed by MSI 370 and by changes to the *Migration Act* 1958 (Cth) in July 2005. The MSI proceeds on the presumption (now bolstered by the Act) that the best interests of a child usually require that child to be released from detention. The minister and by delegation, department managers, are obligated to address this avenue in relation to unaccompanied and separated children who are taken into detention.

Criticism has been levelled at the policy documents for their failure to adequately address both the minister's conflict and the insufficient expertise of departmental managers.²²

The central problem remains that children seeking asylum alone in Australia do not have guardians appointed to act in their best interests until they have been through almost the entirety of any immigration process.

The appointment of ‘mentors’ within the immigration detention community (see 6.3 above) is no substitute. Legal Aid solicitors in Sydney pointed out that more care could be taken to ensure that siblings are empowered to play more of a mentoring role than has generally been the case. In this respect it was thought that the laws on guardianship could be more flexible, but that the need for ongoing monitoring of any guardianship arrangement is paramount.²³

In Brisbane, IAAAS lawyer, Clyde Cosentino, commented that none of his young charges were under any illusion about who their real guardians were. He said:

“I can probably say that they weren’t thinking of the minister as their legal guardian at any stage. That is interesting enough. They saw Jackie Williams and the other people at Mercy Families [Mercy Family Welfare], all the people who were helping them on a daily basis. As far as they were concerned the minister in their eyes was this person who was either going to grant them a visa or not grant them a visa. That is all they saw in the minister.”²⁴



As explored below, the situation has undoubtedly improved with the move away from mandatory detention. However, the problem remains that unaccompanied children are still required to negotiate important stages in their interactions with immigration authorities without an effective guardian.

7.3 Reception Arrangements: Detention Experiences

“They did nothing to help me — just put me in prison.” — Homer

For all practical purposes, the young people studied for this report did not form any meaningful mentoring relationships until after they left the detention environment. The young people were allocated IAAAS advisers in the course of their interactions with the immigration authorities (see Chapter 8 below). However, the role assumed by these advisers was limited to narrow aspects of the legal process (and not all IAAAS advisers have legal training). The appointments were no substitute for the personal and psychological support of an effective guardian.

After a brief stay in transit at either Darwin or Christmas Island, most of the participants were transported to remote immigration detention centres (IDCs). The young people were spread between Curtin and Port Hedland IDCs in Western Australia, and Woomera and Baxter IDCs in South Australia, with some spending time also in Sydney’s Villawood IDC. The experiences of the four detained on Christmas Island and on Nauru are discussed in Chapter 13.

Room in the Separation Unit, Baxter Immigration Reception and Processing Centre, South Australia, 2002. Photograph ©Damian McDonald. National Library of Australia.



The November Compound, Woomera Immigration Detention Centre, South Australia. Photograph obtained from the Human Rights and Equal Opportunity Commission's National Inquiry into Children in Immigration Detention.

“They woke me up like 2 am and told me join the line. They searched me, and then they told me to board the bus. The bus took us to detention.” — Stephen

Of those detained, the period spent in detention ranged from one and a half months to four years or more before release or final determination (see 2.4 above). A number were placed into ‘community detention’, which meant that they lived in the care of a private individual but were considered at law to be in detention. It is not clear on what basis all these decisions were made, although in some instances the children were released following petitions from individuals in the community. Such arrangements often required the carer to undertake not to allow the ‘detained’ child out of their immediate control. Placed in foster homes to be cared for by Australian families, the children’s living quarters, together with other named areas, were formally

designated ‘immigration detention centres’. They were then allowed to go to school in the community.

In Sydney, Legal Aid lawyer, Liz Biok complained that she had had (male) unaccompanied minors who were detained initially in Stage I of Villawood Immigration Detention Centre.²⁵ This part of the facility is usually reserved for difficult and dangerous detainees, such as persons being held prior to deportation on criminal grounds. She claimed that the young men were at risk of abuse and for virtually all the experience was traumatic.

The questions put to the participants did not dwell on their experience of immigration detention: so much has been written already on this subject.²⁶ Nevertheless, it is difficult to avoid the conclusion that many of the negative aspects of the young peoples’ first experiences of Australian bureaucracy had their roots in this aspect of Australia’s prevailing law and policy. Immigration detention meant physical and emotional privation, isolation from much needed legal assistance and, arguably, an otherwise degraded administrative experience. If the children were fed, clothed and housed, they suffered multiple emotional and physical deprivations. At least two of the case files examined contained copies of sheaves



of paper obtained under Freedom of Information requests that proved to be daily ‘incident’ reports or other records kept by the detention authorities of the special surveillance measures put in place to ensure that the young person in question did not commit suicide or engage in acts of self harm.

The children lost their freedom. In some detention centres (Curtin and Woomera are examples in point) the children were given a processing number which was used in preference to proper names in any interactions with the detention bureaucracy. This practice has now ceased. However, in centres where the norm among detention centre guards was to refer to detainees by number, the children also lost their names and the dignity of their identity. Michael Walker, a seasoned agent who handled over 1500 detention cases (including a number of unaccompanied children) commented:

“[When] I first started [in 2000], everyone was called by number. It didn’t matter who you were. And that was anathema to most of us. But it was the only way we could manage our files appropriately, particularly at the peak of it and we had so many files we had to manage. We had to go by number because we were dealing over the phone with personnel at the relevant centres.... Certainly the staff, as it evolved, into 2001–2002, names were being called out as well as numbers.”²⁷

Although experiences in detention were not a specific focus of this research, it is important to understand the context in which the participants’ refugee status determinations were undertaken.

The initial conditions under which children are inducted into a process can affect the children’s ability to understand what is required of them; their ability to trust the officer enough to disclose experiences of persecution; and their ability to cope with the associated stress.

“They were good, almost every one of them was nice, but a few of them was a little bit like, like, you can say...they didn’t treat us very good, but most of them was good.” — *Galileo* talking about the ACM guards

Some of the participants recognised that they were being treated differently from the adult detainees. As HREOC notes, the prevailing practice was to isolate unaccompanied and separated children from the general population in detention upon arrival, and to expedite first interviews (see 8.2 below). Once admitted to the status determination procedures, the children were housed separately from the general population. The participants’ comments suggest that this regime had several shortcomings.

The most obvious was that the ‘special’ treatment only applied if the unaccompanied or separated child passed the first ‘screening-in’ test. *Halimi* (15) and her brother (11) did not succeed in this regard, with the result that eight months was spent in mixed detention accommodation with men and women of varying ages and ethnicities. Extremely fearful of the other detainees, *Halimi* spoke of being afraid to go to the toilets at night: ‘I lived with lots of single men and they are very bad man... They are shouting... use bad words’.

Another negative side of the preferential treatment of unaccompanied and separated children

was that upon reaching the age of 18, the young people would be removed from their peer group and otherwise become ineligible for special treatment. For example, when the situation in one centre became particularly unstable, a number of the unaccompanied and separated children were transferred into community care. *Sam*, who had just turned 18, was not eligible. According to subsequent psychological reports, this event was a major contributing factor to his eventual descent into acute mental illness.

Homer was placed with unaccompanied and separated children in separate accommodation but did not think minors received any special treatment: ‘They were treating me the same as the others.’

The period in which the participants were in detention was highly volatile. There were riots and hunger strikes and repeated incidents where asylum seekers harmed themselves. *Homer* estimated there was a strike practically every week while he was in detention. In some camps the children would be taken to another part of the centre and separated from adults when there were riots but this did not necessarily stop them being affected. A number of *Galileo’s* friends engaged in acts of self harm. His friends had drunk shampoo and others had sewn their lips together. People sewing their lips together



Woomera Immigration Reception and Processing Centre, South Australia. Photograph © Peter Mathew.

was ‘common. That used to happen every day. My friends did that. It’s just very common’.

“Sometimes I thought it’s as if you are disconnected from all world, you’re just inside there and it’s as if your life has stopped. You’re not doing anything; it’s like... I don’t know, it’s hard to explain — too much disappointing. It’s very, very disappointing to be there.

The thing is, you think what is your fault? Leaving your country because it was war-torn, people had been dying — what’s your crime? Cause you came here to save your life and to seek like a better life?” — *Galileo*

The period during which the Woomera detention centre in South Australia and Curtin detention centre in Western Australia were racked with riots and hunger strikes was also traumatic for the lawyers and agents engaged to help the young asylum seekers. Volunteer lawyer, Robert McDonald, had this to say about his experiences in January 2002:

“These kids have grown up a lot. They aren’t like little kids. Like anyone, they were just bloody frustrated. And it was terrible having to go and see these guys having not heard anything. Making calls and not getting a response. You send faxes and don’t get any response. They would feel completely despondent at times. To the extent that during the hunger strike they wanted to self harm and commit suicide.

Some of them had badly self harmed before. You’d see kids with cuts all up their arms, and they’re deep cuts. But the interesting thing about the hunger strike was that all of the psychiatric reports that I saw from FAYS [Family and Youth Services] afterwards showed that they seemed absolutely determined, that they did do the right thing by pulling them [out of detention and into

Identification and Reception | *Stephen's Story*

When we met *Stephen* he had a mop of curly hair. He was bright and talkative — willing to be the spokesman when we sat around one evening chatting with a group of young Hazara refugees. He told us his story of personal hardships with a directness and lack of self pity that gave him an air of maturity way beyond his chronological age.

In spite of completing only three years of schooling in Afghanistan, *Stephen* was then undertaking Year 12 in a local high school and is excelling. He would like to go to university and has dedicated himself to his studies. It is clear that he is both very smart and very motivated.

Asked why he had come to Australia, *Stephen* explains that the Taliban had captured his region. They took the people's weapons and then came for the young boys, going from house to house asking for people's children. Everyone was afraid that their house and their son would be next. The village people would pray and pray for the Taliban to go but they kept rounding up the young men to send to the front to fight. The boys who were taken never returned to the village.

Stephen's older brother tried to run away to avoid the Taliban but he has not been heard from for many years. *Stephen's* family suspect that he was captured and killed. *Stephen* joined the vast exodus of young Hazara boys who feared forced conscription when he was 17 years old.

He was smuggled out of Afghanistan but did not know where he was going. 'I was confused, I only found out I was coming to Australia when I was in Indonesia!' When he arrived in Australia he was baffled and feared that he had been duped about his destination:



'I didn't think the detention centre was Australia, it was so different to anything I expected...

I cannot begin to describe it...they gave me a number when I arrived and they said you will be known as this number now not your name... Can you believe it? I became a number as soon as I arrived'.

psychiatric care].... Personally it affected me. In nine days I had five hours sleep. It was just really unpleasant.... I'd never want to do it again. The kids all have long-term psychological problems now. They tell me their experiences about coming out of Afghanistan and being smuggled here and there, and eventually getting to Australia... those who made it. My view is that the detention centre experience is probably more traumatic than that. The idea of being locked up without a time frame is a killer.

I've seen too many things in the detention centre. One of the things I saw was a kid who was 19, who'd just made it out of the UAM age group. He was leaving the interview room at the centre of the detention centre. The same rooms that the department would tell people whether they'd got their visas or not. This kid walked out, looked at me with this crazed look in his eyes. Pulled a razor blade out from behind his teeth, pulled a razor blade out and just started slashing his wrists. Blood was going everywhere. That's what the process can do to people. It's just not pleasant or necessary, let alone being a breach of the international rights of the child. That didn't seem to matter."²⁸

A number of the young people interviewed spoke of spending long hours lying on their beds in their sleeping quarters. Nightmares and sleeping problems appear to have been common: a fact confirmed by the medical reports placed on some of the participants' case files. *Sam*, although over 18 by the time he left detention, was diagnosed with severe post traumatic stress disorder (PTSD) with disassociative episodes and had to be repeatedly hospitalised. He made a number of attempts on his life before being released into community detention.

For all the participants, the detention environment was characterised by distrust, fear and confusion. Many of those interviewed spoke of

being frightened because they didn't know what was going to happen and didn't know whom they could trust.

“Outside our room we had nothing: no trees or grass. All the people were upset. Sometimes they are crying; sometimes they are fighting. It was very dangerous.” — Halimi

There was a high level of distrust in the camps, including distrust of the interpreters, the department and other detainees. *Stephen* believed that DIMA had recruited other detainees to inform on the detention population. As a consequence he said he was afraid to leave his room in case other people read his documents. He was 15 years old.

Other young people interviewed agreed that their experiences in detention were harsh, but preferred to dwell on the friendships that they had made in the camps among young people of similar age and experience. These friendships are reflected in the successful creation of two soccer teams dominated by separated and unaccompanied child refugees — the Tiger 11 in Brisbane and the Eagles in Sydney. Members from both teams interviewed for the project reported that the young detainees had spent many hours in detention playing soccer. One described how he had become so depressed in detention that he had taken to his bed and made up his mind that he would just lie there and die. Another young detainee came into his room and dragged him physically into the yard to play soccer. Because the young man had not been eating and drinking, he quickly became faint with the exertion of chasing the ball, and passed out. He said: ‘When I woke up, I saw this ring of faces looking down at me and I thought ‘this is my new family’. The young man has remained firm friends with the boy who first dragged him from his bed. In all of the major cities visited for this report, many of the young refugees

who arrived as separated or unaccompanied minors appear to have sought out the company of peers when released from detention. Many are still living with each other in shared accommodation (although others appear keen to avoid all contact with former detainees).

While the experiences of all of the participants was not uniformly traumatic, the context for the vast majority was one of fear and frustration. HREOC argues strongly that Australia's immigration detention regime has been very damaging to children.²⁹ There was nothing in our research to contradict the commission's findings. All of the participants survived considerable dangers and experienced great loss in making landfall in Australia. All were greeted with incarceration rather than support. At a time when they, as adolescents, were forming their identity, their name was replaced by a number.

Former Commissioner for Human Rights, Dr Sev Ozdowski OAM, argues that the damage caused to children by detention is likely to impact ultimately on Australian society as a whole. This is because almost all of the children in immigration detention between 1999 and 2003 have eventually become members of the Australian community.³⁰ The mental health problems suffered by these children in response to their detention are likely to continue on into adulthood.

In this respect, the long-term effects of Australia's policy of incarceration are of concern. Although outside of the scope of the present inquiry, the young people studied for this project suggest that there may be parallels to be found between detention experiences (and in particular the length of time spent in detention) and a refugee's later health, wellbeing and success in settling into the community. Two young people who were firm friends in detention provide examples as to why longitudinal



Drawing by child detainee in Woomera, South Australia. Photograph obtained from the Human Rights and Equal Opportunity Commission's National Inquiry into Children in Immigration Detention.

research is needed in this area. One was detained for six weeks, the other for over a year. The first is now at university, the second barely able to sustain doing casual work as a labourer.

Endnotes

- 1 See UNHCR Global Consultations on International Protection, Refugee Children, 4th Meeting, EC/GC/02/9, 25 April 2002.
- 2 See DIMA, MSI 370, 5.3.1ff.
- 3 Determining precise dates in Afghanistan is particularly complicated because different calendars have been used in the recent past. The Taliban replaced the traditional solar calendar in 1999 with one based on lunar cycles. The solar calendar was restored in February 2002. Note also that the ascription of a date such as 31 December can have the effect of underestimating by months if not a whole year the actual age of a child. This is why some refugee advocates have acted to change ascribed dates of birth to 1 January in a given year.
- 4 Interview with Mary Crock, 1 April 2005. Also in attendance: Geraldine Read and Bill Gerigianis.

- 5 UNHCR (1997) Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, para 5.51.
 - 6 The irony here is that the margin of error in tests such as bone scans is so great that assessments are actually easy to challenge at a legal level (were the children to have legal representation).
 - 7 See Terry Carney, *Law at the Margins: Towards Social Participation* (Oxford University Press, Melbourne, 1991), pp 80–81.
 - 8 On this point, see UNHCR, above n5, p 8.
 - 9 A child who enters with a relative aged over 21 can be made subject to legislation if the relative consents and the Minister for Immigration believes it would be in the best interests of the child for an order to be made. See *IGOC Act* ss 4AAA(4) and 4AA. These children are referred to as ‘wards’.
 - 10 See *IGOC Act* s 6.
 - 11 See *X v MIMA* (1999) 92 FCR 524.
 - 12 See Peter Lachore, ‘Australia’s Treatment of Unaccompanied Child Asylum Seekers Considered in the Context of International Human Rights Law’, Unpublished Honours Thesis, Murdoch University (2002), pp 13–14, citing *Clay v Clay* (2001) 202 CLR 410 at 430; and *Bennett v Minister of Community Welfare* (1992) 176 CLR 408; and *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 347 (Brennan J). Copy on file with author.
 - 13 See discussion of the ‘Pacific Strategy’ in Chapters 6 and 13.
 - 14 See HREOC, *A Last Resort? National Inquiry into Children in Immigration Detention* (AGPS, Canberra, 2004), p 133. See further Chapter 13. Note, however, that the minister is required to consent in writing to the removal of any such child from Australia. This raises questions about whether such decisions have been made in the best interests of the children involved.
 - 15 Interview with Mary Crock, 3 March 2005.
 - 16 In fact, the pair was put on a plane to Singapore on 3 August 1998. On the same day urgent applications were made to the Federal Court to prevent the young men’s removal from Australia, together with applications seeking judicial review of the RRT’s decisions.
- The court granted the order preventing the applicants from leaving Australia but the plane took off anyway. After discussions with the airline, it was agreed that the applicants would be issued with visas allowing them to return to Australia after the plane had made its scheduled trip to Singapore. Background information on this case was supplied by Melbourne solicitor, Erskine Rodan and by the children’s barrister, Debbie Mortimer (both interviewed by Mary Crock, March 2005).
- 17 *X v MIMA* (1999) 92 FCR 524.
 - 18 *Ibid.*
 - 19 *Id* at [62].
 - 20 See, for example, *SFTB v MIMIA* (2003) 129 FCR 222.
 - 21 See Mary Crock, ‘Lonely Refuge: Judicial Responses to Separated Children Seeking Refugee Protection in Australia’ (2005) 22(2) *Law in Context* 120.
 - 22 HREOC, above n14, p 730, para 14.4.4.
 - 23 Liz Biok, Geraldine Read and Bill Gerigianis, interview with Mary Crock, 1 April 2005.
 - 24 Interview with Mary Crock, 20 April 2005.
 - 25 Interview with Mary Crock, 1 April 2005. Also in attendance: Geraldine Read and Bill Gerigianis.
 - 26 See, for example, HREOC, above n14; (2004) 27 *International Journal of Law and Psychiatry — Special Issue on Migration, Mental Health and Human Rights*: see Zachary Steel, Naomi Frommer and Derrick Silove, ‘Failing to Understand: Refugee determination and the traumatized applicant’ at 511–528; and Terry Hutchinson and Fiona Martin, ‘Australia’s Human Rights Obligations Relating to the Mental Health of Refugee Children in Detention’ at 529–548; and Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (The Federation Press, Sydney, 2006), ch 11 ‘Conditions in Detention’.
 - 27 Interview with Mary Crock, 2 March 2004.
 - 28 Interview with Jessie Hohmann, 1 January 2005.
 - 29 HREOC, above n14.
 - 30 See *id*, p 2..



Entering the Refugee Status Determination System

8.1 The Training of Decision-Makers

From an administrative perspective, one of the most significant determinants of success or failure in a system is the skill of the decision-makers. This depends in turn on the selection and training of key officials.

Without the cooperation of DIMA, it was difficult to make much of an assessment of these aspects of Australia's immigration bureaucracy. DIMA was asked to respond to a series of questions in writing that included inquiries about training. In reply, the department sent a short letter enclosing a CD containing copies of the migration legislation (the *Migration Act* 1958 (Cth) and *Migration Regulations* 1994 (Cth)) and the policies guidelines relating to 'unaccompanied minors'. Prior to the introduction of the guidelines produced by DIMA in 2002, the researchers could find no evidence of decision-makers being given any specific training either in the identification of unaccompanied or

separated children or in the processing of refugee claims.

In response to its inquiries, HREOC reported that its researchers:

*were provided with some course materials from March 2000 which has a document entitled 'interviewing skills' which has a half page discussion about children. There was also a one-off training in July 2001 which had as part of a 2 day course on 'investigative interviewing' information on children that lasted a total of 90 minutes.*¹

In the concluding phases of the project, DIMA provided the following comment on the issue of training:



Training in interview techniques is provided to new case officers during their Induction program and then as part of on-the-job training where they observe interviews for approximately one month before interviewing applicants themselves. New case officers are also provided with the UNHCR guide on ‘Interviewing applicant’s for refugee status’.

Training for the sensitive treatment of particular client caseloads (such as minors) is provided under case manager induction modules addressing cross cultural communications.

Mentoring processes for new case managers also allow case managers an opportunity to clarify policy and procedures in relation to unaccompanied minors.²

In response to written questions on this subject, the RRT provided the following information on the training of RRT members. Again, no indication is given about when the training programs were introduced:

Professional development of Members

Upon appointment all Members are given intensive

induction training and are provided with wide ranging guidance on the proper conduct of reviews.

An ongoing and comprehensive program of professional development and training is also provided to Members, which includes advice on dealing appropriately with applicants who are unaccompanied minors. The Tribunal regularly provides professional development to Members in relation to applicants who are torture and trauma victims using the Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS) and in relation to cross-cultural sensitivities, both including reference, as appropriate, to minors. The issue of minors has also been addressed in more general training courses for Members such as those covering questioning techniques.³

Without prejudice to the programs that have now been established for the training of personnel involved in the processing of refugee claims by unaccompanied and separated children, the impression gained in research for this report is that the learning curve in Australia has been steep.

The comments of advocates and our own experience in observing hearings involving unaccompanied children suggest that both DIMA officers and RRT members are now much more sensitive to the needs of young people seeking asylum alone than was the case when the young asylum seekers first started to arrive in the late 1990s.

One long time migration agent, with experience of assisting more than 180 asylum seekers in detention over the period in question, including a number of unaccompanied and separated children, had this to say:

“What struck me was just how much the DIMA officers were floundering [when they first encountered children seeking asylum alone]. They knew they shouldn’t be doing what they were doing. It was just ridiculous. It was, like, they hadn’t been trained. They were uncomfortable...

It struck me that the officers were feeling frustrated themselves, that they hadn’t had the training themselves to deal with the process. They were uncomfortable and unsure as to how to deal with the minors. In hindsight now, it is clear to me that none of us were prepared.

We should have been given, as migration agents, special training — DIMA officers, interpreters, migration agents, all of us. We should have been given special training and we weren’t.”⁴

8.2 The Screening-In Process

In practice, primary refugee status determination involves three phases, each of which will be considered in turn. The first phase is a process known as ‘screening in’. The second involves the allocation of an adviser and the preparation of

written submissions. The third phase, which will be considered in the next chapter, is the formal interview by the DIMA ‘case officer’.

The first point to make is that the identification of a child or young person as ‘separated’ or ‘unaccompanied’ does not lead immediately to the grant of any sort of visa. This is so even where such children arrive embedded in a group of obvious asylum seekers.

To be considered for protection as refugees, all asylum seekers who enter Australia without a valid visa must demonstrate that they are claiming asylum and that their claim is not manifestly unfounded. Only then will they be permitted to make a formal written application for a protection visa. No exception is made for unaccompanied and separated children.

The decision to allow an asylum seeker to make a formal application for protection is made on the basis of a ‘screening-in’ interview. This involves interviewing a prospective claimant alone — with an interpreter if needed but no adviser of any kind (see 6.2.1 above).

The ‘screening-in’ interviews are carried out at the airport for unauthorised plane arrivals or in immigration detention centres for those arriving by boat without visas. Detainees in the remote detention centres are initially detained in a separate section of the detention centre and have no access to other detainees. They are not permitted to join the other detainees in the main section of the detention centre until they have been ‘screened in’. Detainees are not permitted to make telephone calls or communicate with anyone in the Australian community when in ‘separation immigration detention’ other than with HREOC and the Ombudsman.⁵

In most cases, children who arrive within family groups are not subjected to a screening-in interview.

Their claims are imputed from the interview with their parents. Unaccompanied and separated children, however, are interviewed separately.⁶

DIMA suggested in its submission to HREOC's detention inquiry that there was a possibility that children 'of tender age' could be allowed to have another person present when the child was being interviewed.⁷ However, it was conceded that there was no policy, directive or instruction to the effect that such responsible adults should be appointed in all cases.⁸

Although a number of the participants in this study were aged 13 at time of arrival — one had a sibling who was even younger — all were apparently interviewed alone and without the benefit of any form of briefing on the law or process they were entering.⁹

All the advisers interviewed for this project confirmed that they did not have any contact with their clients until they had been through this screening process. Although agent Michael Walker suggested that in the 'early' days (in and before 1999) agents were given transcripts of the screening-in interviews, by 2000 interview tapes were no longer being released.¹⁰

As Sydney Legal Aid solicitor, Liz Biok, noted, the contrast with any form of legal process in New South Wales State law involving children — or federal family law — could not be more stark. Under these systems unaccompanied children must be accompanied by a court-appointed representative who has undertaken child-specific training.¹¹

It is often assumed that people smugglers coach asylum seekers on what to say to advance their claims prior to arrival. This appears to be the rationale for DIMA refusing to provide applicants with a copy of their first interview tape. Unaccompanied and separated children, by virtue of their age and suggestibility, could be assumed to be

particularly susceptible to this kind of advice. The evidence of the participants suggests that where smugglers did any coaching, the advice given did not reflect a particularly sophisticated understanding of Australia's refugee determination laws. For example, the smugglers just advised *Man* to tell the people about the Taliban, but not to tell them that he was persecuted by the Pashtun (as the smugglers were Pashtun). *Stephen's* smugglers advised him to make a simple case, and told him that he would only be in detention for a few days. *Halimi* was also instructed to make her statement simple — advice that appears to have led to her being 'screened out' at first instance for failing to 'engage Australia's protection obligations'.

While screening-in interviews are supposed to be conducted as soon as possible after the detention of the asylum seeker, in practice some individuals who arrived on boat have been kept in 'separation detention' for months before the screening process is completed.¹² The comments by the participants suggest that they were first interviewed between one day and one and a half weeks after their arrival in detention. This appears to conform with the practice of expediting the hearings of unaccompanied and separated children.

Eighty-one of the young people studied were taken to have valid protection claims, and were screened in: as stated earlier, *Halimi* (aged 15) and her brother were the only ones who appear to have been screened out. Having said this, the participants' accounts of the earliest stages of their processing were not always easy to decipher. For example, *Tony* appears to have been screened in because he was granted a visa. However, he claimed that he spent three to four months housed in a metal building that he could not see out of and without an air conditioner — conditions suggestive of 'separation detention' reserved for persons screened out of the process.

Halimi was both very vulnerable and completely un-schooled, with little exposure to life outside of her village. She faced a number of special barriers to being able to articulate refugee claims. Her own account suggests that her mental and physical condition at the first interview was poor (and that the sensitivity of the interviewer was less than optimal):

“I was scared, confused and tired. I was cautioned to be very brief with my answers. In particular, they did not seem interested in the type and level of harm we suffered.”
— *Halimi*

While it is not possible to determine the reasoning of the DIMA officer without access to the departmental file in this case, it would appear that the child’s inability to articulate a protection claim to the decision-maker’s satisfaction was given more weight than any consideration of age. No written reasons are provided for decisions to either screen out an individual or accept a refugee claim. Although this participant was eventually recognised as a refugee, there is no decision recorded to assist in these matters.

Some years after these events, *Halimi*’s comprehension of the process she had experienced remained poor. She was not able to articulate the fact that she had been screened out. In fact, she was admitted to the refugee status determination process after the intervention of advocates who helped her to lodge an application for protection. By that time, the Taliban had been ousted from power in Afghanistan, adding further complexities to her situation.

The qualitative data collected by the researchers from the interviews conducted with participants interviewed face-to-face (as individuals and as focus groups) raise a number of serious concerns about the timing and conduct of these ‘screening-in’ interviews. Many expressed concerns about their physical and mental condition at the time of their first con-

tact with the administrative process. For example, *Barry* stated that he was interviewed very soon after his arrival in Australia, while he was still recovering from the traumas of the sea voyage he had endured. He asserted that he had drips in both arms on the evening of his arrival at his detention centre, yet was taken to his first interview on the following morning. ‘I had been very sick, I was dizzy, I was not well. They had just taken the drips out.’ *Halimi* also raised this issue separately, asserting: ‘they don’t care if you are sick’.

A number of the participants spoke of being interviewed at night. *John A* was detained at Curtin detention centre. Aged 13 on arrival, he described being collected after dinner and being taken by car for his first interview. Although he travelled with an older cousin, his cousin was not permitted to either come with him in the car or to attend the interview with him. *Denzel* also spoke of people being taken out at night for interviews.

An interview at night for a separated child would hardly seem to be ‘child friendly’. Putting aside the fact that a child is more likely to be tired at night, the fears associated with being taken away into the dark for an interview upon which your life depends are obvious.

The participants confirmed that interviews were conducted typically without any support person being present. The one exception was *Homer*, who thought that a migration agent did attend his screening-in interview — although he was at pains to say that the migration agent did not say anything. *Halimi* claimed that four people attended her first interview — a DIMA officer, an interpreter and two other men whose role she could not explain. While *Halimi* was cautioned to be brief during her interview, *Homer* thought his first interview lasted for two and a half hours.

A number of the participants reported that they were interviewed frequently and in quite

random circumstances by DIMA officials — outside of what they perceived as any formal status determination process. In addition to his screening-in interview, his first instance DIMA interview and an interview apparently conducted to test his use of language, *Stephen* was questioned on one occasion for more than 30 minutes about his religion. The same participant claimed that he attended another interview which a fellow detainee told him was conducted by intelligence officials. The purpose of these extra interviews was never explained to him, adding to his fear and confusion about the process. Legal representation was not allowed in either instance. There were other stories of boys being taken to Woomera police station where they were interviewed by ‘Interpol’ and asked about smugglers and terrorism. They also reported being refused a lawyer.

Halimi, who was in detention for more than eight months, claimed that she was questioned on more than 20 occasions, although interviewed formally for a protection visa only twice. When asked why so many interviews were conducted, *Halimi* suggested that it was because the officers were bored ‘so they would interview the children again’.

Even though the participants all survived this first part of the administrative process, it is difficult to see how the experiences described by any of them could constitute anything approximating the kind of treatment recommended for unaccompanied and separated children by UNHCR and mandated by Art 20 of the CRC. All spoke of their first contacts with the immigration authorities in terms that evoked feelings of anxiety, discomfort and lack of comprehension. This is reflected in the confusing variety of accounts given by the participants of this stage of the status determination process.

8.3 Access to Legal Advice and ‘Immigration Assistance’

For children seeking asylum alone, the failure to provide for an effective guardian (other than the Immigration Minister) to assist children through the labyrinth of administrative processes represents a major shortcoming. Although provision is made for the allocation of advisers, the focus of these people is necessarily on the legal process rather than on the physical and emotional needs of the child. Our research confirmed that, with all the goodwill in the world, IAAAS agents have often found the representation of unaccompanied and separated children very difficult. As well as facing great difficulties in ‘getting the story’ from a child in a very short space of time, they have found themselves having to play roles more appropriate to social workers than lawyers. Many of those interviewed expressed profound dissatisfaction with the tasks demanded of them and with their own ability to provide the children with the support they needed.

As HREOC acknowledges, in relation to the process of seeking asylum *within* Australia, a most serious deficit in the *Migration Act* is that no provision requires government officials to inform unauthorised arrivals of their rights.¹³ As noted earlier, advisers and application forms are only provided if specific requests are made.¹⁴ In the case of unaccompanied and separated children, advisers appear to have been appointed as a matter of course after the screening-in interview. This was confirmed by the agents and lawyers working for the IAAAS providers in and after 1999.¹⁵ David Manne commented:

“I think the best way to put it is we were only engaged or referred the work...once that screening process had already occurred. So, in a sense it wasn’t as if we were told we couldn’t be part of it. We didn’t



even know it was occurring. It was only afterwards that we became involved. I guess the department had determined that prima facie these people could be refugees.... We were engaged to go up pursuant to a contract to XXX Detention Centre to prepare their protection visa applications in a very short space of time. Then as part of that to also provide general advice about the process, attend an interview with the client and the Department of Immigration and perform any follow up work.”¹⁶

Although all 85 of the young people studied for this report were ultimately allocated IAAAS advisers, most appear to have spent little time with the individual appointed to help them. Some of the participants were not aware that the advisers were there to assist and described the advice sessions as their ‘second interview’. A number confirmed that an adviser was present during their formal interview with DIMA (described by them universally as ‘the third interview’) but showed little understanding of the function

the person was supposed to be performing for them.

The perception that advisers are part of the government may be due in part to the passive role played by the adviser during any of the interactions with immigration officials: at no stage does the adviser ‘put’ the case of the asylum seeker or otherwise speak on his or her behalf. Just as importantly, the agent’s role for an individual in detention is inherently limited as agents are rarely physically present to explain the significance of developments outside of the formal hearings.

Both *Tony* and *Barry* thought they did not receive migration advice in detention at all: *Barry* claimed that an interpreter helped him prepare his application for protection. *GS* believed he did not see his migration agent before his interview with DIMA, although his records show that an IAAAS adviser prepared his statement. When it was explained that a representative must have been present, he hypothesised that ‘maybe the migration agent changed’, and that he did not recognise him or her.

Likewise, both *Denzel* and *Homer* thought that they only saw a migration agent just before the interview with the department. Some of the participants never knew that they had an advocate; did not know who their migration adviser was; could not distinguish between their representative and DIMA officials; and/or were not conscious that they were giving instructions in their applications for protection.

Given their age and backgrounds, it is perhaps not surprising that the participants should have been unfamiliar with the role of a migration agent in Australia when they first arrived. *Homer*, for example, stated simply: *'I did not understand anything'*.

Lawyer David Manne was not surprised that some of the young asylum seekers might not have recognised their agents and lawyers for what they were:

“Many of the people that we met and assisted had only ever sat across the other side of the desk with a government official [and potential persecutor] ... None of them had any experience at all or any real concept of the role of a lawyer or legal adviser or migration agent... those sort of foreign concepts were...almost impossible to fully explain in that short space of time. That is, to explain a whole other world dynamic which is foreign to them in a really fundamental sense. Not just a bit foreign, but fundamentally foreign.”¹⁷

Some participants expressed open distrust of their earliest adviser. For example, *Stephen* said he found it difficult to trust his representative because his agent did not respond to what he was saying. He stated that he was so suspicious of his migration agent that after each interview he would document everything he had said on toilet paper afterwards (no paper being provided). The comments made by this young man were confirmed by other IAAAS agents. For example, Michael Walker volunteered near the start of his interview that he found many

of his young clients deeply suspicious of him.¹⁸

Some of the participants claimed that they did not meet their advisers until some months after their arrival in Australia. For example, *David* estimated it took two months before he saw a migration agent. *Halimi* stated that she did not see an adviser until six months after she arrived (a situation consistent with her having been ‘screened out’ of the process).

While three of the participants thought they did not see their adviser before their DIMA interview for protection, others said that they saw their adviser twice: once at the interview where the adviser prepared a statement of his or her claim, and again at the DIMA interview. Apart from these face-to-face visits, described typically as being approximately two hours in duration, the participants reported little contact with their advisers. For example, *GS*, who spent over five months in detention, said he never spoke to his adviser by phone, even though his representatives were located in another State. He was illiterate so it is unlikely that he was successfully contacted by fax.

Halimi claimed that she had only two contacts with her migration agent: once six months after her first DIMA interview and then again eight months later with no phone or fax communication in between



those periods. *Galileo* (then aged 15) wrote to his representative asking about the progress of his case because it had been two and a half months since his adviser had contacted him. After six months he wrote again:

Dear Sir,

This is now my sixth month here in detention now, and still there hasn't been any decision made yet. Sir, I can wait longer than this but to be unaware of anything is so much difficult. Sometimes I become very frustrated and I think that I'll be here in this detention forever where no body want to be for a day.

Sir, I am an 'UAM' and I am only 15. You can't imagine how a boy in this age feels to be in detention for six months away from his family, even can't sleep properly. My friends have been released or rejected but my case is still unknown. Please Sir don't mind my comments. I think I am totally broken and I'll be in this cage forever. Sir, if you want to say anything please write me quickly as possible.

Thank you very much.¹⁹

The participants' advisers were not always present when evidence critical to their claims was being collected. For example, none of the children reported that a representative was present when language testing was conducted. The results of these tests would later be used as evidence by decision-makers. The participants were also unrepresented in matters apart from their applications for protection as refugees. For example, as noted above (at 4.2), *Stephen* had no adviser when he was interviewed by 'intelligence'. When *Galileo* asked for a migration agent in his 'intelligence' interview, his request was declined.

If the participants all appeared to have an IAAAS adviser for their initial application to DIMA, the same is not true of those whose applications were rejected. The statistics supplied by the RRT reveal that a number of children sought review of decisions without the support of an IAAAS adviser. The outcome in such cases appears to have been almost uniformly negative for the young person involved. In the following table, reference to a decision 'affirmed' indicates a loss for the child involved as the RRT 'affirms' the decision to reject the claims made. In cases where an 'effective guardian' is found, the child cannot be regarded as 'unaccompanied', although they may be 'separated' if their

Table 10: Outcomes for Unrepresented Children before the RRT²⁰

	1999–2000	2000–2001	2001–2002	2002–2003	2003–2004	2004–2005	TOTAL
■ Total USC Appeals	35	63	50	34	24	8	214
■ USC Unrepresented	9	13	7	4	5	1	39
■ Decision Affirmed	7	8	4	4	4	1	28
■ Appeal Withdrawn/Ineligible	1	3	1	-	-	-	5
■ Departed Australia	1	2	-	-	-	-	3
■ 'Effective Guardian' Found	2	9	4	2	2	-	19
■ Other Finalisation	-	-	2	-	1	-	3

claims are not subsumed within the claims of the ‘effective guardian’. Note also that the numbers of unaccompanied and separated children (USCs) appealing to the RRT is distorted by the re-cycling effect of the temporary protection visa scheme. The children could have been rejected when they first sought asylum in Australia and/or when they sought permanent protection after the expiry of their first visa.

The quality of representation

A number of issues were identified about the quality of representation afforded to the participants. For example, some of the asylum applications that the children’s advisers prepared were extremely brief. Many of the statements setting out the participants’ claims for protection were the equivalent of one to two pages. One barely spanned half a page.

The central problem was (and continues to be in cases where applicants are processed in remote detention centres) that both the representation of detainees and the processing of their asylum claims are approached as intensive exercises. Both the DIMA and RRT (appeal) stages tend to be handled by ‘task forces’. In practice, this means that government officials or (less typically) tribunal members are sent out to the detention centres to work on a certain number of cases over a finite period.

In anticipation of the decision-makers arriving, IAAAS agents are sent ahead and given the task of taking instructions from the persons to be interviewed in the following week. The result is that both advisers and decision-makers are placed under intense pressure for the duration of the process. For their part, the detainees are submitted to an intense flurry of activity followed by months of empty waiting. The process is an inevitable result of the placement of detainees in remote centres; the allocation of particular caseloads to IAAAS providers; and contractual arrangements that involve set pay-

ments for every claim. The IAAAS providers invariably choose to minimise the number of staff sent out to assist detainees so as to minimise the costs associated with travel and accommodation of staff. Researchers found one case in 2004 where one IAAAS solicitor was responsible for the representation of 53 asylum seekers processed at the RRT appeal stage in the space of three weeks.²¹ A number of the lawyers interviewed complained that these task forces prevented advisers from building relationships of trust with their young clients. It is a system that clearly does not operate in the best interests of the children.²²

IAAAS solicitor David Manne explained the constraints under which the contracted advisers were working between 1999 and 2003:

“The process was very simple and it wasn’t our choice. It was the circumstances in which we had to work. We had a preliminary meeting with the client. It was a meeting at which we had to both do preliminaries in terms of explaining the process and who we were and the capacity in which we had been referred the work and to then, at the same time, prepare the protection visa application. We had about three hours [per case] to do all of that work, including fully preparing the application with an interpreter which of course takes double the time.

... There was no preliminary or initial meeting prior to actually preparing the claim so it was all done in the one hit which means that if an applicant or client had any concerns about proceeding or was uncomfortable, there was not really the space to... have a cooling off period or consideration of what they had to do.”²³

Michael Walker described the set-up at Woomera Detention Centre:



“The interview rooms we used were all demountable buildings with no discernable shade or cover or anything. As you would be aware, it was stifling hot in the summer and in the middle of winter it would be freezing cold. The applicants were brought out in the early days and sat under like a tent from an army disposal store and waited their turn and we would go up and call them into our individual demountable rooms. These were for the meet and greet interviews. We would go up for two weeks as a time. The first week was to assist with the application and the claims-taking. The second week was the DIMA interviews. So the first week we would have our clients to ourselves and the interpreters to ourselves.”²⁴

The same agent also complained about the inability to return to the centre so as to be able to maintain a professional relationship with clients. He said:

“Basically after Tampa, we were cut out... We only went to the detention centres when a new boatload

came in. But what that allowed us to do was to do follow-up work *in situ* with our existing clients. But we couldn't get access anymore because we weren't getting new clients in.... Well, we could go back but we didn't have funding to go back and it was a very expensive process. We actually put a proposal before Minister Ruddock that they consider appointing an IAAAS liaison manager. Because we found that when we were there, and our clients having established a relationship with us, that we were able to allay a lot of fears. As soon as we would go, we would hear of the riots and we would hear of the troubles. And we thought it was actually, not only better for the welfare of our clients, but it was politically expedient to do it because if it kept trouble down to a minimum then it wasn't being publicised and was saving the government anyway. But they wouldn't be in that.”²⁵

Some of the young people raised direct concerns about the fairness and reliability of the representation they were afforded. For example, GS testified that he was invited by the department to respond to the adverse findings of his language analysis test. The usual practice is that the IAAAS adviser receives the results of such a test and is then given an opportunity to commission an independent review of the report. In this case, GS claimed that he prepared his own response. As the young man was illiterate in both English and his own language, another detainee drafted his response to DIMA. The participant's case files showed that his adviser also made a submission.

One of the participants stated that his IAAAS statement contained significant inaccuracies, some of which appear to have been pasted in by his agent from another application. By introducing an obvious and immediate inconsistency with the young man's oral testimony, the inaccuracies complicated considerably his subsequent application for permanent protection. Poor migration advice and



Baxter Immigration Reception and Processing Centre, South Australia, 2002. Photograph ©Damian McDonald. National Library of Australia.

assistance can be devastating for all asylum seekers but is particularly acute for children negotiating the complex refugee determination process alone. Without appropriate representation, the claims of unaccompanied and separated children can become lost or distorted. The risk of damage to a claim as a result of the shortcomings of advocates highlights the need to examine the systems in place for assisting unaccompanied and separated children in immigration detention. IAAAS advisers operating outside of the temporal and physical constraints of such detention are able to do (and in practice have done) a far superior job of representing their young charges (see further Chapter 14).

Allegations about the shortcomings of the government funded advisory scheme used for detention cases are not new. The Senate Legal and Constitutional References Committee received many complaints about the scheme in as early as 1999–2000.²⁶ The committee made numerous recommendations including that an independent evaluation of the administration of IAAAS, including the quality of work performed by contractors and the effectiveness of the complaints mechanism,

be undertaken and completed by a qualified body within two years.²⁷

The HREOC report also highlighted the limits imposed on IAAAS providers. The inquiry found that service providers get very little face-to-face contact with child clients which led to a shortfall in the quality of advice provided to unaccompanied children in particular. The HREOC report noted that the IAAAS was to be evaluated by an external reference group as part of a standard five-year review of government programs. The findings of the external evaluation had not been made public in December 2005.²⁸

The experience of the researchers for this report was that the IAAAS arrangements probably do pose problems from the perspective of children seeking asylum alone.

The real flaw in the system, however, is plainly the practice of isolating asylum seekers in remote locations. With respect, it is difficult to see how any system of representation (or decision-making) could operate with excellence given the physical, financial and emotional constraints of the remote detention centres. For children seeking asylum alone, it is a regime that can only be described as disastrous.

One can only ask whether this is an intended outcome of government policy.

Endnotes

- 1 HREOC, *A Last Resort? National Inquiry into Children in Immigration Detention* (AGPS, Canberra, 2004), 7.5.2.
- 2 Letter to the author from Robert Illingworth dated 10 March 2005, on file with author.
- 3 Letter dated 19 April 2005, on file with author.
- 4 Libby Hogarth, interview with Mary Crock, 15 December 2005.

- 5 See DIMA, Immigration Detention Standards, <www.immi.gov.au/detention/standards_index.htm>, accessed 13 February 2006.
- 6 Note also that the screening-in process is not used where a non-citizen enters Australia on a valid visa and later applies to change status on the basis of a refugee claim.
- 7 DIMA, Submission to HREOC Inquiry into Children in Immigration Detention, 9 July 2005, <www.dima.gov.au/illegals/hreoc/index.htm>.
- 8 See the discussion above at 6.3.
- 9 One adviser (Mary Anne Kenny, SCALES, Perth) reported that a 13-year-old client was permitted to have another person (an adult detainee of the same ethnic background) present at his DIMA interview and was unsure as to whether the child had had this person with them when undergoing screening in. The involvement of this adult seems to conform with the suggestion in MSI 370 that young detainees have a 'mentor' appointed from within the detention community. The guidelines suggest that this is only to occur once a young person has been screened into the refugee determination process. See DIMA, MSI 370, part 7. Email comment from Mary Anne Kenny dated 8 February 2006, on file with author.
- 10 Interview with Mary Crock, Melbourne, 2 March 2005.



- 11 Interview with Mary Crock, 29 January 2006.
- 12 HREOC, above n1, pp 240–241.
- 13 HREOC, above n1, pp 270–272. Criticisms of this aspect of the migration law and policy are made in Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Processes* (Canberra, June 2000), recs 3.1 and 4.8.
- 14 See *Migration Act* s 256 and 3.2.2 above. These provisions appear to have lead DIMA to introduce requirements that detainees request on each occasion to see their lawyers — in some instances requiring written notice of 24 hours.
- 15 Interviews with IAAAS providers: David Manne, (RILC, Victoria); Michael Walker, AMPI (Victoria); Libby Hogarth, formerly AMPI, now Libby Hogarth and Associates (SA); Christian Carney, RACS (NSW).
- 16 Interview with Mary Crock, 3 March 2005.
- 17 Interview with Mary Crock, 3 March 2005.
- 18 Interview with Mary Crock, 2 March 2005.
- 19 Document contained on *Galileo's* case file, in possession of author.
- 20 Statistics supplied to the author by the RRT in letter dated 19 April 2005.
- 21 The 53 included family groups which in most instances were treated as a single unit. 'Hao Kiet' refugees, cases handled by Craddock Murray and Neumann, Sydney.
- 22 Comment by Liz Biok, interview with Mary Crock, 29 January 2006.
- 23 Interview with Mary Crock, 3 March 2005.
- 24 Interview with Mary Crock, 2 March 2005.
- 25 Ibid.
- 26 Senate Legal and Constitutional References Committee, above n13, pp 69–98.
- 27 Ibid, p 99. See also Legal and Constitutional References Committee Report *Administration and Operation of the Migration Act 1958*, 2 March 2006, recs 17 ff, <www.aph.gov.au/senate/committee/legcon_ctte/migration/report/index.htm>.
- 28 HREOC, above n1, p 260.



The Primary Decision-Making Process: The DIMA Interview

9.1 The Framework of Decision-Making

Once an individual has been ‘screened in’ to Australia’s refugee status determination system, and a protection visa application has been made, DIMA appoints a case officer to look over the application, acting as a delegate of the minister.

The case officer may make a decision on the papers, but if further clarification is required, he or she may interview the applicant. For asylum seekers held in detention, the usual practice is to interview claimants.¹

The *Migration Act* 1958 (Cth) gives decision-makers considerable freedom in the way in which they assess refugee claims: few prescriptions are placed on case officers as to how they should conduct interviews, or whether they should conduct interviews at all. Being in detention, all the participants in this study were required to undergo a formal DIMA interview or interviews before being granted refugee status.

The importance of conducting status interviews involving children in a child-friendly manner, by individuals with relevant training, cannot be exaggerated.

As HREOC acknowledged, the need for care in processing is especially important because the detention environment itself places additional strains on children.²

DIMA asserts that refugee determination interviews ‘are conducted in a non-adversarial environment, using interpreters and drawing on all available and relevant information concerning the human rights situation in the applicant’s home country.’³ The ‘relevant

information' referred to is data provided through the department's Country Information Service. The guidelines state that all applications are treated in confidence, and DIMA does not approach home governments on information about individual asylum seekers.

In this project, no attempt was made to investigate matters such as the training and backgrounds of particular decision-makers. Neither was data collected on the administrative experiences of the children studied that could 'prove' that certain behaviours were representative of general administrative practice. It is acknowledged that policy guidelines introduced in late August 2003 recognise the sensitive nature of children making protection visa applications. These advise that children should be interviewed by experienced, trained case managers and if possible by case managers who have experience in children's cases.⁴ Even so, HREOC's findings suggest that before the introduction of these guidelines, case managers appear to have conducted interviews without being trained or otherwise chosen for their experience in dealing with children's claims.⁵ IAAAS agents and lawyers interviewed for this report expressed similar views.

DIMA officers assess the applicants' claims against criteria set out in the Refugee Convention with some minor modifications made by the Australian Parliament in 2001.⁶ The applicant must therefore show that they are outside their country of origin and that they meet the other elements of the refugee definition. The officer also assesses whether the applicant may be able to access 'effective protection' in a third country, and whether he or she satisfies Australia's common public interest criteria relating to health and character.

Although not a primary focus of the commission's report, HREOC found that 'there is no evidence that child friendly processes are generally

adhered to or mandated' in Australia's detention centres.⁷ Within the limited confines of the present study, there are many aspects of the testimony provided by the participants that reinforce this finding.

Bearing in mind that most of the participants interviewed did ultimately win protection as refugees, it is well to note that the system did deliver a positive result in terms of final outcome.

In this context it is somewhat ironic that the predominant impression from the overwhelmingly successful young refugee claimants is of an interview process that was intimidating and, on occasion, deeply flawed.

In both this chapter and the next, particular focus is placed on the experiences of a select number of the young people studied for this report. Again, it is not suggested that these experiences are universal or even necessarily representative. Those chosen tend to be participants who were able to provide substantial documentary evidence about their experiences. Where relevant, general comments by other participants in the process are included.

9.2 Getting the Story: Comprehension and Interpretation Issues

"As far as what happened in detention, it's quite clear...they're very young at the time and it's quite clear that the process was dreadful. Their statements are very short. They didn't know who they were speaking to most of the time. It's been interesting to talk to them. I don't think they distinguished between who is interviewing them in terms of lawyers, DIMA officers and so on."⁸



View from interview room at Port Hedland, 2002.
Photograph obtained from the Human Rights and Equal Opportunity Commission's National Inquiry into Children in Immigration Detention.

Most of the young people interviewed for this study appear to have had little or no understanding of the legal process involved in seeking asylum in Australia when they first arrived in the country. All of the IAAAS agents interviewed for this report confirmed the apparent bewilderment of the young people assigned to them. Most of the young people seem to have developed a keen appreciation of the central importance of obtaining 'the Visa'. However, just how that was to be achieved appears to have been a great source of mystery and confusion.

"It felt like if someone was lucky they would get a visa" — *Stephen*

Homer said that DIMA had explained the process briefly and he thought that he had a reasonable understanding of what it was all about. However, this participant also stated that he did not know that his IAAAS adviser was meant to be helping him.

A number of the young participants expressed concerns about the interpretive assistance they received at their interviews. These concerns were echoed by many of the IAAAS advisers interviewed.

The use of interpreters from ethnic groups with a history of discriminating against Hazaras was considered to be extremely inappropriate by the participants, given the tensions between the ethnic groups in question. Few topics generated more passionate responses from the young Hazara Afghans than the use of Afghan interpreters who were of Tajik ethnicity:

"DIMA was fair...I would blame the interpreter for everything." — *Homer*

Homer thought that it was the interpreter, rather than the interviewer, who was adversarial or, as he put it, the 'interpreter [was] trying to piss everyone off...The problem was that he was Tajik and I am Hazara'. He claimed that it was the interpreter, not the interviewer, who had questioned his background and, by implication, his story.

"If the interpreter was fair then there wouldn't be strikes or hunger strikes." — *Homer*

The Sunni Tajiks, many of whom fled Afghanistan in previous conflicts and have subsequently become interpreters, were considered by some of the participants to be the same as the Taliban in that their ethnic group had also been responsible for persecution of the Hazara people. *Galileo* commented:

"Our religion was one of the reasons we were persecuted so when we explain our point of view we think that actually [the Tajik] interpreter gets angry at that moment and he thinks we are stupid that we are saying, like, we are saying our point of view that our enemy is sitting on the next seat with us and he's listening to us and when we leave the room he says 'oh he's just bullshitting, he's just (sorry for the language) but he thinks that we are just lying.'"

Stephen also thought that ethnic differences meant that the interpreter ‘would always translate different’. A number of participants reported concerns about the quality of interpreting, particularly by Iranian interpreters: ‘I couldn’t really understand [my interpreters] cause our pronunciation is, like, different to them... we say different way — Hazaragi.’

The implication is that the testimony collected from the participants was not always reliable, creating the potential for misunderstandings and mistranslations. The participants asserted that rumours about which interpreters were good or bad circulated in detention. *Stephen* recounted how an applicant who spoke English found that his interpreter was not interpreting properly. The person then told everyone not to trust the interpreter.

Galileo explained that educational background made a difference to whether children could understand the interpreters with Iranian backgrounds. Boys who had not attended school were unable to understand an Iranian interpreter, while those who had been formally educated could. For boys taught in Shia Madrassas (religious schools), the books used typically came from Iran, and many of the Shia Imams who taught them were educated in Iran. In the result, such children both understood the accents and dialects from Iran and could even have absorbed words and accents into their own speech affect. This could be a source of problems in itself, arousing suspicions that the young person has come to Australia from Iran rather than from Afghanistan.

Among the IAAAS advisers interviewed, Michael Walker (AMPI) said he was ‘certain’ the interpreters he used had no training in dealing with children’s cases. However, he added:

“Some do it better than others. Some people advise better than others. They cope with the environment better than others. We formulated over time close

relationships with many of the interpreters. By far most of them were professional and knew what they were doing. There was a perception that if you were Hazara and you were given a Tajik interpreter immediately there was a problem. Unfortunately there just weren’t that many Hazara interpreters — in fact only one [for Hazaras who represented] 80 per cent of the caseload.... Many of our clients at the entry interview stage were given Iranian Farsi interpreters. Now, besides the fact that that would be disconcerting, there clearly is a potential that you’re going to get some facts wrong. Doesn’t matter. They’re accredited interpreters.”⁹

Without a multilingual analysis of the quality of translation in more of the interview tapes provided to us, it was not possible to make conclusive findings on the quality of the interpreting provided. Even so, analysis of the interviews with DIMA did suggest there were some problems, particularly where the applicant’s response did not match the interviewer’s question. Analysis of the participants’ interviews showed that some interpreters were struggling with translating Dari into English. For example, in *John A*’s interview there were long pauses in the interpretation, suggesting that the interpreter was finding it difficult to translate the child’s words accurately. For example, when the interviewer asked if the applicant had seen his uncle very often, the applicant answered, ‘My uncle, he was from Kabul, Yes’.

The implications of incorrect interpretation are considerable, particularly where inconsistencies are linked to credibility. For example, in *John A*’s DIMA interview a considerable amount of time was spent clarifying what type of vehicle was used to transport him out of Afghanistan. The interpreter had described the vehicle as a car when it clearly was a truck. As the interviewer continued to question the applicant on the structure of the car, this error was



used to question the credibility of the child:
 ‘...normally in a car you can’t put more than six people. Are you telling me there’s more than six people in this car?’

The problem is one that will be familiar to anyone working with interpreters. Unless interpreters are well trained and/or kept closely in check by an interviewer, there is often a temptation for interpreters to summarise and interpolate rather than interpret something word for word. In such circumstances, it is often easy for nuances to be lost, important facts to be omitted and meanings to be twisted.

Researchers came across many instances of this occurring.

The lack of transparency in the screening-in process also made it easier for interpreters to be blamed for any problems. For example, *Homer* was convinced

that the interpreter was not interpreting properly because at the status determination interview the DIMA officer asked ‘but you said this...at the last interview’, apparently as a way of testing the *Homer*’s story. *Homer* asserted that he had never made the assertions in question. Rather than understanding them as a ‘test’ he understood them as mistakes made in the interpretation of his story.

Having said this, not all of the young people studied had negative experiences with the assigned interpreters. Although he was aware of the rumours about Tajik interpreters changing what was said in interviews, (Hazara) *David* had a good experience with his Tajik interpreter. He said that when he cried, his interpreter cried. His interpreter even gave him his address and encouraged him to call him if he was released from detention.¹⁰

At the interviews, the common practice appears to have been for DIMA officers to explain the role of the interpreter and to ask whether the client was happy with his or her interpreter. However, none of the participants reported complaining at this point (even where they were concerned with the quality of the translation). On the other hand, it appears that the participants were not instructed at the DIMA interviews on how best to use an interpreter. Apart from the screening-in interview it is assumed that for most participants the DIMA interview was the first occasion on which the participants had used an interpreter.

According to *Galileo*, the opinion of a ‘qualified Afghan interpreter’ was used in some cases to verify the ethnic identity and origin of minors.

“The [Immigration Department] actually asks them, ‘do you think this person sounds Afghan?’ and if interpreter is happy with that or something, if he’s one of his people or he’s happy somehow with that person, he says ‘yeah I think he’s Afghan’, and that helps that person. We think that when

The Primary Decision-Making Process | *John A's Story*

When *John A* came to see us he brought a friend. He struck us as a sociable and articulate young man. He has a very good command of English and spoke with assurance and conviction. It had been three years since his somewhat traumatic engagement with Australia's refugee protection regime.

He made it clear that he had learned a lot in those years: he had grown up quickly. Although his preoccupations with identity and image are typical enough of young people of his age, his sense of displacement and his anxieties about the future are acute. His transition from childhood through adolescence to early adulthood has been anything but 'normal'.

Aged only 13 when he arrived in Australia, *John A* was the oldest surviving son in a family of eight children. His brother was killed by the Taliban and his father was missing, presumed dead:

'The Taliban came to our house and took my brother away. After a month, another Hazara found a body and he felt so sad that he took the body to the mosque. This is how we found that this was my brother's body.... Then the Taliban came and took my father from our house. We do not know where he is.'

Asked to explain how he felt coming to Australia he answered: 'When I came here, I was so young. I did not know so much about life.'



people were released from Woomera, some were released being within one month in camp, other people like me in eight months, other person in three years. We think that actually it is totally the fault of the interpreter, if the interpreter feels that person... the DIMA agent actually pays attention to what the interpreter is saying."

Given the animosity that existed between many of the interpreters' ethnic groups and those of the

unaccompanied and separated children, the use of interpreters in this way is highly problematic. If the interpreters' opinion on the national origin of the children was sought as evidence, this would have extended the interpreting role well beyond that envisioned by the interpreters' professional training. Indeed, such practice could render the process illegal if the child is not being made aware of and being given an opportunity to respond to damaging allegations.

Again, if accurate, there would indeed be grounds for a child inferring that the interpreter was not a neutral party in the process. It goes without saying that evidence collected in such an informal way would be very difficult to challenge (except in the unlikely event of an interpreter giving the opinion in writing).

DIMA responded to these allegations as follows:

It is DIMA policy that interpreters only provide interpreting services and do not comment on the substance of the matters raised. If personal comment or opinion is provided by an interpreter, there are formal avenues either through merits review of the visa application or complaints process with the Translating and Interpreting Service (TIS) where this issue can be tested. DIMA takes seriously any allegations of inappropriate action by interpreters or DIMA officials. A number of such allegations have been investigated in the past, and in the overwhelming majority of cases the assertions of inappropriate or ineffective interpreting has been found to be without foundation.¹¹

9.3 Concessions for Age, Development and Trauma

“I was scared. I didn’t know what they were asking me... I didn’t know what was going to happen.” — *John A*

In the interview tapes analysed, no DIMA officer made any reference to guidelines of any sort on interviewing unaccompanied and separated children. On the other hand, written decisions in two instances (*Sam* and *Stephen*) cited UNHCR’s guidelines for determining children’s claims in the Handbook on Procedures and Criteria for Determining Refugee Status. In these cases the decision-makers noted

that the benefit of the doubt should be given where a young applicant’s account appears credible, and no documentation is available. Indeed, in one other decision (that of *Halimi*) specific reference was made to the constraints of age: ‘The applicants had a good knowledge of their own area, within the constraints that would be expected in view of their age’.

An analysis of the interview tapes of four of the participants suggests that in those cases, few allowances were made for the young persons’ age and development in the interview process. In each instance, the opening statements were overtly intimidating. Reflecting the legislative changes relating to questions of credibility made in September 2001, *John A* (then aged 13), *Stephen* (aged 15), *Sam* (aged 17) and *Halimi* (aged 15) were all warned through their translators that they would face penalties if they provided false or misleading information ‘in connection with remaining in Australia’. The first two were told (inaccurately) that they could be imprisoned for a maximum of 10 years — an adult sentence. *Stephen*’s lawyer was the only person to object to this statement, intervening to argue with the interviewer about whether a child would be burdened with such a penalty. The interviewer responded, accepting that as a minor, *Stephen* would ‘probably not’ get the 10-year sentence. However, the interviewer defended his warning with the comment that young people ‘do tend to get treated as adults’.

Other aspects of the opening exchanges are equally inappropriate to the age, culture and educational levels of the children being interviewed. This was a matter of comment for many of the IAAS advisers interviewed. Of the participants who were able to provide tapes of their interviews, however, *John A*’s tape recording stands out as the most poignant example of how not to start an interview with a traumatised child. *John A*’s interviewer opened with the following apparently *pro forma* statements:

“It is important that you understand that Australia’s immigration laws contain provisions which provide for penalties against a person found to obstruct, hinder, deceive or mislead an officer in the course of duty. The law also provides for penalties against a person found to have provided false and misleading information in connection with entering or remaining in Australia. The maximum penalty is imprisonment for 10 years. *(Statement translated)*”

The information you provide at this and any future interview may be used or disclosed as the basis for checks with authorities in countries through which you have passed or in which you have resided since you left your country of origin and checks with international humanitarian agencies. *(Statement translated)*

The information you provide may also be disclosed to Australian Government agencies including those involved with security and law enforcement matters. *(Statement translated)*

A tape of this or any future interviews may also be disclosed to language experts by the Australian government to assist in verifying your place of origin.” *(Statement translated)*

Before this monologue, the interviewer asked at several points whether *John A* could understand what he had said. At each point *John A* answered in the affirmative. Following the long introductory statements set out above, the tape records the following exchange in response (through the translator):

Interviewer: ‘Do you understand what I said?’
(Statement translated)

Participant: ‘Yes.’

Interviewer: ‘Can you please explain to me in your own words what I said previously — to me? What you understand it to mean?’ *(Statement translated)*

Participant: ‘Ah...I mean...my...own birth country...the village where my mum and dad was born...and then shifted somewhere else...with my parent...later.’

Interviewer: ‘It’s...ah...what I said previously... is...ah...what I want you to understand is that it is important that you don’t lie to me, that you tell the truth during this interview and that you don’t mislead me about anything that I ask you.’
(Statement translated)

Participant: (No response)

Interviewer: ‘Can you give me your full name?’

John A’s affirmative response to each question suggests a courtesy bias, or desire to be seen as a willing and cooperative participant in the process. The invitation to repeat the opening statement in his own words was met with a response that suggests that the young boy either did not understand the request being made or had not comprehended the earlier statements, or both. The response is confused and disjointed. The boy’s voice on the tape is infused with the beginnings of mild panic, struggling to find the elements of the story he knows he has to recount. The interviewer seems to have recognised the discomfort but abandoned any attempt to deal with the situation.

The obvious problems encountered could have been avoided through the use of more appropriate language and much less formality in approach and manner. Later in the interview, there are other indications that this participant could not comprehend his departmental interviewer. For example, when asked if he knew anyone who had been taken away by the Taliban, *John A* replied: ‘No, I don’t know’. This answer was given in spite of the young man’s often repeated statement that his father, his uncle and his brother had all been taken by the Taliban.



John A's interviewer also demonstrated a lack of sensitivity to the boy's past experiences of torture and trauma, and to the difficulties of the interview environment itself. Some questions asked were incongruent to the sensitivity of the subject matter. Others seemed designed to provoke an emotional response. For example, when *John A* explained that his father had been taken by the Taliban, the interviewer asked him: 'Was your mother happy about it?' The reason for this particular question is not clear, particularly as *John A's* written submission had already spelt out the distress experienced by his mother at this event.

John A was asked repeatedly how he felt when his father was taken away by the Taliban; whether he was 'happy' that his father had left; how he felt about it now; and how he felt 'inside' about what happened to his father. Again, the relevance of this

line of questioning is not clear. It may be that the interviewer was seeking to explore whether the applicant's grief was congruent with his claims of a subjective fear of persecution. If so, the interviewer would be required to have some knowledge of the fact that Hazara men or boys of *John A's* socio-economic background may not be comfortable in demonstrating grief or fear to strangers.

The probing of the boy's feelings of grief and loss occurred after the interviewer had asked 78 closed questions: that is, questions requiring a one-word answer only such as 'What is the name of your village?'. In contrast, the decision-maker asked only six open questions. For the record, *John A* made no substantial comment about his feelings related to the loss of his parent.

John A's tape recording also demonstrated a lack of attention as to how to structure an interview with vulnerable people. Rather than close the interview with neutral questions, so as to 'contain' any emotional distress within the interview, *John A's* interviewer appeared to be trying to provoke an emotional response from the young boy at the close of the interview. The final exchanges were both disjointed in logic and emotionally confusing:

Interviewer: 'Do you know the names of any of these [name deleted] men?' (*Statement translated*)

Participant: 'No.'

Interviewer: 'Do you know anywhere that you went in Pakistan?' (*Statement translated*)

Participant: 'No.'

Interviewer: 'What do you think of Australia?' (*Statement translated*)

Participant: 'Nothing.'

Interviewer: 'Do you miss your mum?' (*Statement translated*)

Participant: (No response.)



The departmental officer concluded the interview as he began, with big words, long sentences and complex ideas compounded in a multi-part question:

“Before we finish this interview, I’m going to ask if you’ve given the department all the information you have which concerns your application, whether there’s anything else you’d like to say and if you wish you may take the opportunity now to talk privately with your representative.”

It is self-evident that the shortcomings of one interview cannot be used to condemn every DIMA interviewer. Many of the IAAAS agents interviewed made the point that the quality of decision-makers varied greatly, and that many showed considerable sympathy for the young asylum seekers.

In contrast to the tapes provided by *John A*, the recordings of *Stephen* and *Halimi* suggest that their interlocutors were more sensitive to the vulnerabilities of the young participants. In the first of these two

cases, it is notable that the participant was accompanied at his interview by an adviser who intrudes in the tape recording on more than one occasion to advocate that concessions be made for her client: ‘the fact that he is a child under Migration Law, he should be given special consideration during this interview because of his age’.

The interviewer responded with a simple ‘OK’ to this intervention, but appears to have been responsive to the sensitivities of the situation throughout the interview.

Halimi’s recording reveals that her interviewer was of an appropriate gender and that a quite concerted effort was made to mix questions designed to elicit useful information with questions aimed at trying to make the participant feel at ease. The overwhelming impression, listening to the recording, is that the process was excruciatingly difficult for both the interviewer and the interviewee. Unfortunately, the attempts to make small talk or to elicit responses from the participant were not always

culturally appropriate. For example, at one point the interviewer asked *Halimi* what sort of music she liked. This exchange followed:

Halimi: ‘They haven’t got any electrical appliances, like radio or cassette, but we singing without any assist among...’

(Interpreter speaks, indicates that *Halimi* responds with nod or shakes her head)

Interviewer: ‘You can’t sing? I can’t sing, I’m hopeless. Alright, what’s your favourite thing to do?’

When asked about this exchange, *Halimi* indicated that she understood the interviewer to be asking that she sing something. Her interview was conducted during Muharram, a religious festival that prohibits singing: ‘They asked me to sing a song, but we can’t sing because it’s Muharram.’

Muharram is a solemn festival held to mourn the martyrdom of the revered Hazrat Imam Husain, the grandson of the Prophet Mohammad. It is not considered appropriate to sing in a time of mourning. *Halimi* did not explain to the interviewer why she could not sing, just that she couldn’t sing the songs. Being unaware of the cultural dimensions of the issue, the interviewer lost the opportunity of deepening her knowledge of her young charge. The interviewer’s reversion to a flip-pant and dismissive style also suggests a possible insensitivity if not ignorance of the female role in Hazara culture, where a woman’s singing voice is not normally to be heard in public.

Asking a young girl who has lived under the Taliban to demonstrate her ethnicity through her knowledge of songs was problematic because, as she put it to the researchers, ‘If you sing, the Taliban will kill you’.

Ethnic and religious Hazara songs, like most traditional music of minority groups, are treasured as indicators of cultural survival. No doubt this is why the interviewer saw knowledge of them as important indicia of the identity of the child. However, these cultural indicators must often be hidden from the oppressive majority, and as such are secrets not to be disclosed to strangers.

The officer’s insensitivity to Afghan culture is also apparent in an exchange a little later in the interview. *Halimi* had been explaining that her favourite pastime was washing clothes with the women of her village:

Interviewer: ‘Mmmmm, and you talk. Which is the best bit, the washing or the talking?’

Halimi: ‘Both of them.’

Interviewer: ‘Haha, both of them. OK. Did you go to the pool this morning?’

Halimi: ‘They took the boys.’

Interviewer: ‘Yes. Yes. Did you go?’

Halimi: ‘No.’

Interviewer: ‘Oh, you watched, you didn’t go in the water?’

Halimi: ‘No.’

Interviewer: ‘It looked very cold.’

Halimi: ‘Yes.’

Again, for a young woman raised in the shadow of the Taliban, the concept of bathing in public with male bathers was pure anathema. Both the questions posed and the rejoinders to *Halimi*’s awkward responses reveal little cultural sensitivity. The attempts to place the young woman at her ease seem to have had an effect quite at odds with that apparently intended.

The participants' case files and personal accounts of their DIMA interviews revealed other examples of poor understanding of the developmental stages and cultural sensibilities of the children. For example, *John A*, a child with very limited education (and even less understanding of topology) was asked to draw a map of his area, a task he was unable to complete because 'I didn't write maps before'.

Tony was accused of being from Pakistan because he was not able to recite the names of the months on the Afghan calendar. Some allowances could have been made for the fact that month names are less culturally significant to an uneducated and illiterate boy living in a rural environment in Afghanistan. Seasonal markers of time and religious holy days would have been more appropriate determinations of time to the young man. The ability of a child to recite anything under stress is also a matter that bore consideration — most particularly in this instance where the child had suffered serious head injuries as an infant.

9.4 General Interviewing Techniques

The IAAAS advisers interviewed were not generally very complimentary about the skills of the DIMA officers they observed. For example, Southern Communities Advocacy Legal and Education Service (SCALES) solicitor Mary Anne Kenny said:

"Maybe one or two officers (were) quite good. But they all... do use leading questions which are very inappropriate for these kids. Depending on the officer the leading question will be positive or negative. So, for example, the interviewer I had last week was... started off by saying, 'Tell me why you don't want to go back to Afghanistan', which is an open ended question but it's too open ended for a young person

to understand what is it he's trying to get at. Even though they understand the definition of a refugee. But then he moved on to sort of summarising and saying, 'You know, are your fears more general fears, you're not talking about anything that's specific to you, your fears are general in nature, aren't they?' They don't understand."¹²

Analysis of the participants' interview tapes, files and of their comments on the process raise concerns about the timing and context of the DIMA interviews. Some participants reported that interviews were very long.

Galileo: 'I know boys who was 10 and they were like interviewed for hours...'

Researcher: 'For hours?'

Galileo: 'For hours, like two hours, three hours. I don't think that is very nice 'cause the solicitors said, like, if you come with your family and you're under 18 then they can't interview you. Yeah. But the thing is, just because we don't have family they get information from us'.

In his DIMA interview, 13-year-old *John A* was asked over 200 questions without a break. Others reported that their interviews were shorter and their case officers sympathetic. For example, *David* reported that his interview lasted an hour, with a break when he started crying.

On the whole, if the government's assumption is that DIMA officers act as disinterested arbiters of refugee status this would not appear to have been the perception of the participants. None of the young people we studied regarded their interviewers as being either neutral or 'on their side'. Participants likened the DIMA interview to a test in which the interviewer was trying to catch them out. *Homer* described the questions as 'tricky'. This concept is



reflected in the advice *Stephen* received from other detainees about making a claim for protection:

“Make your story easy: because if you make it complicated they will keep asking more and more details until they catch you out, but if you keep it simple they will not ask — only answer questions they ask you, don’t tell them anything else.”

In the four cases where tapes and transcripts of actual DIMA interviews were available for analysis, both the style of the questioning and the tone of the interview suggested that some interviewers were not particularly comfortable with the inquisitorial process.

The interviewers provided few opportunities for the unaccompanied and separated children to articulate their claims, or to establish any kind of narrative about what had happened to them.

Most of the interviews analysed were dominated by closed questions. For example, *Halimi’s* interview

tape suggests that she was asked 86 questions that elicited one word responses. Most of these were ‘Yes’, ‘No’, ‘Ummm’ or one word descriptors of places or events.

It is not difficult to see how the interviewers might have slipped into this pattern of questioning. Adolescent children often have a tendency to be taciturn, making the extraction of information difficult. Such characteristics are almost invariably magnified in situations where the young person is frightened and understands little or nothing about what is going on. The experiences of the participants whose interviews were analysed closely confirm both the difficulties inherent in interviewing unaccompanied and separated children and the wisdom of the international guidelines that advocate the appointment of a real and effectual guardian for these people. Although accompanied by IAAAS advisers, the adults seem to have played little role in the interview process: their voices are largely absent from the tapes and transcripts in relation to anything other than matters of formality (such as the supply of documents). Again, the one exception was *Stephen’s* adviser who intervened on the matter of her client’s age, calculated according to the Afghani and Western calendars.

The types of questions asked were often difficult for the young people to understand or respond to, requiring levels of analytical ability or self-knowledge that were patently unreasonable to expect of a child or young person — much less a child hampered by cultural difference and limited education. For example, *Halimi* was asked to explain why her brother’s face did not look like hers. *Sam* was asked to prove to the decision-maker that he was an Hazara. Without knowing how ethnicity is determined in legal settings, it is extremely difficult to imagine how a young person could answer these types of questions. In both cases the questions induced considerable distress in the interviewees.

At other times, the interviewers displayed avoidance reactions when faced with torture and trauma experiences. For example, after being asked a question about the abduction of *John A*'s immediate relatives, the interviewer then asked what his ethnicity was, before returning to this emotionally sensitive topic. The juxtaposition of highly emotive experiences beside non-emotive experiences arguably treats all events as of equal importance. The effect on the child is disorientation, distress, inability to answer and confusion.¹³ Again, an inference that could be drawn is that the interviewer was not well versed in appropriate ways in which to interview foreign children who have experienced severe trauma.

In some cases traumatic material was avoided almost completely, even where it was critical to the case. For example, in *Halimi*'s interview, the DIMA officer did not ask her specifically about the persecution facing her family, choosing to refer to the written statement in her decision and focus on identity at the interview.

Another way that traumatic subject matter was addressed was to maintain a high degree of control on the topic. For example, in *John A*'s case, all the questions related to persecution were closed questions, effectively preventing the child from explaining his narrative. Where traumatic material was raised, the decision-makers did not respond to the child's descriptions of persecution.

If the questions asked of the participants were not always helpful in eliciting meaningful responses, DIMA officers were faced with inherent difficulties in trying to get their young charges to speak of their experiences. Our research suggests that there was considerable variation in the ability of the participants to articulate their stories and protection claims. This was so, even after the young people had been through the status determination process and were being asked (yet again) to tell their stories for the purposes of this project. For example, *Denzel* did



not know exactly how long it took for him to travel to Pakistan. *Barry* stated that he was too young to understand a lot of what was going on at the time of his original journey. *Galileo*, who was 15 when he left Afghanistan, found it difficult to give details about the fighting in Afghanistan.

Again, the difficulties that the participants demonstrated in articulating claims underscore the complexity of interviewing unaccompanied and separated children. There is a clear need for interviewers to have specific training if they are to elicit useful responses. These problems are heightened greatly when the young people being questioned have been traumatised.

The comments of the IAAAS advisers on these points were interesting. Several asserted that there were particular DIMA officers who routinely adopted a hostile approach to applicants in general and children in particular. The allocation of such an officer to a particular caseload could mean the rejection of a complete or almost complete cohort of applicants.¹⁴ Agent Michael Walker commented:

“The one enduring memory I have is that, even with the most experienced DIMA case officers, they ran to a script. And the script was ‘I don’t believe you.’ They wouldn’t always say that but many did. In other words, ‘You prove to me you are who you say you are.’ And I often thought should the burden of proof be the same for a minor as it should for an adult?... When I say a script, there was a methodology in their interrogation. [By way of example] there’s one particular case officer who was famous. His trick was this. Unaccompanied minors for obvious reasons would say that they were illiterate. He would hold up his fob watch and ask them what time it was...and if they told him what time it was, he would say, ‘But you can’t be illiterate.’ And I had this long running battle with him where I argued that we could teach preschoolers how to tell the time.”¹⁵

For all of the shortcomings apparent in DIMA’s interviewing process, the critical factors for the participants as asylum seekers were the matters considered by the decision-makers to be the critical determinants of their status. These matters are discussed in Chapter 11 below.

Endnotes

- 1 This is not necessarily the case where asylum seekers come on valid visas and make their claims from within the community. Only 10% of such claimants are interviewed: see Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia’s Refugee and Humanitarian Processes* (Canberra, June 2000), pp 125ff.
- 2 HREOC, *A Last Resort? National Inquiry into Children in Immigration Detention* (AGPS, Canberra, 2004), p 261.
- 3 See DIMA, Procedures Advice Manual, discussed 6.3 above.
- 4 See DIMA, Protection Visa Procedures Manual, 28 August 2003.
- 5 HREOC, above n2, pp 262–263.
- 6 These require that the ‘essential reason’ for any persecution suffered be one of the five Convention grounds. Changes were made also about the definition of membership of a particular social group. See *Migration Act* ss 91R and 91S.
- 7 HREOC, above n2, p 264.
- 8 Mary Anne Kenny, interview with Mary Crock, 24 November 2004.
- 9 Interview with Mary Crock, 2 March 2005.
- 10 These accounts illustrate the value in listening to interview tapes rather than relying on transcriptions that often do not record breaks or reasons for breaks in the interview.
- 11 Letter to the author from Robert Illingworth dated 10 March 2006, on file with the author.
- 12 Interview with Mary Crock, 24 November 2004. Similar comments were offered by agents Libby Hogarth and Michael Walker and by solicitor David Manne.
- 13 See Amanda Waterman, Mark Blades and Christopher Spencer, ‘Do children try to answer nonsensical questions?’ (2001) 18 *British Journal of Developmental Psychology* 211; and Susan Brennan, ‘Centering attention in discourse’ (1995) 10(2) *Language and Cognitive Processes* 79.
- 14 Comments to this effect were made by lawyers and/or IAAAS advisers, Libby Hogarth, Michael Walker (AMPI, Melbourne), Mary Anne Kenny (SCALES, Perth), David Manne (RILC, Melbourne) and Clyde Cosentino (SBICLES, Brisbane).
- 15 Interview with Mary Crock, 2 March 2005.



Challenging Adverse Decisions

10.1 Refugee Status Determination Appeals

Although both the DIMA and the RRT responded to requests for statistical data on the numbers of unaccompanied and separated children who have exercised a right of appeal to the RRT, the answers given by these two bodies are widely discrepant.

For example, while DIMA claims that only three ‘minors’ lodged claims to the RRT in 1999–2000, the RRT claims that in the same year it received applications for review from 35 principal applicants who were under 18 at the time of lodging their applications. Six were from unaccompanied minors in detention and 29 were from unaccompanied minors in the community (see Table 10, 8.3 above). Similar differences occur in the figures for later years. In 2000–2001 DIMA noted 26 appeals and the RRT, 63; in 2001–2002, DIMA claimed 20 and the RRT, 50. DIMA did not provide data beyond 2002, while the RRT furnished figures up until 2005.

Although it is difficult what to make of these discrepancies, it would seem fair to surmise that the RRT’s figures are likely to be more reliable than those collated by DIMA, as its members were actually handling the cases. The simple point seems to be that the number of unaccompanied and separated children refused refugee status at first instance was much greater than would appear from the data supplied by DIMA. If it is accepted that only 290 such children sought asylum in Australia between 1999 and 2002, the proportion refused in those years appears considerable. On the other hand, the numbers

refused by the RRT suggest that most of the children were pushed through at this level, with relatively few being forced to seek judicial review in the courts.

Of the 85 young people studied for this report, 26 were rejected at first instance and lodged appeals to the RRT. The young people granted a temporary permit at the end of this process (56 of the 85), all applied subsequently for a permanent protection visa. A total of five were refused visas during this reapplication process and appealed to the RRT.

As explored below, many of those refused at first instance have secured either temporary permits or permanent residence after either applying for judicial review or by direct pleadings to the Minister for Immigration.

The accounts given of RRT hearings in relation to the early detention cases varied considerably. According to one agent, the IAAAS providers contracted the work to agents, some of whom had no experience preparing RRT appeals:

“They were expected to prepare seven cases a week. Written submissions, all done from the papers. They did not re-interview the clients at all. It was all done on the material from DIMA. Then they would attend the hearing with the client...Occasionally they would ring up and get something over the phone. They did not really know what they were doing. It was all new to them.”¹

As many of the same issues arose in the context of RRT appeals as in the DIMA interviews at first instance, the issues relating to the substantive material considered in appeals are considered in the following chapters. For present purposes, it suffices to note that there are many aspects of the appellate regime as it operates in practice that work against the interests of children seeking asylum alone.

It is a system that places great power in the hands of RRT members and provides very few safeguards against bad practice or poor skills in decision-makers. Asylum seekers must appear in person and answer questions put to them by the presiding member (through an interpreter as required). As noted earlier, there is no right to legal representation before the RRT. Legal and other advisers can be present, but only more or less as observers.² Government funding does not extend to the RRT hearing itself, so even here the attendance of an IAAAS adviser is done as a gesture of goodwill. RRT hearings are closed to the public and the RRT is bound not to release any details that might identify an asylum seeker. The closed nature of the tribunal — although designed as a measure to protect the privacy of applicants — creates a tendency towards insularity and defensiveness in members. Although ostensibly governed by the same procedures as the generalist Migration Review Tribunal (a tribunal with hearings open to the public), IAAAS advisers were almost unanimous in the view that the mood and atmosphere within the RRT is often quite different.

Another feature of the appeal system is that hearings may be conducted by way of video conferencing. During the period 1 January 1999 to 28 February 2003, the RRT interviewed 33 unaccompanied minors by video link-up.³ The RRT has issued guidelines to its members on the use of video conferencing technology. A number of the young people studied for this report were interviewed in this way. Their experiences illustrate the challenges posed by the practice of conducting ‘remote control’ hearings. In these situations, unaccompanied and separated children have to cope sometimes with the double remove of the RRT member and interpreter in one State and an adviser in another.

The issue of video conference hearings was raised in early cases involving two unaccompanied minors, Simon Odhiambo and Peter Martizi. Both



were assisted by a legal adviser in the preparation of their written claims, but appeared by themselves before the RRT. In fact, neither physically attended the tribunal, as both were heard using video conferencing. The two argued that the decisions made by the RRT were in breach of both the requirements of the *Migration Act 1958* (Cth) and common law rules of procedural fairness. They both asserted that the Minister for Immigration was obliged to appoint a guardian to assist them at the hearing before the tribunal and that the RRT was impliedly required to modify its procedures to account for the applicants' young age. Intervening as *amicus curiae*, the HREOC argued that the procedures in the *Migration Act*, read together with the *IGOC Act*, should be interpreted consistently with Australia's international human rights obligations — in particular, the best interests of the child principle enshrined in the CRC.

HREOC contended that the use of video conferencing in place of a face-to-face hearing was so inappropriate for children that the procedures

followed could not be said to constitute a hearing. The factual findings made by the tribunal were also challenged for failing to properly take into account and assess relevant matters. These were: the age, maturity and state of development of the appellants both at the time of the hearing and at the time of the relevant events occurring; and the capacity of the appellants to communicate their experiences and the impact of any trauma suffered by them at a young age in this capacity.

The issue of the applicants' youth was considered in the most cursory terms at first instance.⁴ On appeal, the Full Federal Court declined HREOC's invitation to interpret the code of procedures in the migration legislation so as to take account of the obligations assumed by Australia at international law.⁵ Instead, the court emphasised the narrow scope it was allowed in the judicial review of the tribunal's rulings in the two cases. It confirmed that formal compliance with the bare terms of the legislation was all that could be required of the RRT in this case.

In the Australian system, the child’s position is indeed weakened by legislation that seems on its face to invite an insensitive administrative response. Of particular note in this regard is s 91R of the *Migration Act* which allows decision-makers to have regard to historical inconsistencies in an applicant’s story and apparent ‘insincerity’ over the course of an administrative process.

Given the problems traditionally associated with interpreting demeanour in cross-cultural situations, the problems inherent in this scheme are obvious.⁶ Quite apart from the difficulties of ‘reading’ a foreign child’s behaviour in a situation as stressful as a tribunal hearing, there would appear to be real dangers inherent in any scheme that presupposes a link between lying and lack of credibility. Where questions are raised about the credibility of a child’s testimony in an RRT hearing, the child will always stand at a disadvantage. Of the Federal Court cases examined for this report in which a finding was made adverse to the child applicant, the RRT had chosen to preference the minister’s evidence over that of the child in every case.

This is not to say that efforts have not been made within the RRT to make the appellate process more child-friendly. The RRT’s Guidelines on Children Giving Evidence refer in footnotes to both the UNHCR Guidelines on the protection and care of refugee children and to Art 22 of the CRC (see 4.3 above). Among other things, the RRT Guidelines recommend that while there is no legal obligation requiring an adviser to be present when a child is interviewed, it is recommended the tribunal conduct a hearing for a child in the presence of an adviser or a support person or with their assistance.⁷ In more recent times, this is the practice that the tribunal seems to be adopting for children who appeal from within the community. However, as noted in Chapter 6 (Table 10), the statistics provided by the RRT

suggest that children have not always been assured of having an adviser on appeal to the RRT.

The RRT guidelines acknowledge that children may not present information in the same way as adults and may have difficulty distinguishing context, timing, importance and details. They also note that children may find it difficult to provide evidence on why they have left their country and why they fear return.

RRT members are exhorted to adopt child-friendly procedures and to give more weight to independent information in assessing the child’s claims.⁸

These promising protections notwithstanding, the guidelines are little more than a step in the right direction. While alluding to some of the UNHCR guidelines, the RRT policies fall short of mirroring these — the limitations of the legislative regime in Australia notwithstanding.⁹ Two areas in which the guidelines could be stronger are in the matter of credibility assessments and the actual interpretation of the definition of refugee. The guidelines cite a High Court decision on lying and credibility,¹⁰ which effectively warns members against taking an overtly aggressive approach to the questioning of children. However, no attempt is made to address the difficult issue of children who lie and how this should be treated in the overall assessment of whether a child has a valid refugee claim. Apart from the reference to the UNHCR Handbook concerning the difficulties inherent in requiring children to display subjective fear in the same way as adults, the guidelines make no reference at all to any jurisprudence on children and refugee status generally (see further Chapter 12 below). In May 2006, draft guidelines on assessing credibility were released for comment.



10.2 Judicial Review and Applications for Ministerial Intervention

The regime for challenging the legality of decisions involving unaccompanied and separated children poses problems at two levels. The first and most significant challenge for children is the content of the migration legislation itself (or lack thereof). As noted earlier, the silences in the law from the perspective of children are many. There are limits in the extent to which the courts, through any judicial review process, can make up these deficits. The second, serious, problem is the nature of the powers given to the courts to engage in judicial review. Again, as noted earlier, successive changes to immigration laws in Australia have stripped the courts of the powers they might otherwise have to intervene and ensure basic fairness and justice for children seeking asylum alone.¹¹

The reality has been that, at the judicial review stage, Australian courts have been largely indifferent to the age of applicants, confining their attention to the administrative and constitutional law issues under contention. As one child advocate explains:

“They’re not interested. Their interest is in a legal point, really, so they don’t care that it’s a minor or

not. The fact that we raise that it’s a minor means that at the end of the judgment...they’ll recommend the minister exercise discretion because the applicant is a minor. They don’t elaborate on it so much. We make a big point of it, but the fact that the person is a minor has little bearing on the case. They deal with them as if they were adults.”¹²

Moreover, asylum seekers generally have no right to government funded legal assistance at the judicial review stage. Many are forced to approach the courts as self-represented litigants. Because the Australian legal system is an adversarial one, individual judges tend to be reluctant to intervene in proceedings to protect individual litigants, even where, as in the case of unrepresented child applicants, there is a patent inequality of power. As noted, in cases such as those of *Odhiambo* and *Martizi*,¹³ the Australian courts have been reluctant to acknowledge the strong relationship between due process for unaccompanied and separated children and the rights of representation and assistance.¹⁴

In addition to (or in lieu of) making an application for judicial review, it will be recalled that the Minister for Immigration has power under s 417 of the *Migration Act* to make a decision in favour of an applicant where the RRT or a court has rejected an application for review. A similar power exists in s 48B to permit a failed asylum seeker to lodge a second application for refugee status. The minister can exercise these powers when he or she believes that it is in the public interest to do so, but the minister cannot be compelled to reconsider a rejected application. Nor can reconsiderations be reviewed by the courts: hence the description of the ministerial discretions as ‘non-compellable and non-reviewable’.

In cases involving unaccompanied and separated children, recourse appears to have been made to both of these less formal appeal mechanisms. Interestingly, with the furore that developed over the

exercise of the ministerial discretions in 2003,¹⁵ a preference of sorts appears to have developed for allowing individuals to lodge second applications under s 48B of the *Migration Act*. Visas granted through this means — at least on their face — appear to come within established programs and have less of an appearance of being grants of grace and favour.

By March 2006, most of the unaccompanied and separated children whose first refugee claims were rejected in 2001 and 2002 had either been granted permanent residence or were on their way to achieving that status. The routes taken to achieve this outcome, however, were varied. A group of five young people received considerable attention in 2003–2004 because of the lobbying of the Catholic school in Adelaide where the young men were enrolled while in ‘community detention’. The intercession of a high profile priest (and now Professor of Law), Fr Frank Brennan SJ AO, led to two young men travelling to Pakistan where they were reunited briefly with their families before returning to Australia on student visas. Other young people were to follow suit, but ultimately remained in Australia and were granted permanent residence on humanitarian grounds. The young men on student visas were later permitted to lodge fresh refugee applications and were granted temporary protection visas.

As Adelaide agent and advocate, Libby Hogarth, complained to us, there appears to be no rhyme or reason as to why some of the original ‘refusniks’ have been granted permanent residence, while others were given TPVs only. There is also a mystifying diversity in the visas granted.

While most have been granted subclass 866 permanent protection visas, at least four of the 85 studied were granted subclass 202 visas even though they were physically present in Australia. These visas are



designed for individuals brought into the country through the offshore humanitarian program.

Desley Billich, then principal solicitor at the Refugee Advisory Service of South Australia, described the discretionary regimes of ss 48B and 417 as lacking in transparency and ‘cruel’ in their operation:

“I don’t think the guidelines are particularly clear as to what’s required to be submitted, but also what [the minister] should take into account. I think often it’s a case of who speaks to her and what political party exerts any pressure. It also depends on whether we have an election or not.

... There aren’t sufficient checks and balances in place as far as I’m concerned... I don’t know for example, if [the minister] does it herself anyway. We don’t know any of that process. The policy section also make recommendations uncalled for by her in relation to particular cases. Often the policy section doesn’t know what the legal section’s doing... There’s an enormous problem within the department in how they deal with all of this.

What I find about the process which is evil and stupid is that it takes us four to five years to get us to a position... The same argument I put on the 417’s and 48B’s are exactly the same as four to five years ago, which is it wasn’t safe for them then, it’s not safe for them now. I find the whole process

particularly cruel and vindictive on the part of the minister. Particularly in relation to unaccompanied minors. But I could also say that about sabean mandeans because the evidence was always clear — that they were being killed in Iraq. Absolutely clear from the word go. It took this government four to five years to get to that position again.... So in relation to unaccompanied minors I think that it's particularly cruel, particularly the way the process has taken place. I mean, many of these kids were only 10, 11, 12, 13 when they first came out here. Not many people would stick their kids on a boat. It denies any concept of logic, let alone any concept of anything else.”¹⁶

Adelaide solicitor, Abby Hamden, also complained about the apparently random nature of the discretionary process, claiming that success nearly always comes down to who you know, rather than what you know. She stated:

“You have to have the connections, really. It's not about discretion, it's about doing favours for each other. In my experience, three of four clients, some not minors, I've done 417 applications for, maybe once, twice, three times were rejected. They were nearly deported. But when you find someone who knows the minister and can intervene, suddenly they are accepted, even though they are appealing on the same grounds. It's about connection and not compassion.”¹⁷

Endnotes

- 1 Libby Hogarth, interview with Mary Crock, 16 December 2005.
- 2 Again, in spite of their limited role, the allocation of advisers to unaccompanied and separated children does appear nonetheless to make a difference in many cases between success and failure on appeal: see above, Table 10, 8.3 above.
- 3 DIMA Portfolio, Questions Taken on Notice, Additional Estimates Hearing, 11 February 2003.
- 4 *Odhiambo v MIMA* (2002) 69 ALD 312; *Odhiambo v MIMA* (2002) 122 FCR 29.
- 5 *Odhiambo v MIMA* (2002) 69 ALD 312; *Odhiambo v MIMA* (2002) 122 FCR 29 at [12].
- 6 See Maggie Bruck and Stephen Ceci, ‘Reliability and Credibility of Young Children’s Reports’ (1998) 53(2) *American Psychologist* 136.
- 7 RRT Guidelines on Children Giving Evidence 3. Representative and support person.
- 8 Id, Guideline 4. Eliciting the Evidence.
- 9 Note that the Guidelines append extracts from the *Evidence Act* 1995 (Cth) (on competence and capacity); the *Migration Act* 1958 (Cth) ss 420, 425 and 427; and UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR, Geneva, January 1992), paras 214–219.
- 10 See *Re RRT; ex p H* [2001] HCA 28 (24 May 2001) at [30].
- 11 Mary Crock, ‘Privative Clauses and the Rule of Law: The Place of Judicial Review Within the Construct of Australian Democracy’ in Susan Kneebone (ed), *Administrative Law and the Rule of Law: Still Part of the Same Package?* (Australian Institute of Administrative Law, Canberra, 1999), pp 57–83; Mary Crock, ‘Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law’ (2004) 26 *Sydney Law Review* 51.
- 12 Abby Hamdan, interview with Jessie Hohmann, 5 January 2005.
- 13 *Odhiambo v MIMA* (2002) 69 ALD 312; *Odhiambo v MIMA* (2002) 122 FCR 29; *Martizi v MIMA* (2002) 122 FCR 29.
- 14 See further Mary Crock, ‘Lonely Refuge: Judicial Responses to Separated Children Seeking Refugee Protection in Australia’ (2005) 22(2) *Law in Context* 120.
- 15 See Senate Select Committee on Ministerial Discretion in Migration Matters Report, <www.aph.gov.au/Senate/committee/minmig_ctte/report/index.htm>.
- 16 Interview with Jessie Hohmann, 4 January 2005.
- 17 Interview with Jessie Hohmann, 5 January 2005.



Deciding Refugee Status

11.1 Critical Factors: Criteria Relied upon by Decision-Makers

Although the same definition of refugee applies to all individuals regardless of their age, UNHCR recommends that in the examination of the factual elements of a claim made by an unaccompanied or separated child, particular regard should be given to circumstances such as the child's stage of development, his or her possibly limited knowledge of conditions in the country of origin and their significance to the legal concept of refugee status.

Just as children can manifest their fears in ways that are different to adults, so decision-makers need to modify their expectations and thinking when dealing with children.¹

The material collected for this report suggests that both DIMA officers and RRT members handling the cases of unaccompanied and separated children between 1999 and 2003 were well aware that greater

emphasis needs to be placed on objective factors in cases involving children. As explored further below, this approach is manifest in the tendency to subject many of the young people to language testing and/or to rely on other objective manifestations of identity or ethnicity. The very high acceptance rate for the children studied suggests that this approach generally worked to the benefit of the young asylum seekers.

Even so, our research suggests that attempts at gathering ‘objective’ evidence was not always done with either great sensitivity or in a manner that might induce confidence in the conclusions drawn.

At the time that most of the unaccompanied and separated Afghan children studied for this report underwent their status determination interviews with DIMA, the prevailing conditions in Afghanistan for ethnic Hazara meant that the vast majority of such people had little trouble in gaining recognition as refugees. Official and public knowledge of the horrors being perpetrated by the ruling Taliban meant that the most important task for the participants was to convince the authorities that they were Hazara who had lived in Afghanistan immediately before coming to Australia. The determination of identity as *Afghani* Hazara was therefore given significant weight in the interviews of these participants. Factors taken into consideration included correct answers to questions regarding Afghanistan including knowledge of local geography, culture and the Shia religion followed by ethnic Hazara.

For example, in *John A*’s interview there were some 150 questions focused on establishing whether he was from Afghanistan. He was asked to describe towns in Afghanistan, the landscape, measurements, festivals, his school and his journey.

“They were asking so many tricky questions from the village. I didn’t know where the mountains, where the bazaar, where’s the other village where I was going to school.”

Most of the questions directed at *Halimi* in her (much shorter) interview seem to have been framed with the same objective in mind (see Chapter 9). In all the interviews analysed, identity determination was of far more concern to the interviewer than was the specific persecution suffered by the child. Some claims presented in the children’s written statements were



not referred to in the interview at all. For example, although *John A* asserted that his brother was a member of a political party that was engaged in military action against the Taliban, there was no exploration about whether this relationship would put the applicant and his family at risk of persecution, despite his claims that the Taliban had killed his brother.

Among the advisers interviewed for this project, several noted a hardening in the approach of DIMA officials in mid to late 2001 following the institution of the naval blockade following the *Tampa* Affair and the war in Afghanistan that following the terrorist attacks of 11 September. Solicitor David Manne said:

“I think that what occurred was that...a profound pervasive bureaucratic paranoia developed really about Afghans...some bureaucrats would say in all seriousness that possibly 90 per cent of Afghans were not from Afghanistan but were from Pakistan. There was a really strong sense that there were a

huge amount of people you know defrauding the department and I think that that attitude grew and grew, from my general observations and that's why we saw the toughening up...of attitudes and questions and more detailed questions about identity and origin.”²

11.2 Language Testing

One practice emerged as a matter of particular concern in this context, although it was not new even in 2000. Language analysis appears to have been used as evidence of identity and or national origin in many of the cases analysed for this project. This part of the decision-making process involved a taped sample of the participants’ speech being sent to ‘Spraklab’, a language analysis service based in Stockholm, Sweden, for analysis.

Given the malleability of language in children, the dangers of using the speech of young people to determine their origin and/or nationality are obvious. As Legal Aid solicitor, Liz Biok, commented, language testing can be particularly fraught in cases involving children who are illiterate, uneducated and who have been subjected to a wide variety of ‘household’ influences.³

Indeed, the use of the Swedish language reports has been criticised in a number of cases involving unaccompanied and separated children. In *Odhiambo*,⁴ the RRT requested comments on the linguistic analysis of the speech of a separated child seeking asylum but declined an additional interview to allow the boy to ‘analytically prove’ himself. His lawyer wrote to the tribunal to reiterate that the client had lived in Mombassa for five years, at a formative age, and that it was therefore likely that he spoke Swahili with a Kenyan accent. The lawyer noted:

“We ask that you treat the expert opinion you have received with caution as in our submission there is insufficient evidence available at present to show that such assessments are reliable. We request that you consider such things as the formal qualifications of your experts and when they last resided in the country in question. Any long absence from a country of origin would probably seriously discredit an opinion. It is a given fact that languages and dialects do not remain static, but can and do change and evolve, even over a short period of time.”⁵

For the young Afghans studied for this report, the major concern was that the Afghans doing the analysis in Sweden could not be trusted to be accurate in their assessment — either because of their own ethnic background or bias or because of the length of time these people could be presumed to have spent away from Afghanistan. *Galileo* commented:

“[T]hey actually send the tape overseas for language analysis and everybody in language analysis are Tajik. They haven’t been in Afghanistan for 30 years, 20 to 30 years. They lived in Afghanistan when the Russians invaded Afghanistan so they like analyse our language and say, ‘Oh they’re not Afghanistan, they don’t sound like Afghanistan.’”

Because the sample of the participants’ language is taken during an interview, concerns were also expressed about whether the accent and choice of language could be affected by the questions asked and by the ethnicity of the interpreter. *GS* questioned the analysis of his language on the basis that he had to modify his choice of words so as to be understood by his Iranian interpreter: ‘How am I supposed to talk my own language when the interpreter is Iranian. I have to talk with him, and that’s unfair, it’s very unfair.’

Afghanistan, as is the case with most war-torn countries, has seen mass movements of people who have been forced to flee from their native regions into neighbouring regions or even countries, only returning when the conflict has passed on. The country's unstable 20th century history has led to many such shifts. The ebb and flow of diverse people has influenced the language and culture of Afghans. *Galileo* drew attention to the impact on children of religious teachers and leaders who had been educated in Iran. School textbooks are often Iranian, as are other teaching materials. He said:

“[B]asically Imams are educated from Iran so they are talking Iranian and probably Afghanistan, for the past 25 years now, there has been war and people have been leaving Afghanistan and coming back. They leave when there is war they come back when it is OK so the language has mixed a lot. That's how my language has mixed and I said a few words, which relatively wasn't our words so Immigration got confused like. 'How come you can say these words?' I said, people has just mixed a lot... I was in religious school so the books everything comes from Iran so I understand Iranian.”

DIMA's Procedures Advice Manual (PAM) states that evidence from language analysis may be used to assist in determining country of origin.⁶ Although origin is often central to the determination of an asylum claim, for the participants, language findings did not always determine the outcome. Both *GS* and *Galileo* were told that their language analysis placed them outside of Afghanistan. Yet, the decision-makers in both cases accepted that the children were Hazaras from Afghanistan and both were recognised as refugees.

On the other hand, the Swedish experts analysed *Sam*'s language and determined that he spoke Dari with a Hazaragi accent. On this basis, they concluded that the young man had originated in Afghanistan.

This report was rejected by *Sam*'s DIMA case officer — on the basis that *Sam*'s physical appearance contradicted the finding. *Sam*'s decision-maker reasoned: 'The applicant bore no resemblance to the distinctive 'Asian' facial features expected of the Hazaras of Afghanistan'.

He noted that 'Hazaras are a people with predominantly Mongoloid features' but did not elaborate on which of *Sam*'s features are inconsistent with this stereotype. Again, as evidence such as this is based on the opinion of the decision-maker, it is extremely hard to challenge. The written decision in *Sam*'s case did not include the sources for the officer's statements about 'typical' Hazaras. The young man's refugee claim at first instance was rejected accordingly.

A further (perhaps unintended) consequence of using language analysis as a decision-making tool was that the time taken to make refugee status decisions was inevitably extended. *Galileo*'s decision took seven months from the time of interview until a visa was granted. More than four months passed between the time when *GS* prepared his statement for his IAAAS provider and the decision made in his case.

Interestingly, a number of the court cases involving unaccompanied children raise issues about language testing — reflecting the prevalence of the practice in such cases. The courts appear to accept the use of language analyses notwithstanding their recognition of the procedural fairness problems associated with such evidence. For instance, while accepting 'appropriate' reservations in relation to the reliability of the language analysis and its implications for procedural fairness in *WAEF v MIMA*, French J concluded that the reliability of the tests was not available as a ground of review.⁷

Similar comments were made in *Applicant WAFV* in which the Applicant submitted that a breach of natural justice had occurred when the tribunal and minister failed to provide him with a copy of the

taped interview used to produce the linguistic analysis and failed to take account of the contradictory expert's report submitted by the applicant.⁸ Though ultimately finding for the minister, the court accepted that the department and tribunal, in failing to provide the applicant with a copy of the tape, had probably failed to accord him the degree of fairness which might have been expected.⁹ Owing to the importance of the analysis to the applicant's claim, it 'should have been provided in full to the Applicant', and no convincing reason had been advanced to explain why this did not occur.

In many early cases involving unaccompanied minors where linguistic analyses were used, the accuracy of the tests themselves was attacked. For example, in *SBBR v MIMIA*, the applicant alleged that the tribunal had erred in failing to take into account the reliability or otherwise of a language analysis test relied upon by the delegate.¹⁰ He claimed that the delegate knew, or ought to have known, that linguistic analysis reports of this type had not previously been accepted as reliable by the tribunal when attempting to determine the difference between a Pakistani and Afghani dialect.¹¹ The delegate had preferred the 'untested, unreliable linguistic' reports notwithstanding the direct and tested testimony of the applicant.¹² Part of the difficulty faced by the applicant was in executing the significant burden associated with proving that the delegate's decision was 'biased, perverse and contrary to the evidence'. This was a very serious accusation that the court found was not made out on the facts.¹³ While it could be said that the delegate's decision was 'contrary to the evidence', that would not elevate the decision to such a height that it could properly be characterised as biased or perverse. The applicant's submissions therefore failed at this first hurdle.

The young applicant in *SCAS v MIMA* made similar submissions, where it was alleged that evi-

dence of linguistic analysis should only be used as a last resort.¹⁴ On appeal to the Federal Court, this submission was rejected by von Doussa J (later President of HREOC). His Honour ruled that there was no principle of law requiring linguistic analysis, or analysis of any other kind, to be used *only* in the instance that the tribunal could not otherwise make a decision on the applicant's claims. On the contrary, the obligation of the tribunal was to have regard to all probative material before it. Part of that probative material would include the results of linguistic analysis where it was undertaken.

Similarly, the unaccompanied minor applicant in *Latif v MIMIA* argued that the tribunal was not entitled to give any weight whatsoever to the linguistic analysis.¹⁵ His representative made detailed submissions to the RRT on the shortcomings of the language analysis test. Issues raised included the language analysis company's lack of reliance on a recognised method of evaluating the merits of their employees and their adoption of an ad hoc process developed in-house. The court rejected this submission, holding that the decision-maker was entitled to give some weight to the linguistic analysis. The amount of weight to be given to it was a matter for the decision-maker.

The jurisprudential trend established in these cases has continued. In spite of criticisms made of the methodologies adopted by the Swedish company charged with analysing many of the interview tapes, the typical outcome of judicial review applications is that the court has found no legal error in the reliance placed on the analysis.

The practice of relying on a disembodied report generated literally and figuratively a world away from the experiences of a separated child seeking asylum underscores the sur-reality of the refugee determination from the perspective of the child. For the child wishing to dispute the assessment

made of his or her speech, the label of ‘expert’ applied to the reports from Sweden has proven an irrefutable presumption against the credibility of the child.

This comment does not imply that all analyses of a separated child’s use of language are either correct or incorrect. The simple point is that for the child wishing to dispute the assessment made of his or her speech, the superior authority of the expert will typically prove impossible to overcome.

11.3 Judging Credibility

The credibility of the applicant is always an important consideration for the decision-maker when assessing an applicant’s refugee claims. As noted earlier, DIMA decision-makers (and, by implication, RRT members) are empowered by s 91W of the *Migration Act 1958* (Cth) to draw an adverse inference about the honesty of a claimant if he or she does not provide identification documentation without reasonable explanation. More specifically, under s 91V of this Act a decision-maker can make an assessment of the applicant’s credibility based on the manner and demeanour of the applicant.

One difficulty in assessing the credibility of an unaccompanied or separated child is that a child’s demeanour can be affected by the symptoms of trauma. Considerable research has been devoted to judging truthfulness from demeanour in adults and children.¹⁶ The research has found that while cues do vary between deceptive and truthful statements, no single cue is uniquely associated with deception and cues linked to stress can be confused with those linked to lying. These findings are magnified in children.

In this section of the report, particular study is made of the decisions of two of the young Afghans

studied — *Tony* and *Sam* — both of whom were initially rejected because of adverse credibility findings. The same decision-maker rejected the both claims, using remarkably similar reasoning. *Sam* was rejected in his initial application for a protection visa; *Tony* in his re-application for a protection visa after he had lived in the Australian community for three years. In *Sam*’s case, credibility was a key determiner:

“The applicant’s spontaneous and detailed description of both — and — and the route taken between these localities leads me to believe that the applicant had originated in Afghanistan as claimed. However I consider many other aspects of his story to be implausible, to the extent that I do not accept that the name supplied in this application [omitted] is his real name, or that he is a minor, or that he has ever had any contact with the Taliban in Afghanistan.” — Decision of *Sam*’s DIMA case officer

The decision-maker also stated that he was not satisfied with the young man’s claims about his identity, age and protection needs. Why he was not satisfied about these matters is not revealed in the decision — nor was this issue raised at the interview. The written reasons suggest that it was the implausibility of *Sam*’s story that appears to have swayed the officer. Here it is asserted that the escape route *Sam* claimed to have followed was too risky to be credible.¹⁷ He determined that *Sam*’s identification papers and the death certificate for his father were not authentic because he thought they should be scuffed. He was particularly suspicious of the lamination on one document given to *Sam* by an uncle:

“I consider that the protective lamination has been a pre-meditated ploy to attempt to establish a connection between himself and a high profile XXX official, and that there is no connection between the applicant and [his father]... I find it too well con-



ceived and contrived that the applicant had in his procession... documents relating to a man called... these documents had obviously been provided by the applicant to demonstrate some link between himself and this man.”

— Decision of DIMA case officer

The written reasons in *Sam*'s case suggest that the decision-maker had a poor understanding about many aspects of life in Afghanistan. For example, the per capita income of Afghanistan is cited as evidence of why *Sam* could not have had access to the amount of money he claimed was paid to get him out of the country. This is in spite of the fact that the amount claimed was in line with similar claims made by many of the young fugitives from Afghanistan (including some of the participants in this study).

Tony's application for a permanent protection visa was made following the expiry of his temporary protection visa. Although *Tony*'s claims were rejected by the same decision-maker, unlike *Sam* this adverse decision was overturned by the RRT, whereupon *Tony*

was granted a permanent protection visa. *Tony*'s initial claim was also rejected on the basis that he had fabricated claims that he was from a high profile family and that he feared threats from certain individuals and groups in Afghanistan. *Tony*'s credibility was questioned in part because the decision-maker found it unlikely that the applicant's family would have remained in Afghanistan and used their money to send *Tony* away, rather than all fleeing to a neighbouring country. In fact, *Tony*'s family did flee to a neighbouring country following *Tony*'s escape. As with *Sam*, the decision-maker also found it unlikely that *Tony*'s parents could raise the money for his departure. The text of the rejection decision is almost identical to that used in *Sam*'s decision three years earlier:

“Given the average annual salary of Afghanistan around this time was only about \$US200 I consider it extremely unlikely the applicant's family, living and operating in a subsistence 'barter type' economy would have been able to raise this [\$US6000 used for *Tony*'s escape] sort of money — equivalent to much more than a lifetime savings and seemingly at the drop of the hat.” — Decision of *Tony*'s DIMA case officer

Such statements by the decision-maker indicate a further attack on the credibility of the child. Given that both *Tony* and *Sam* were in fact in Australia, it is evident that the families did raise the money to get them here. The decision-maker's suggestion seems to be that either the children lied about their family's position in Afghan society, about the origins of the money raised, or about their identity.

Another interesting aspect of *Tony*'s permanent protection visa decision is that the decision-maker questioned *Tony*'s age. He found that *Tony* appeared seven or eight years older than claimed. *Tony*'s Australian supporters moved to rebut this finding

with both forensic medical evidence (bone scans) and quite moving personal observation of the boy's physical development relevant to age determination. On appeal, *Tony* had no difficulty in persuading the RRT that he was in fact a minor when he arrived in Australia.

The adverse credibility findings of the decision-maker in these two cases were made in both instances in the face of strong evidence that the claims of the two boys were *bona fides*. The cases illustrate the difficulty faced by many applicants in proving the truthfulness of their claims in the face of adverse opinion rulings.

The UNHCR Handbook notes that it is generally impossible for a refugee to 'prove' every part of her or his case and that if the applicant's account appears credible, she or he should be given the benefit of the doubt, unless there are good reasons for a contrary finding.¹⁸

On the face of the rulings in the cases of both *Sam* and *Tony*, it is plain that the two young people were not given the benefit of the doubt. On appeal to the RRT, *Sam* was believed, although by this point his mental health was such that he was barely able to articulate anything.¹⁹ However, the tribunal took the view that circumstances in Afghanistan had changed such that it was then safe for the young man to return home.

It is acknowledged at this point that any fact finding process that relies very heavily on the assessment of oral evidence is going to be difficult. Although these are only two cases of many, and they relate to only one decision-maker, the cases serve as reminders of the need to ensure that decision-makers at every level are trained to handle cases involving children and encouraged to perform their administrative tasks with compassion and good will.

A pervading problem in ensuring that this

occurs, however, is that the legislative regime that mandates so many things is silent on such matters. As a result, it has been difficult to use legal mechanisms of any kind to try and force administrators to behave as they ought (as a matter of humanity and so as to comply with norms of international law). The case of *VFAA v MIMIA* serves to illustrate the difficulties in this regard.²⁰

VFAA is an Hazara Afghan who arrived in Australia (probably as a minor) and applied for refugee status on the inauspicious date of 11 September 2001. He was detained for over five months, during which time the United States launched its war against terror in Afghanistan. Australia's involvement in that war seems to have fostered a somewhat idealistic assessment of the situation on the ground — for example, assumptions that the Taliban were no longer a force to be feared in that country. Where the young Afghan asylum seekers had previously been gaining protection visas almost as a matter of course, the cases assessed after September 2001 reveal a significant change in approach. *VFAA* was one of many young Afghans processed over this period questioned in relation to his age and required to undergo a wrist x-ray.²¹ The examination put his age at 19 years. Two months later, a delegate of the minister refused the applicant's application for a protection visa, on credibility and other grounds.

On appeal, the RRT rejected the contention that a different standard of proof should apply to unaccompanied minors as opposed to adult claimants. It found that the applicant's age — be it 16, 19 or 22 — had no bearing on the outcome of the review. In fact, the tribunal declined to make a finding as to *VFAA*'s age. Before the Federal Court, it was argued that the RRT fell into 'jurisdictional error' by failing to determine *VFAA*'s age, or to take into account his psychological and physical condition (including his stutter) when assessing his claim to be a refugee.

Rejecting these arguments, Merkel J held that the RRT was not mandated by the *Migration Act* to consider the applicant's age and physical and psychological condition as matters of fact. His Honour found that aspects of the UNHCR Handbook on procedures and criteria for determining refugee status that might have assisted the applicant have no force in Australian law. Accordingly, no error of law could be identified in the tribunal's decision.²² As explored further below, this approach has been echoed in a number of other court rulings.

11.4 The Making and Notification of Decisions

“The main thing is, like, if you don't harm yourself when you hear the news.” — *Galileo*, explaining why psychologists at his IDC were present when decisions were announced.

International guidelines recommend that determination proceedings for unaccompanied and separated children should be expedited and otherwise given priority.²³ Policy guidelines direct that case managers are to give protection visa applications from unaccompanied and separated children a high processing priority.²⁴ In practice however, the process for unaccompanied and separated children can be as drawn out as it is for adults.

For the participants of this study, the time it took for decision-makers to hand down their decision varied. While one child remained in detention for less than two months, *Galileo* waited some seven months between his DIMA decision and his interview.

The *Migration Regulations* 1994 (Cth) reg 2.16 prescribe the way in which applicants must be notified of their visa grants. Generally, it is enough that the applicant be given evidence that he or she has been granted a visa. Policy guidelines indicate

that notification should be in writing and sent by registered post.²⁵ However, this was not how some children first received news of their status. *Galileo* explained that it was simply a matter of ‘waiting for your number to be called’. This referred to the now outdated practice of calling children by their number rather than name in some detention centres. In at least one detention centre, groups of detainees' numbers would be called out together over the loud speakers, and asked to come to a certain office. One group would be those who were accepted, and the other those who were rejected. Unaccompanied and separated children did receive special treatment: their numbers were called separately from the adult population. The detainees quickly worked out the time and day on which announcements were made for both groups.

Galileo reported that one day his number was called on the loudspeaker, instructing him to attend to receive a decision. As the successful group had already been called, he knew before being given his paperwork that he was to be rejected. When he arrived at the office, his fears were confirmed: the DIMA officer told him she was sorry, and that his claim for refugee status was rejected. Then she opened the papers and asked to see *Galileo's* identity number. The announcement been a mistake; the number was not his. The incident caused obvious distress, as *Galileo* recounted to the author at interview:

“She just said ‘Oh, good news you can go now’ and I went. I was just sitting there and thinking what happened, and eh, and yeah, it was just...” (sigh)

The unaccompanied and separated children were often given little time to prepare for their life outside. *Homer* was told he had been given a TPV at 6 am in the morning and given an hour to pack. From there he was flown to a capital city. *Stephen* was told that he got a visa at 4 am, in the doorway of his room. He was told simply to get his things

and say goodbye to his friends. Other examples were less distressing. *Denzel* said someone came to his room and told him he had received a visa, and he was then put on a bus to a capital city. While less traumatic in its immediate effect, the trauma of being sent to a foreign city alone, with no acclimatisation after a prolonged period in detention, presented its own problems.

For those whose claims were rejected, the process for notification was of particular significance because of the time limits that were (and still are) imposed on subsequent applications for RRT or judicial review of an adverse ruling. The *Migration Act* s 477(1) provides that the times in question are to be calculated not from the date of the decision, but from the date of *notification* of the decision in question. This has enabled one young Afghan (*Jaffari/WACB*) to argue that he was not ‘notified’ of a decision until he was both given a written copy of the reasons for decision and a translation and explanation of the legal effect of those reasons.²⁶ Failure to notify a decision would mean that the time limits under the *Migration Act* had not begun to run and, accordingly, his appeal would not be out of time.

The evidence presented was that *Jaffari/WACB* had been called to the appointed office (see above) where he was told orally that he had lost his appeal. At that point the boy began to cry and was comforted by a social worker. He alleged that he was not physically handed a copy of the decision. It was not disputed that the decision was not translated for him at this point. *WACB*’s barrister argued that the best interests of the child principle in the *CRC* should operate to require the word ‘notification’ to be given real meaning from the perspective of the child.²⁷ The boy sought judicial review of the RRT’s decision in the Federal Court, but his application was lodged outside of the 28-day time limit (then s 478(1)(b)).

At first instance, French J considered whether the applicant’s status as a minor rendered the noti-



High Court of Australia, 1980. From the collections of the National Archives of Australia.

fication of the tribunal’s decision ineffective. French J found it more likely that the DIMA official did advise *Jaffari/WACB* about applying for review and that he did tell the boy of the 28-day time limit. His Honour commented, ‘It is quite possible that the applicant was so distressed at hearing that he was not to receive a visa, that he did not register the other things he was told’.²⁸ This observation, nevertheless, did not appear to impact upon the judge’s finding as to the effectiveness of the notification received. He said:

“The fact that a person is a minor should not be seen, of itself, as imposing any procedural barrier to invoking the legal processes necessary to establish that the person is a refugee and entitled to protection. There can be no gloss upon the jurisdiction of the court conferred by Part 8 of the *Migration Act* which prevents it from dealing with such an application simply because the applicant is a minor. That is not to say that in an appropriate case such as that of a child of tender years, an order should not be made providing for the appointment of a tutor or a next

friend. In my opinion, however, that is not shown to be necessary here.”²⁹

French J observed that the status of the Minister for Immigration under the *Immigration (Guardianship of Children) Act 1946* (Cth) does not in terms affect ‘the conditions under which notification may be given and under which time begins to run for the purposes of an application to this Court’. However, his Honour drew attention to the ‘significant discrepancy’ between the treatment of unaccompanied child asylum seekers under the *Migration Act*, and the guidelines published by the UNHCR (see 4.3 above). In particular, he noted the obvious disadvantages facing children in detention; and the need for child-sensitive refugee status determination procedures. French J concluded:

“It is of concern that the application for judicial review in this case was lodged by a 15 year old non-citizen and lodged out of time thus depriving him of such limited rights of review as he would otherwise have enjoyed.”³⁰

The judge’s findings were endorsed by the Full Federal Court on appeal.³¹ That case held that the juvenile status of a separated child from Afghanistan could not alter the literal operation of the time limits in the legislation. It rejected arguments that the notification provisions in the legislation should be interpreted so as to imply a special duty of care in the case of unaccompanied child detainees. When the case went on appeal to the High Court, the central issue in dispute was whether the relevant provisions in the *Migration Act* imply notification of a bare decision only, or whether the requirement is to physically deliver the document and/ or to inform the applicant of the substance of any ruling.

Before the High Court, counsel for the minister argued that it was enough that the young man was

advised of the adverse outcome without being informed of the reasons. Such an approach denies any legal requirement to take account of factors that might impede an applicant from understanding the legal import of the process in which she or he is engaged. In the case of a separated child who has no understanding of Australian legal process, who speaks no English and who has no ‘next friend’ to explain what is going on, it is an interpretation that gives no practical meaning to the term ‘notification’.

Before the High Court, the majority (Gleeson CJ, Gummow, Hayne and Heydon JJ) ruled that s 478(1)(b) required nothing less than the physical delivery of the tribunal decision to the applicant.³² Mere oral communication of the result did not suffice. Kirby J dissented on the basis that ‘decision’ means ‘result’ or ‘outcome’ — communication of which had to be accepted as ‘notification’ whatever the modality adopted to achieve this. For the whole court, the young man’s status as a minor without either language or education was professed to be irrelevant. Kirby J expressed his sympathy for the applicant, but ruled that the language of the legislation was unambiguous. The majority found on this occasion for the young man, but also stressed the importance of simple and strict statutory interpretation in its reasoning. The majority noted that the issue of notification was addressed by amendments made to the migration legislation by the *Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Act 2001* (Cth). These changes operate to deem individuals to have been notified of decisions upon the delivery of oral, written or electronic communications.

In spite of the WACB’s ‘win’ in the High Court, the decision confirms that immigration laws in Australia make no concessions for minority or disability — principles of international law and notions of common decency notwithstanding.

Deciding Refugee Status | *Sam's Story*

Sam was born to a wealthy and politically influential Hazara family. His father was a commander in his region who had two wives and many children. *Sam's* older brothers were established as businessmen in their own right. From the age of eight or nine, *Sam* had lived with his large family in an Hazara stronghold in Afghanistan that fell to the Taliban in a dramatic firefight in 1999. The day of his city's capture is one that *Sam* will never forget. He had been sent with friends of his father to represent the family at a funeral — a sad but responsible duty for a boy aged 14.

When the Taliban attacked, he was forced to flee with his father's friends, joining a convoy of displaced people that snaked its way irregularly across the Afghan countryside. *Sam* was told that his father had been killed by the Taliban in an assault on their house. He later met one of his father's bodyguards who confirmed the grizzly news. The rest of his family had disappeared. Two brothers were missing in one part of the country; every indication pointed to his mother, sister and little brother having been killed along with his father. The Taliban victory in *Sam's* home town had seen 11,000 people lose their lives. Many were Hazara.

Sam saw many atrocities over this period: he stumbled over dead bodies, saw people around him dying of disease, hunger and injury. His father's friends delivered him to a mosque, where he was given sanctuary for eight months. *Sam* eventually made his way south to the province where he was born, seeking out an aunt who lived on a farm. His aunt took the boy in and hid him among the household for the best part of two years. In his 16th year, *Sam* was told that his extended family could no longer live with the risk he posed — and that the boy himself must find a life where he could live a real existence. His uncle made arrangements with the people smugglers.

Like many of the other unaccompanied and separated children who made their way to Australia in 2001, *Sam* was flown to Indonesia from whence the smugglers consigned him to a fishing boat that was barely seaworthy. He endured a terrifying boat voyage, arrived in Australia and was transferred immediately to one of Australia's more remote and difficult detention centres. Already a severely damaged young man, *Sam* had the misfortune of



encountering both riots and disturbances in the detention centre and a new generation of 'tough' decision-makers.

Sam's appeal to the RRT failed. All attempts to get a court to overrule this finding were also to fail. By February 2002, *Sam* had been diagnosed with severe PTSD and 'dissociative disorder'. He had made several attempts to commit suicide. By the time he was released into the care of his adviser whose home was declared to be a detention centre, *Sam* was regularly wracked by nightmares and dissociative attacks. His adviser described these attacks:

"He cries, then has uncontrolled laughter, then weeping and stamping of feet and body spasms (like a fit) where his body becomes icy cold and he shakes uncontrollably for five to 30 minutes. Then is exhausted and sometimes sleeps for days and we have to wake him and force him to eat and drink. At night time he has twice opened the door and gone out in the freezing cold and started to yell in his 'dissociated state' — we just have to wrap him in blankets and hold him until he calms down and then put him back to bed."

Endnotes

- 1 See, for example, John Myers et al, 'Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Court-Room Testimony' (1996) 28 *Pacific Law Journal* 1; and Len Roberts-Smith, 'Communication Breakdown: The Importance of Cultural Language Awareness in Court' (1989) 27(7) *Law Society Journal* 70.
- 2 Interview with Mary Crock, 3 March 2005.
- 3 Interview with Mary Crock, 29 January 2006.
- 4 *Odhiambo v MIMA* (2002) 69 ALD 312; and *Odhiambo v MIMA* (2002) 122 FCR 29.
- 5 *Id* at [11].
- 6 See DIMA, Procedures Advice Manual 3 (2003), 43.1.
- 7 *WAEF v MIMIA* [2002] FCA 1121 (10 September 2002).
- 8 *Applicant WAFV v MIMIA* [2003] FCA 16 (17 January 2003).
- 9 *Id* at [57].
- 10 *SBBR v MIMIA* [2002] FCA 842 (3 July 2002).
- 11 *Id* at [9].
- 12 *Id* at [10].
- 13 *Id* at [11].
- 14 *SCAS v MIMIA* [2002] FCA 598 (10 May 2002).
- 15 *Latif v MIMIA* [2001] FCA 1701 (21 November 2001).
- 16 See for example, Amina Memon, Aldert Vrij and Ray Bull, *Psychology and the Law: Truthfulness, Accuracy and Credibility* (McGraw-Hill, London, 2nd ed, 1998), in particular, Ray Bull, 'Obtaining Information from Child Witnesses', pp 188–209.
- 17 In the interview the delegate did not raise these suspicions other than to ask *Sam* whether it was dangerous as he travelled through Afghanistan, a fact that the applicant affirmed.
- 18 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR, Geneva, 1979), pp 302–209.
- 19 *Sam's* RRT transcript records the young man breaking down during the hearing. At interview he stated that he was so ashamed of the tape recording that he did not want us to listen to it.
- 20 *VFAA v MIMIA* [2003] FMCA 389 (12 September 2003).
- 21 See DIMA, MSI 370: Procedures for Unaccompanied Wards in Immigration Detention Facilities (DIMA, Canberra, 2002).
- 22 *VFAA v MIMIA* [2003] FMCA 389 (12 September 2003).
- 23 See UNHCR, above n18, 67.2.
- 24 DIMA, PAM 3, 18.12.
- 25 DIMA, PAM 3, 153.
- 26 See *Jaffari v MIMA* (2001) 113 FCR 524 (French J); and (on appeal) *WACB v MIMA* (2002) 122 FCR 469 (FFCA); and *WACB v MIMA* (2004) 210 ALR 190 (HCA).
- 27 *Jaffari v MIMA* (2001) 113 FCA 524 (French J, 26 October).
- 28 *Id* at [34].
- 29 *Id* at [11].
- 30 *Id* at [44].
- 31 *WACB v MIMA* (2002) 122 FCR 469 at [7]–[8].
- 32 *WACB v MIMA* (2004) 210 ALR 190; [2004] HCA 50 (7 October 2004).





WITH JACQUELINE BHABHA

Unaccompanied and Separated Children and the International Definition of 'Refugee'

The term 'refugee' shall apply to any person who: “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, is unable or, owing to such fear, is unwilling to return to it.”¹

In Australia, jurisprudence on children and refugee status of any kind is recent and poorly developed. Analysis of Australian case law suggests that the term 'refugee' has tended to be interpreted from an adult-centred perspective, marginalising the experiences of persecuted children. For the Convention to be recognised as relevant to the claims of unaccompanied children, care must be taken to consider the specific nature of the harms that can and do befall these children. The

Convention definition has been interpreted to accommodate the particular experiences of women.² Similar concessions are yet to be made in relation to children, or for our purposes, unaccompanied and separated children.³ In this chapter we examine some of the key aspects of the definition of refugee so as to highlight the issues for children. It will be seen that Australia's limited experience of children as asylum seekers in their own right means that many issues have yet to be

considered at the level of either appellate (RRT) or judicial review.

In advocating a child-centred approach to the definition of refugee, the call is twofold. First, as discussed earlier, decision-makers need to consider the *procedural* concessions that are necessary if a child is to be able to tell their story, and to articulate the dangers that they do (or should) fear. Second, and this is the subject of this chapter, decision-makers need to examine what words like ‘persecution’ in the definition of refugee mean in the context of children (especially those who are alone and without the protection of family or responsible adult).

The Convention needs to be read with the image of the child front and centre in the mind of the decision-maker.

12.1 ‘Well-Founded Fear’

The phrase ‘well-founded fear’ in Art 1A of the Refugee Convention comprises two components, one subjective and one objective. Where a literal interpretation of the definition is applied, young children could face a significant obstacle. They may be exquisitely vulnerable, yet incapable of expressing any fear. As is often manifest in cases involving child soldiers, it is often an attribute of childhood that children do not experience fear in the same way as adults do because of their under-developed cognitive state. The inability of a child to express subjective fear should not be a barrier to recognition of refugee status.

UNHCR has issued policy and guidelines on asylum seeker and refugee children in order to ensure that they receive appropriate and effective treatment and assistance.⁴ The Guidelines on Policies and Procedures in Dealing with Unaccompanied

Children Seeking Asylum were published in February 1997. In assessing a child’s refugee claims, the guidelines recommend that ‘particular regard... be given to circumstances such as the child’s stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her vulnerability’.⁵

The RRT Guidelines on Children Giving Evidence acknowledge that ‘child applicants in a refugee matter may not be able to express a subjective fear of persecution in the same manner as an adult applicant’.⁶ They also recognise that children may be unable to present evidence in support of their claims because of their age, gender, cultural background or other circumstances. The guidelines state that greater allowances should be made for inconsistencies in the evidence of children.

These guidelines should provide a useful reference point for Australian courts and tribunals. Yet cases involving unaccompanied and separated children exhibit a kind of ‘anxiety’ about the ‘global legal order’⁷ and confirm a generalised reticence to refer to international instruments in the interpretation and application of domestic laws.

As noted in Chapter 4, international law may be used to inform the interpretation of Australian statutes where ambiguity is evident in the legislative scheme. Yet appellate bodies retain substantial discretion in determining the existence of ambiguity for this purpose and without greater recognition of the particular needs of unaccompanied and separated child applicants, international law is unlikely to be applied with any regularity in these cases.⁸

Objective fear

As noted above, the test posed by Art 1 implies an objective element too, such that the fear of persecution



must be 'well-founded'. The test has consequently been paraphrased into the question whether there is a 'real chance' of persecution.⁹

For the Afghan children whose cases we examined, regime change in Afghanistan presented substantial obstacles to proving the existence of a well-founded fear of persecution. In every one of the Federal Court cases that dealt with this matter, regime change in Afghanistan was deemed a sufficient basis from which to infer that the applicant's fear of persecution was no longer well-founded. In these cases, the court was willing to accept that these children held a subjective fear of persecution at the time of fleeing, but in light of changed country circumstances, refused to recognise that this fear retained any objective basis.¹⁰

Another problem associated with the objective element of this definition is the RRT's use of country information. Precisely which country information the tribunal will have reference to is generally a matter for the tribunal. In each of the Federal Court decisions studied, the court declined to intervene in the tribunal's application of particular country information. The case of *SCAW v MIMIA* is representative.¹¹ There, the RRT referred to BBC Monitoring Reports when considering the contemporary situation of Hazaras in Afghanistan. These reports quoted a Hazaran leader, who expressed happiness at the Taliban's downfall and the newfound freedom of Hazaras to participate in political processes. Citing these reports, the tribunal found that there was no longer an objective basis for the fears expressed by the applicant. On appeal to the Federal Court, these sources were taken to support the tribunal's finding against the applicant. It was not necessary for the tribunal to locate reports favouring the applicant's position. It had reached a legitimate finding of fact on the material before it.

Just how durable the change in country circumstances must be before the applicant's fear of persecution loses its objective basis is a contentious matter in many cases.

The case of *SFTB v MIMIA* is representative of the jurisprudence examined in this study. In that case, the RRT declined to consider the 'durability', significance or effectiveness of the changed circumstances in the applicant's home province of Ghazni in Afghanistan.¹² On appeal to the Full Federal Court, this finding was upheld: the RRT was not obligated to consider the durability of peace in the region. It had reached a legitimate finding of fact on the material before it.¹³

12.2 'Persecution'

12.2.1 General Principles

To qualify for asylum, a child, like any other applicant, must demonstrate that what they fear amounts to 'persecution'. This term is not defined, in either international or domestic law. This indeterminacy is not a coincidence — the terms 'torture' or 'cruel, inhuman or degrading treatment or punishment' which feature prominently in international human rights law could have been used instead if the goal was to reference a clearly circumscribed domain of behaviour. Instead, the term 'persecution' was chosen precisely in order to accommodate a wide range of situations and to encompass new developments threatening human dignity as they evolved and were brought to international attention.¹⁴

Despite this open-endedness, certain principles are clearly established. A threat to life or freedom, arising out of a failure of state protection and based on civil or political discrimination always constitutes persecution. So, an unprotected child whose flight is motivated by such a threat, because he or she is an indigenous person, or a member of a vulnerable minority group, should fall within the definition. Similarly, other serious but non-life threatening violations of human rights for the same reasons — such as torture — would also qualify. A child fleeing torture specifically targeted at street children or at children of dissidents — would thus also be covered. It matters not whether the State is directly responsible for instigating the torture (an act of commission) or whether the State is indirectly responsible for knowingly failing to prevent the torture (an act of omission).

However, and this is the third principle, the protection to be afforded asylum seekers is broader, and tracks developments in human rights law more generally. Australian courts have recognised the



importance of general human rights principles in construing the scope of asylum protection. In Australia, both the legislation and the jurisprudence from the courts have favoured a broad interpretation. In s 91R of the *Migration Act 1958* (Cth), for example, persecution is said to constitute *serious harm* defined in turn to *include* (the definition is not exhaustive):

- a) a threat to the person's life or liberty;
- b) significant physical harassment of the person;
- c) significant physical ill-treatment of the person;
- d) significant economic hardship that threatens the person's capacity to subsist;
- e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
- f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.¹⁵

In *Applicant S v MIMA*, the Australian High Court confirmed that the characterisation of persecutory behaviour is to be determined by the standards of human rights law and by the extent to which an individual is subjected to discriminatory treatment.¹⁶ This, in turn, has given rise to questions about when (if ever), validly enacted State laws will or could amount to persecution. In the same case, Gleeson CJ, Gummow and Kirby JJ noted that the more 'ad hoc and random' the infliction of harm, the more likely it is that an individual is being subjected to persecution rather than a 'law of general application'.¹⁷ The test is whether a general law has a legitimate objective and uses means proportionate to the objects desired. In *Chen Shi Hai v MIMA*, the court stated:

Whether the different treatment of different individuals or groups is appropriate and adapted to achieving some legitimate government objective depends on the different treatment involved and, ultimately, whether it offends the standards of civil societies which seek to meet the calls of common humanity.¹⁸

For unaccompanied and separated children seeking asylum alone, this approach has the benefit of expanding the categories of persecutory behaviour to include actions that might be taken in line with either broad scale policies or with the tolerance of the authorities. The relevant standard to be applied is that of the 'civilised and organised society'.

The expansive and inclusive conception implicit in this approach is important, since human rights violations that affect asylum seekers may well fall outside the range of domestic experience and be unfamiliar to domestic fact finders and decision-makers. It is not just spectacular individual acts

that constitute persecution. Lesser measures that do not individually amount to persecution can nevertheless cumulatively constitute persecution, where they operate incrementally and in aggregate. This principle is well established in both international and domestic law. So, whereas one act of beating a street child for sleeping in a public place may not constitute persecution, a pattern of such conduct over time certainly could. Indeed discriminatory acts that are not even particularly serious (taken singly) can rise to the level of persecution where they constitute a persistent pattern. Taunting, baiting and excluding subsequent or 'black'¹⁹ children from government services, in an area where a governmental 'one-child' birth policy is strictly enforced, exemplifies how this principle might impinge on a child asylum seeker in practice. So does the forced recruitment of first-born sons into a guerrilla force.

Finally, although lawful punishment cannot generally constitute persecution — as the UNHCR Handbook puts it, 'a refugee is a victim...of injustice, not a fugitive from justice'²⁰ — the distinction between punishment and persecution can become complicated. Thus, excessive punishment (for example, the death penalty for a small drugs-possession charge) or discriminatory punishment (for example, imprisonment for pursuing 'illegal' religious education) may constitute persecution, and decision-makers must be open to looking behind the formal claim that harsh behaviour constitutes mere punishment. This may be particularly pertinent in the case of politically active adolescents, where the line between punishing insubordination and prohibiting expression of legitimate political expression may be wrongly drawn. Police brutality towards street children caught thieving or begging, or towards adolescent activists on the streets of Baghdad or Port au Prince, are examples.

Whether or not other conduct can be considered ‘persecution’ depends on the circumstances of each case. Individual situations have to be evaluated separately and in detail. Blanket decision-making — for example, determinations that all West Papuan children arriving unaccompanied across the Torres Strait are not eligible for asylum — would violate this requirement.

12.2.2 The Concept of Child Persecution

As we examine in more detail in the *Seeking Asylum Alone: A Comparative Study*,²¹ for children seeking asylum alone, ‘persecution’ can be manifest for children in at least three ways. Children can face persecution that is similar or identical to the types of persecution faced by adults. However, they can also be at risk because of persecution that only applies to children. For example, only children can be victims of the various iterations of child abuse; only children can be forced into underage marriage or conscripted as child soldiers or as members of child street gangs. Finally, there are threatened or actual harms that might not constitute persecution for adults but that become persecutory in the case of children because of their special vulnerability.

Australia’s legislative scheme contains elements that work both for and against children seeking asylum alone. As explained above, s 91R of the *Migration Act 1958* defines the term ‘persecution’ in a way that focuses attention on personal violence and traditional types of harm but includes other deprivations affecting the ability of a claimant to subsist. This is a non-exclusive definition that could work well for children seeking asylum alone. The problem seems to be that not enough attention has been paid to considering the issue of persecution from the perspective of a child, in a way that acknowledges and prioritises the special vulnerability of children. On the other hand, s 91S of the Act operates to restrict the ability to rely on the persecutory

experiences of family members (alive or dead) where these cannot be tied directly to the Refugee Convention definition of refugee.

In the case of unaccompanied and separated children, the denial of family protection and denial of education and other citizenship rights clearly constitute an interference with basic human rights and dignity within the meaning of s 91R.

Unaccompanied and separated children face an increased risk of military recruitment, sexual violence, exploitation and abuse, forced labour, denial of access to education and basic assistance and detention.²² These are matters which have the potential to affect the right of these children to subsist.

Although the outcomes in most were favourable to the children involved, it is a striking feature of the cases studied for this report that the persecution feared tended to be similar or identical to the types of persecution feared by adults. For the 85 children whose cases we examined, persecutory conduct included the abduction, conscription and murder of male relatives by the Taliban and direct physical threat to the children themselves. As noted in Chapter 3, for male applicants, fear of being conscripted or killed overwhelmingly provided the impetus for fleeing (see Chapter 2 above). One of the children interviewed, *Adris* described how his older brother had been abducted by the Taliban and how he apprehended the same treatment as he approached fighting age. *John A* similarly described the abduction of his father and murder of his brother by the Taliban. These events ultimately caused him to flee with his cousin. The father of *John A* finally decided to send his son away when it became clear that the Taliban was going to conscript him and other male children living in the area. *Halimi* described how she and her brother hid on the many occasions

when the Taliban came to their house. She described the pattern of abductions in their village that ultimately caused them to flee. After the Taliban confiscated all guns, boys as young as 10 or 11 were systematically taken. Their father and grandfather were abducted and subsequently killed. Of those children whose relatives were killed by the Taliban, all were granted temporary protection visas and, eventually, permanent residence.

In these instances, even when children are unaccompanied or separated from their families, the child persecution alleged may not need to include reference to any child-specific features. Though the separated status of the children may give rise to special procedural problems, it does not necessarily constitute an issue for the substantive adjudication of the asylum claim. No special account of child persecution is therefore required.

However, even in these ‘mainstream’ cases, child-specific issues may arise and be neglected. For example, a child may be persecuted as part of an oppressed minority group in order to increase pressure on politically prominent or targeted parents. DIMA officials and judges who ignore child-specific factors may miss such a dynamic and overlook the particular risks facing such a child.



12.2.3 Persecution that Only Applies to Children

Situations of persecution that is specific to children arise where the fact that the applicant is a child is central to the harm inflicted or feared. The most obvious examples involve persecution that can only be inflicted on a child.

Only children can be: conscripted as child soldiers; subjected to child abuse; recruited into gangs of street children; threatened with infanticide or pre-puberty female circumcision; subjected to child sale or marriage; or made to suffer persistent discrimination as ‘second children’ or as street children.

In these cases, an understanding of child-specific persecution is critical to the success of an asylum claim. Until recently, many of the categories of child-specific persecution listed above were not considered to fall within the asylum rubric at all. This is not because the behaviour concerned did not have the hallmarks of serious harm or threat to life and freedom, but because a traditional conception of the limits of persecution hampered both advocates and decision-makers in advancing and pursuing such claims. Given the rapidly expanding scope of human rights norms, and of global knowledge of rights violations inflicted on children, it is critical that the concept of persecution central to the adjudication of asylum claims keep in step.

In Australia, the recognition of children born in contravention of China’s ‘One Child’ policy as refugees is an example of good practice — but its also demonstrates how long it has taken to recognise children as refugees in their own right. In the late 1990s, considerable controversy arose in Australia over whether key aspects of the Chinese policy — including practices of forced abortions and sterilisation — could amount to persecution given that

the policies were ones of general application. The High Court overruled lower courts on this point in 1997, stating that the test should be the nature of the harms inflicted, and not the question of whether the harms are caused by government actors following orders.²³ It was not until three years later that the same court accepted that children excluded from key aspects of participation in Chinese society could be refugees.²⁴ The change came only after a major scandal involving a Chinese woman who was denied asylum and returned to China, only to be forced into an abortion of her unborn child at 38 weeks gestation. Ironically, the child recognised as a refugee in 2000 was born to a refugee family who arrived in Australia on the same boat as the ill-fated Chinese woman. They managed to avoid removal.

12.2.4 Behaviour that Constitutes Persecution for a Child but not an Adult

The third and perhaps most contentious category of child persecution are situations where the behaviour complained of should be considered persecution when inflicted on or threatened against a child, even though the same behaviour may not rise to the level of persecution in the case of an adult. Although courts in the United States have begun to explore these concepts, the jurisprudence in Australia has yet to venture into this territory.²⁵

This category epitomises the relativism inherent in the concept of persecution. It is also the one which is most likely to present difficulties for child advocates and decision-makers concerned with children's cases, since similarly placed adults would not succeed in obtaining asylum. There are two reasons why conduct that might be considered mere harassment or interference when directed at an adult could rise to the level of persecution for a child. First, a child's heightened sensitivity might influence the emotional response to the conduct. This dynamic is commonly witnessed in adversarial

situations (including court rooms) and should be fairly uncontroversial. Aggressive questioning, restraints on freedom such as handcuffs or shackles, detention, rough handling such as slapping, shouting, threats, can produce high levels of terror, anxiety and distress in children where these behaviours may not rise to the level of 'serious harm' for adults. These experiences may result in temporary or permanent trauma to a child. A child-centred perspective would identify such behaviour as persecution, whereas an approach lacking this might miss the significance of the experience and trivialise its impact on the applicant. For example, overnight incarceration of street children may instil terror or despair for a child, as might a bullying and aggressive rebuke, threat or admonishment from a uniformed State agent carrying out a house search. It is not only conduct directed at the child that can elicit this heightened response. Behaviour that targets close relatives, such as parents or siblings, may also terrorise and traumatise a child so as to constitute persecution, in circumstances where an adult would not be so affected.

Second, conduct may rise to the level of persecution for a child where it would not for an adult because of children's heightened dependence. Children's vulnerability in the face of separation or loss of family is widely acknowledged. Forced separation from parents, as where the latter are detained or where children are abandoned or neglected, may in some circumstances constitute persecution for a child where similar separation for an adult could not be so considered. The same argument applies to children who become homeless as a result of domestic abuse or family destitution and who are, as a result, deprived of basic social and economic rights such as access to schooling, housing and basic health care. They are not just clear candidates for welfare protection or foster care, as a matter of immediate social provision. Where such domestic

protection is unavailable, these children may validly claim to face persecution.

In 2004, an IAAAS adviser contracted to assist a group of asylum seekers detained on Christmas Island raised arguments that went some way to characterising child-specific persecution. Allegations were made of persecution of a baby who, born after the (negative) assessment of her parent’s claim, happened to be seeking asylum in her own right. Even if the child’s parents were found not to be refugees, it was argued that the disadvantages that would be visited on the child should be regarded as persecution. Interestingly, the RRT member recognised the child’s refugee claim, in spite of the parents having received an adverse assessment. However, the member did so after carefully dismissing the submissions made about child-specific persecution involving generic assertions of harms done to ‘children born into a family in difficult circumstances’ or to the ‘children of dissident families’. It was argued that the child was at increased risk of being abused, both physically and sexually, either through being kidnapped and sold for trafficking or forced ultimately into prostitution. The member rejected the arguments on the basis that:

“Both perspectives rely on state complicity or indifference to bring the applicant’s anticipated exploitation within the scope of the Convention. However, the Tribunal is not satisfied by the evidence from external sources...that either the government of XXX or its agents are commonly involved in the exploitation of children or indifferent to children at risk of exploitation.”²⁶

In essence, the RRT relied on new information advanced about the persecution that the parents would face if forced to return to Vietnam, using this as the basis for accepting that the child would face serious discrimination in matters such as housing,

access to education and the ability to earn a livelihood. The child was therefore recognised as a refugee on the basis of her parent’s (implied) refugee status and her membership of the particular social group constituted by her family.

While cases like this one are a welcome development in Australian law, it is well to note that the norm among both IAAAS advisers and government decision-makers has not been to insist on the articulation of separate refugee claims by children embedded in a family group. Until this occurs, it is difficult to see that the refugee claims of children will be given the attention they deserve. This case also suggests that decision-makers remain wary about expanding the categories of cases in which refugee status will be recognised. In a political environment where asylum seekers and irregular migrants remain deeply unpopular, such attitudes are not surprising.

12.3 The Convention ‘Grounds’

Showing that a person faces persecution is not in itself a guarantee of refugee status, even if the persecution feared is real and serious. To qualify as a Convention refugee, child refugees, like their adult counterparts, must fear persecution on the basis of civil or political discrimination as defined in the definition of ‘refugee’ in the Refugee Convention. The five Convention grounds — race, religion, nationality, membership of a particular social group and political opinion — each raise issues for children seeking asylum alone.

12.3.1 Race, Religion and Nationality

Once again, the ‘grounds’ that have been used most frequently in children’s cases are those that involve unchanging characteristics on the part of a claimant and so can accommodate either adult or child. In a country torn apart by racial, ethnic or religion



divisions, it is often relatively easy to demonstrate the requisite nexus between persecution feared and the race, religion or nationality grounds. For example, a sizeable number of the 85 young people studied claimed to be of Shiite religion and Hazara ethnicity and were granted refugee status on grounds of both religion and ethnicity. Successful claims in these cases have not always required applicants to show that they were active practitioners: it is enough that a person is *perceived* to belong to a particular sect or religion and is liable to be persecuted for this reason.

The cases involving claims based on nationality can raise strong issues of persecution that is specific to children. An example in point is where a child faces legal disqualification or exclusion amounting to persecution for being born stateless. For example, a child might be denied all form of schooling because of his or her nationality; or the child might face deportation to a dangerous location, from the only country he or she has known as home because of immigration rules excluding the child and/or the family.

There are also cases where children from minority nationalities are forced to receive their State education in the majority language. Such

practices can result in denial of cultural and linguistic rights and in exclusion from access to work and other key social structures. This could rise to the level of child-specific persecution on the basis of nationality. In Australia, children faced with such discrimination would be accepted as refugees only if the discrimination feared met the description of serious harm in s 91R of the *Migration Act*.²⁷

12.3.2 Political Opinion

Decision-makers and advocates frequently make two false assumptions about the relationship between childhood and political activity or belief. The first is the widespread notion that children are incapable of holding political opinions; that they are insufficiently mature or experienced to have an understanding of political issues and differences. This can be a radical misperception — particularly in societies where political activity is constant and political opinions ubiquitous. Whether a child is capable of (or indeed does) hold a political opinion is a question of fact. This can be determined by assessing the child's maturity, intelligence and ability to articulate thoughts. There is no standard distribution of such capacity. It is worth noting, however, that in polarised and politically unstable

societies, children and youth are often extremely engaged in political struggles and frequently occupy leadership positions.

A second assumption that impacts on children’s ability to claim asylum on the basis of political opinion is the view that persecutors would not target children for political reasons. The notion here is that children are considered too insignificant as opponents or too ignorant as adversaries to hold political positions. Again, this attitude can also be misplaced. Children in many countries immerse themselves in the political battles of their kin. They are often — as the escalation in recruitment of child soldiers brutally demonstrates — on the front lines of confrontation and risk. Their political involvement can lead to targeting for persecution by government or hostile forces. Moreover, even if they are not directly involved in politics, children can be associated with the political activities or opinions of their parents or other relatives. As a consequence they may have political opinions attributed or imputed to them, and this may also lead to persecution. Decision-makers need to be alert to these political realities to avoid projecting inaccurate stereotypes about childhood innocence or naïveté onto politicised children.

12.3.3 Particular Social Group

The meaning of ‘membership in a particular social group’, the catch-all phrase that appears both in the 1951 Refugee Convention and in domestic legislation, has been a matter of less certainty than the other Convention grounds. However, litigation and scholarly debate²⁸ has led gradually to broad consensus about the application of the term. The early jurisprudence in Western countries defined the phrase ‘particular social group’ in terms of ‘immutable’ characteristics and/or association between members of a group. The Canadian Supreme Court in *Canada (Attorney General) v Ward*²⁹ provided three examples

of such groupings: (1) groups identified by an innate or unchangeable characteristic; (2) groups whose members associate voluntarily for reasons fundamental to their human dignity; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence. The Australian courts expanded these categories by confirming that association between members is not a prerequisite for a ‘social group’: see further below. Because the Convention requirement is that persecution be ‘*by reason of*’ membership of a social group, it is accepted that the existence or otherwise of a group is less important than the *perception* that such a group exists.³⁰

So, persecution based on membership in a particular social group is understood to mean persecution directed at an individual because of his or her membership in a group sharing settled or unchanging characteristics. These may be immutable either because they cannot be changed (sex, race, family, personal history or experience). Alternatively, the characteristic may be so fundamental to the group that members should not be required to change (personal belief system, sexual orientation). For children, the most frequent group membership grounding an asylum claim is likely to be the family.

In some cases, group membership for the child asylum applicant will be defined by a form of child-specific persecution. This may take one of three forms: the government may participate directly in the abuse, such as by conscripting child soldiers or authorising shooting at street children; the government may acquiesce or fail to proscribe cultural or social practices which (whatever their intent) are *de facto* persecutory, such as female circumcision; or, despite criminalisation of the behaviour, the government may in practice fail to protect children being harmed by their carers or other members of their society, as in cases of incest, child abuse,



forced or bonded labour, child sale or persecution of disabled or mentally handicapped children.

As noted earlier, while the Taliban were in control in Afghanistan, the vast majority of the young Afghan asylum seekers in Australia had little difficulty in gaining recognition as refugees on the same bases as their adult counterparts. Many were Shiite Hazara — members of a group widely accepted as being at risk of persecution from the predominantly Pashtun Taliban on grounds of both ethnicity and religion. After the fall of the Taliban controlled government, however, the children lost the comfort of the broad and accepting approach that had been taken to the Afghan asylum seekers.

The predominant view in the lower federal courts has been that unaccompanied and separated children cannot be identified as belonging to a ‘particular social group’ in their own right for the purposes of the refugee definition. In 2003 the Full Federal Court heard two cases that raised precisely these issues. Applicants *SHBB* and *VFAY*³¹ were unaccompanied children who claimed to have fled forcible conscription by the Taliban. Different arguments were raised about the social groups to which young people in the applicants’ situation might belong. However, in both instances the court upheld the rejection of the boys’ claims on the basis

that the undisputed vulnerability of unaccompanied and separated children did not mean that they faced persecution *by reason of* their membership of a cognisable social group. In *SHBB v MIMIA* the court held that the RRT made a defensible finding of fact that Afghan society does not recognise ‘young males without a protector’ as a social group.³² In *MIMIA v VFAY* the court ruled that it was not enough to show that the general conditions in Afghanistan might have a differential impact on some groups.³³ A well-founded fear in itself does not create refugee status. The fear of persecution must be *by reason of* the individual’s membership of a particular social group.

A subsequent ruling from Australia’s High Court suggests that these Federal Court rulings may no longer represent good law in Australia.³⁴ The case of *Applicant S v MIMIA* concerned a young Afghan male of Pashtun ethnicity who fled Afghanistan after narrowly avoiding recruitment by the Taliban on two occasions.³⁵ The RRT rejected the man’s refugee claim on the basis that he was not ‘targeted to the extent that he was listed or registered for recruitment’ by the Taliban. He was merely seen as a young, able-bodied man who was available in a particular area at a particular time. The High Court upheld the first instance ruling by Carr J to the effect that this characterisation of the applicant’s case revealed a failure to consider at all whether the applicant belonged to a ‘particular social group’ for the purposes of the Refugee Convention.³⁶

The High Court concluded that both the Full Federal Court and the RRT fell into legal error in their characterisation of the claimant’s status. The Full Court erroneously advocated a subjective test (perceptions of individuals *by the Afghan community*), while the RRT also asked itself the wrong questions by failing to consider whether young able-bodied men in Afghanistan emerge as a distinct group when seen in the light of ‘legal, social, cultural and religious norms prevalent in Afghan society’.³⁷

For the unaccompanied children at the heart of the applications in *SHBB* and *VFAY*, the ruling in *Applicant S* provides cause for hope.

In a society where family ties and clan allegiances determine virtually all aspects of a person's daily existence, such children take on dramatically different characteristics depending on whether a subjective (inter-societal) perspective or an objective (third party) perspective is used. Stripped of clan relationships and protection, unaccompanied children are at once manifestly at risk and invisible within Afghan society.

The adoption of the subjective test approach explains why the RRT in both *SHBB* and *VFAY* found that the young people did not constitute a 'particular social group'. If an *objective* test is used, however, the results are starkly different. The children stand out as a 'particular social group' not because their youth makes them vulnerable, but because social, cultural and legal factors within Afghan society mark the children as different or distinct within the community. The dislocation of the children distinguish them from the wider body of children in Afghanistan with whom they share the heightened vulnerability to harm common to all children in situations of war and deprivation.

There is one other aspect of the High Court's ruling in *Applicant S* that is likely to benefit children who seek asylum alone in Australia. The court also considered the question of whether laws or policies of general application, or behaviours that are not predicated on 'enmity or malignity', can ever constitute persecution for the purposes of the Refugee Convention. In *Applicant S*, the Minister for Immigration argued that young, able-bodied men could not be refugees because the Taliban 'merely sought to harness the valued resource of those capable of fighting'.³⁸ The fact that young conscripts might die

or suffer harm in the fighting did not mean that the regime was trying to rid itself of the young men. The court rejected this submission. The ruling provides a welcome indication that legal formalism should not be allowed to override basic notions of human rights in the interpretation of the Refugee Convention.

12.4 Conclusion

Advocates and decision-makers involved in the asylum applications of unaccompanied and separated children have considerable scope to apply the Refugee Convention definition to their circumstances.

It is our view that insufficient use has been made of the flexibility within the international definition. As a result, many child asylum seekers have been left unprotected, their claims ignored or denied.

The prevailing presumption of ineligibility must be replaced by a more diligent, child-centred focus. This needs to be done at a variety of levels. First, more needs to be known about what is happening to children in the countries from which they are fleeing. This requires better human rights reporting of child-specific human rights violations. Second, more needs to be done to elicit the stories of the children themselves. Better training is required to build up techniques for obtaining evidence from vulnerable and traumatised children. Finally, child-rights advocates need to communicate with each other and to share information so as to make use of favourable precedents. The overall objective must be to foster a new, rights-based approach to child asylum. As the General Comment of the Committee on the Rights of the Child states:

The refugee definition of the 1951 Refugee Convention must be interpreted in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children.

Persecution of the kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child-specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds.

States should, therefore, give utmost attention to such child-specific forms and manifestations of persecution as well as gender-based violence in national refugee status determination procedures.

Endnotes

- 1 UN Refugee Convention Art 1A(2).
- 2 See for example, Heaven Crawley, *Refugees and gender: law and process* (Jordan, Bristol, 2001); Thomas Spijkerboer, *Gender and refugee status* (Burlington, Aldershot, 2000); and Catherine Dauvergne, 'Dilemma of rights discourses for refugees' (2000) 23(3) *University of New South Wales Law Journal* 56.
- 3 On the dangers inherent in interpreting the term 'refugee' from an adult-centred perspective, marginalising the specific claims and experiences of persecuted children, see Jacqueline Bhabha, 'Demography and Rights: Women, Children and Access to Asylum' (2004) 16 *International Journal of Refugee Law* 227; Jacqueline Bhabha, 'Boundaries in the Field of Human Rights: International Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights' (2002) 15 *Harvard Human Rights Journal* 155 at 175–180; and Sandy Ruxton, *Separated Children Seeking Asylum in Europe: A Programme for Action* (Save the Children, Stockholm, 2000), pp 79–80.
- 4 UNHCR, Policy on Refugee Children, 1993, E/SCP/82; UNHCR, *Refugee Children: Guidelines on Protection and Care* (1994). See 4.3 above.
- 5 UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (February 1997), para 8.6.
- 6 Refugee Review Tribunal, *Guidelines on Children Giving Evidence*, para 5.2.
- 7 Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423.
- 8 For example, in one case the Federal Court found that aspects of the UNHCR Handbook on procedures and criteria for determining refugee status that might have assisted the applicant would have no force in Australian law. Accordingly, no error of law could be identified in the tribunal's failure to refer to those model procedures when dealing with separated children. See *VFAA v MIMIA* [2003] FMCA 389 (12 September 2003).
- 9 See *Chan Yee Kin v MIEA* (1989) 169 CLR 379.
- 10 See for example, *SBI v MIMIA* [2002] FCA 552 (10 May 2002); *SBAX v MIMIA* [2002] FCA 582 (10 May 2002); *SCAW v MIMIA* [2002] FCA 810 (4 July 2002); *SCAX v MIMIA* [2003] FCAFC 86 (9 May 2003), *SFTB v MIMIA* [2003] FCAFC 108 (27 May 2003); and *WAEY v MIMIA* [2003] FCA 1314 (17 November 2003).
- 11 *SCAW v MIMIA* [2002] FCA 810 (4 July 2002).
- 12 *SFTB v MIMIA* [2003] FCAFC 108; (2003) 129 FCR 222.
- 13 On the issue of changed circumstances, see further 14.2.1 below.
- 14 See James Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991), ch 4; and Guy Goodwin-Gill, *The Refugee In International Law* (Clarendon Press, Oxford, 1996), ch 2.5.
- 15 In the case of *MIMA v Haji Ibrahim* (2000) 204 CLR 1, McHugh J stated (at [65]) that 'ordinarily... persecution is:
 - unjustifiable and discriminatory conduct directed at an individual or group for a convention reason.
 - Which constitutes an interference with the basic human rights or dignity of that person or the persons in the group.

- Which the country of nationality authorizes or does not stop, and
- Which is so oppressive or likely to be repeated or maintained that the person threatened cannot be expected to tolerate it, so that flight from, or refusal to return to, that country is the understandable choice of the individual concerned.
- 16 *Applicant S v MIMIA* (2003) 217 CLR 387.
- 17 See *id* at [39]–[49], discussing the High Court ruling in *MIMA v Israelian* (2001) 206 CLR 323.
- 18 *Chen Shi Hai v MIMA* (2000) 201 CLR 293 at 317.
- 19 This is the term used in the Peoples' Republic of China to describe children born in contravention of the One Child policy in that country. The High Court of Australia has identified 'black children' as a particular social group for the purposes of the Refugee Convention. See *Chen Shi Hai v MIMA* (2000) 201 CLR 293.
- 20 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR, Geneva, 1979), para 56.
- 21 Jacqueline Bhabha and Mary Crock, *Seeking Asylum Alone: A Comparative Study of Laws, Policies and Practices Regarding Unaccompanied and Separated Children in the United States, the United Kingdom and Australia* (Themis Press, Sydney, 2006).
- 22 See, for example, Ilene Cohn and Guy Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflicts* (OUP, Oxford, 1994); Mark Gallagher, 'Soldier Boy Bad: Child Soldiers, Culture and Bars to Asylum' (2001) 13 *International Journal of Refugee Law* 310; Jacqueline Bhabha, 'Demography and Rights: Women, Children and Access to Asylum' (2004) 16 *International Journal of Refugee Law* 1.
- 23 *Applicants A and B v MIMA* (1997) 190 CLR 225. Note, however, that the High Court ruled in that case that parents fleeing China to escape the persecutory practices associated with the policy were not refugees. This was because the parents could not demonstrate that they were being persecuted for one of the five Convention reasons. The court ruled that the parents could not be said to belong to a 'particular social group' because such groups must be seen to exist independently of a simple shared experience of persecution. See Mary Crock, 'Apart from Us or a Part of Us: Immigrants' Rights, Public Opinion and the Rule of Law' (1998) 10 *International Journal of Refugee Law* 49; Catherine Dauvergne, 'Chinese Fleeing Sterilisation: Australia's Response against a Canadian Backdrop' (1998) 10 *International Journal of Refugee Law* 77.
- 24 *Chen Shi Hai v MIMA* (2000) 201 CLR 293.
- 25 See for example, *Mei Dan Liu v Ashcroft*, 7th Circuit, 380 F 3d 307 (2004).
- 26 See Case No4/49908, dated 13 January 2005, p 40. Copy on file with authors.
- 27 See *Chen Shi Hai v MIMA* (2000) 201 CLR 293.
- 28 See Heaven Crawley, *Refugees and gender: law and process* (Jordan, Bristol, 2001); Thomas Spijkerboer, *Gender and refugee status* (Burlington, Aldershot, 2000); and Catherine Dauvergne, 'Dilemma of rights discourses for refugees' (2000) 23(3) *University of New South Wales Law Journal* 56.
- 29 *Canada (Attorney General) v Ward* [1993] 2 SCR 689 at 739.
- 30 See *Kuldip Ram v MIEA and RRT* (1995) 130 ALR 314 at 317; *Chen Shi Hai v MIMA* (2000) 201 CLR 293; *MIMA v Zamora* (1998) 85 FCR 458.
- 31 Note that s 91X of the *Migration Act* prohibits the publication of the names of refugee claimants. The letters are the case descriptors used by the Federal and High Courts.
- 32 *SHBB v MIMIA* [2003] FMCA 82 (11 April 2003) at [57]; (2003) 175 FLR 304.
- 33 *MIMIA v VFAY* [2003] FCAFC 191 (22 August 2003).
- 34 In fact, both *SHBB v MIMIA* (2003) 175 FLR 304 and *VFAY v MIMIA* (2004) 134 FCR 402 appealed to the High Court of Australia. After the ruling in *Applicant S v MIMIA* (2003) 217 CLR 387 their cases were settled by consent before going to hearing.
- 35 *Applicant S v MIMIA* (2003) 217 CLR 387.
- 36 *Ibid*.
- 37 See *id* at [50].
- 38 *Id* at [37].



Interdiction and Offshore Processing: The Deflection of Child Asylum Seekers

In this chapter consideration is given to a particularly controversial interception measure widely used by both the United States and in Australia: the interdiction of migrants, including asylum seekers, at sea and the institution of offshore centres for processing their asylum applications.

Asylum seekers interdicted prior to gaining entry into a country of refuge have their journeys interrupted and deflected; the vessels they travel in may be turned back, impounded or destroyed. A description of the policies and practices in force is particularly significant because of the active consideration that many countries are giving to the establishment of similar offshore centres. In 2005, Italy set in motion plans to institute a centre for the processing of intercepted asylum seekers in Libya.¹ The United Kingdom has also expressed an interest in establishing camps in foreign countries to ‘warehouse’ asylum seekers awaiting the outcome of protection applications.

Although all asylum seekers are affected by these measures, the scant available evidence indicates that the impact of these initiatives on unaccompanied and separated children has been particularly serious. The issue is a live one because of the moves made in May 2006 to extend Australia’s ‘Pacific Strategy’ so as to include all unauthorised boat arrivals. The proposal is to deflect all asylum seekers arriving in Australia by boat (without visas) to Nauru or some other destination for the processing of refugee claims. The measures would catch both those interdicted en route to Australia and those who make landfall on the mainland.²

The Committee on the Rights of the Child, the treaty body that monitors implementation of the CRC, has made it clear in its General Comment on unaccompanied and separated children that legal manoeuvres to artificially exclude some parts of a territory from the reach of domestic law violate States' international obligations:

*State obligations under the Convention apply to each child within the State's territory and to all children subject to its jurisdiction (Art 2). These State obligations cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from a State's territory or by defining particular zones or areas as not, or only partly, under the jurisdiction of the State. Moreover, State obligations under the Convention apply within the borders of a State, including with respect to those children who come under the State's jurisdiction while attempting to enter the country's territory.*³

13.1 Unaccompanied and Separated Children on Nauru and Manus Island

Obtaining information about the reception and processing of the asylum seekers sent to Nauru and Manus Island was very challenging, the late cooperation of the IOM in providing statistical information notwithstanding. Although a number of parliamentarians have been admitted to conduct formal tours of Nauru, access to either Nauru or Manus Island has been almost impossible. Agreements between the Australian Government, the government of Nauru and the agencies involved in the reception and processing of the asylum seekers have precluded both physical access to Nauru and the release of relevant information. The constraints did not prevent advocates from making contact with individual detainees,⁴



Children at Nauru. Photograph © Andrew Bartlett.

both by correspondence and in one instance by gaining admission to the camps.⁵ One migration agent, Libby Hogarth, reported that she took email instructions from a number of those detained on Nauru and successfully negotiated their resettlement outside of Australia. However, when HREOC was undertaking its inquiry into children in detention, DIMA denied them access to Nauru and would not provide any statistics on children detained there.⁶

In late 2004, Canberra migration agent, Marion Lé, was permitted to travel to Nauru together with UNHCR officials, assisting in relation to the re-processing of the refugee claims of a number of the detainees. She spoke with journalist Michael Gordon, who was also given access to the island in early 2005. His account of the camps was published on 16–17 April 2005 and subsequently in a book.⁷

Within Australia, researchers have been able to locate and interview two of the unaccompanied and separated children who were processed and accepted as refugees on Nauru. Both had been processed by the Australian authorities and are in Australia on temporary protection visas after having been accepted as refugees. Interviews were also conducted with Senator Andrew Bartlett (Australian Democrats) who has visited Nauru on two occasions; and written questions were submitted to UNHCR and IOM in Australia, followed by informal discussions with both organisations.

13.2 Identification and Reception

Both of the young people from Nauru interviewed by the researchers had been detained after being caught up in one of the most dramatic incidents to occur in the course of Operation Relex. *Shakespeare* and *Sylvester* were two of some 60 asylum seekers rescued from an Indonesian vessel that caught fire and sank near Ashmore Reef in November 2001 just two days before the federal election in that year. The incident is described in detail by David Marr and Marianne Wilkinson in their book *Dark Victory*.⁸ Extraordinarily, *Sylvester* claimed that his boat had made the last part of the voyage to the reef without a ship's captain, the captain having made his escape back to Indonesia so as to avoid apprehension by the Australian authorities. Marr and Wilkinson suggest that the boat's engine caught fire, either as the result of deliberate sabotage, or (more likely) when the person in control of the vessel attempted to outrun the Australian customs vessel, causing the engine to overheat. The fire on the boat was catastrophic in its intensity and impact, forcing all those aboard to abandon ship. Two women — a mother in her 50s and a young woman in her 20s — lost their lives. Another young unaccompanied Afghan boy (*WAJCI P1*) was later to be awarded a bravery medal for his efforts in trying to keep the older of the women afloat.

At 14 years of age *Shakespeare* was singled out as one of the youngest asylum seekers on the boat. When taken on board an Australian customs boat, cold and wet, the young boy stated that he was taken to an upper deck, away from his fellow asylum seekers. He says his most potent memory was of being given chocolate, and of being asked many questions about where the boat had come from and who had been in charge. He told us that he could not be very helpful. He said that he was shown a map of the Indonesian area, but could not make any sense of it

because he had never seen a map before and had no idea of how the picture related to where he was or where he had been.

Sylvester and *Shakespeare* both described their rescue and eventual transfer to Christmas Island as highly traumatic. They were originally taken on board a boat operated by Australian customs, and later transferred to a larger naval vessel, the HMAS *Woolongong*.⁹ This vessel took in asylum seekers from a number of intercepted boats and boats that had landed on Ashmore Reef and appears to have become quite crowded. The asylum seekers were reluctant to board this vessel because they understood that they would not be going to Australia, as they wished. Some feared that they were being returned to Indonesia.¹⁰ They claimed that their young friend was handcuffed when he refused to do as he was told. They said:

Shakespeare: 'There was families and the Afghan children was crying and asking for food and drinking water so they said no, you have to go to other port.'

Sylvester: 'If you want food you have to go and leave here. His father give him a cup full of water to his children so the customs men took the water and dropped [it]. The children was very, very upset and screaming.'

Interviewer: 'So why were those people reluctant to go to the navy boat? Did they think that they would take you back to Indonesia?'

Shakespeare: 'Yeah,...they are taking us back.'

Sylvester: 'I was afraid of men and the navy came so I said 'What [is] happening?', then I saw the ships that having their tank like the guns set was, yeah I really — I said 'What is happening to us?'...When they come before five person dead you have to go in that navy boat — you are scared of them because they have weapons. We said they are going to beat

us because they said if you don't go we take you by force there. We come'.

Interviewer: 'Was anybody injured?'

Sylvester: 'Yeah — not in our boat. When I was in Nauru, those two, three or seven men I think, they went back to Afghanistan, one was bitten [?injured] by navy on his forehead. We saw him'.

Interviewer: 'He had a cut?'

Sylvester: 'Yeah, he was not — they were not in our boat, they were came from Christmas, from Indonesia to Christmas. They had cattle prods, the electric things... on the navy. On the big boat yeah, they had the soldier... They said that there is no soldier, but [for] the people there [who has seen] soldier in the war, they understand. They demonstrated how it works by putting it on their badges'.

Both *Sylvester* and *Shakespeare* told us that they had been taken to Christmas Island, where they were taken to the makeshift camp set up near the Island's recreation centre. Both stated that they had been held there for nearly two months before being moved to Nauru. They said they were interviewed — '*they check up on everything*' — but were never given access to a lawyer or adviser of any kind. The boys saw the decision to send some asylum seekers to detention in mainland Australia and others to Nauru as random, and said that they were (falsely) reassured that there would be a speedy resolution to their problems:

Shakespeare: 'One day they just came [and said] 'Some of you people are going to Nauru'. We were just waiting... They were saying to us: [pointing in one direction] 'You are going to Australian detention'; they said [pointing at themselves] 'You are going Nauru'. We said, 'Why are they going to Nauru?' — so after that when we heard that, [the]

immigration guy said, 'I want to have a meeting with under 13 boys, the teenage boys'. So they said, 'You are going to Australia, don't worry, you will be there for two months or two weeks'... The immigration guy says that you are, you [will be] accept[ed], don't worry, you are separated from your families, you are a special guy... We say ok dude, there's no problem being accepted [laughter].... *WAJC/P1* said that they said to him — 'You are too small, you're too small to go to Nauru. We are sending you to Australia', but they sent him to Nauru anyway'.

13.3 The Processing Arrangements

The two young people interviewed by the researchers expressed keen disappointment about their experience on arrival on Nauru. They complained that they were certainly not made to feel special.

They were given no access to lawyers, nor indeed were any concessions made for age or vulnerability in their accommodation and general treatment:

Interviewer: 'Did they tell you that when you went to Nauru you would have lawyers?'

Shakespeare: 'Yeah, they said you have a lawyer now'.

Interviewer: 'So you thought you'd get special treatment?'

Shakespeare: 'Yeah... But when we get to Nauru no-one was asking it, where is teenager, where is teenager boy, who is the boy, no-one not even.... It's like Christmas, when we were in Christmas there was separate for single boys. We were with families. On Nauru, we stayed with everyone. You can go anywhere, no one asks us here'.



For a period, the two appear to have been given the slightly preferential treatment of being housed at the ‘Stateside’ camp on Nauru, away from the bigger and less well appointed ‘Topside’, which was located next to the island’s refuse dump. Matters became complicated when the Iraqis and Afghans asked to be separated from each other:

Sylvester: ‘They said to us you have to go with the other Afghani Topside and the Iraqi come here and we said that we are not going here, because nothing was there in Topside. There is always for dinner, for everything, when you go [there], you have to...line up [with] about 100 people like that. [You have to stand in] the line just to go have dinner...One week we want to wash our clothes or taking a shower we have to take a line about 10, 20 people. They are taking only may be two or three showers there, when they are finishing the [water]. They are leaving sea water maybe about two hour. They leave one hundred, eight hundred people two hours (to perform all their ablution needs)’.

Shakespeare: ‘We have only two hours — all have to go shower, wash your clothes, nothing else’.

By all accounts, the experience of asylum seekers in Nauru and on Manus Island in Papua New Guinea was not a happy one. In both places, asylum seekers have been held in detention over long periods, with few rights to communicate with anyone outside the camps.¹¹ All were interviewed by UNHCR or Australian officials with the aid of interpreters. Although permitted to ‘appeal’ adverse decisions by way of re-hearing of their cases by these officials, the asylum seekers were refused any form of legal assistance until late in 2004, when migration agent Marion Lé was given access to Nauru.

Attempts by lawyers and public interest advocates to gain access to the camps proved futile, with Nauru refusing to grant visas to enter the country, and Papua New Guinea refusing access to Manus Island.

Discussions with UNHCR in Canberra suggest that UNHCR would have been happy to allow the *Tampa* asylum seekers access to legal advice and that it was Australia’s opposition that led to the closure of the island state to would-be refugee advocates.¹²

Senator Andrew Bartlett was one of the few politicians who made the effort to go to Nauru and to see what was happening there. He visited on two occasions. His overall impression after both visits was of the damage that was being done to the persons detained on Nauru.

‘What stood out for me was the totally psychological state of the vast majority of [the detainees]. Apart from the heat, which is all year round — Nauru is virtually right on the Equator — the psychological state [of the detainees] was very, very crushed and dispirited. As always you have some that carry it better than others and some that are handling it better than others. But over all, and particularly those with family... those with kids were

always particularly despondent because they wondered what sort of a life they'd given their children. To see their children suffer in front of them, or the reverse with the children seeing their parents disintegrate in front of them. That's a vicious cycle which builds on itself and makes it worse."¹³

The senator's impression was that the camps on Nauru were being run very much by IOM, and that the Australian officials only visited when they needed to interview someone or to obtain information relevant to someone's claim. He commented, 'DIMA's regular communication seemed to be, "You have no hope, [go] home". Or words to that effect. Just that continuous pressure to go away. Return, return, return.'

During both his visits the senator met with boys who were recognisably separated or unaccompanied minors. His assessment was that the arrangements were particularly challenging for these young people:

"They were doing it a bit harder in terms of feeling more isolated and alone. I got the impression the IOM was conscious of that along with some of the medical staff. The medical staff quite openly said that a huge proportion of anti-depressants and other treatments were being used to treat the symptoms and not the cause and they couldn't rectify the cause because the cause was being detained. The second time I went was just after the hunger strike so there were some flow-on ramifications from that I suppose. In some ways some of the staff, though careful how they phrased it because they didn't want to make it sound like a good or encouraging thing, said it had given them back some self-respect. They had been able to have control over their lives, even if it was the control of not eating. It's a pretty sad state of affairs.

...It's the psychological effect of being in detention and not having control of your future and your life and all that that really causes the problem. It

doesn't mean that you ignore the physical facilities, but it's also the psychological pressure that has the biggest impact on how people cope with the detention as well."¹⁴

After the hunger strike in 2003, UNHCR commented that it was 'symptomatic of a general degree of despair that must be addressed with a view to responding humanely to what is becoming a human tragedy'.¹⁵

The implications for children in these situations are serious and are dealt with in other chapters of this report.

The senator also commented on the confusion engendered by having two processing bodies (DIMA and UNHCR), with the result that nationals from the same country, with very similar stories, could experience diametrically opposed outcomes in their asylum applications. Senator Bartlett explained that 'some would be accepted, some wouldn't, which would make it harder to explain why to some and not others'.¹⁶ In his experience talking to asylum seekers, some felt that if they were interviewed by UNHCR they would have a better chance than if they were interviewed by DIMA. He agreed with this assessment for the reason that UNHCR 'accepted the notion of derivative status, and DIMA didn't'. Derivative status is the recognition that if one family member is accepted as a refugee, other family members should be accorded the same status. Unless travelling in a single group, Australian decision-makers treat separated family members as individuals who must meet the UN definition in their own right, without reference to the refugee claims of other family members.

On Nauru, the refugee children did go to school for some time, however Senator Bartlett opined that the quality of the schooling provided was very bad as the teachers were rarely paid. The



Vietnamese children detained on Christmas Island.
Photograph © Kaye Bernard.

facilities are appalling as the country is effectively bankrupt. He said:

“I visited the school the first time I went there and it looked like a burnt out concrete shell in a ghetto or something, aside from it had kids in it. The inside was terrible, appalling. The blackboard and the staff room had reminders urging people to turn up to work. It was just terrible.”¹⁷

In general, Senator Bartlett described Nauru as ‘stuffed’, with poor general facilities on the island; power rationing and chronic water shortages. Although the detention centre does have more reliable power than the general population on the island because it has its own generator, the water problem is the same all over the island. This is particularly problematic given the hot climate on the island.

Another problem with the processing arrangements on Nauru is that children detained there (or in Papua New Guinea or Christmas Island) are not entitled to a visa even if they are found to be refugees.

As Senator Bartlett noted, ‘there is no automatic trigger for release from detention’.¹⁸ Unlike children found to be refugees in detention centres on mainland Australia, refugee children in detention ‘offshore’ must wait until a third country offers to resettle them before they are eligible for release.

The biggest concern for the HREOC Inquiry was that children in detention outside Australia will spend prolonged periods in detention, considerably longer than those in detention facilities on mainland Australia.¹⁹ In its 2004 report HREOC acknowledged that the situation of refugee children on Nauru is arguably worse than that faced by children in refugee camps around the world:

While it can be argued that asylum-seeking children in camps in Pakistan, for example, also face a similar hiatus after they have been found to be refugees, the difference is that the waiting period does not occur in a detention environment.²⁰

A child on Nauru may be doubly disadvantaged if Australia does not grant him or her a visa because ‘the fact that they have entered Australian territory and have been processed by Australian officials may make it more difficult to qualify for resettlement in countries other than Australia.’²¹

In May 2005, two young people who were unaccompanied minors at time of arrival and 13 children remained in detention on Nauru after nearly four years on the island. Sixty-four children had spent between two and three years at the facility; 115 had been detained between one and two years and 213 were in custody for less than one year.²²

All but two had gained their freedom by the end of that year.

13.4 Legal Challenges

The difficulties faced in gaining information about the operation of Australia's 'Pacific Strategy' has not stopped advocates mounting legal challenges to the arrangements, the failure of the *Tampa* litigation notwithstanding. In late 2002, six detainees from Nauru were brought to Australia for the purpose of giving evidence against people smugglers.²³ Upon the arrival of the group in Perth, Western Australia, advocates immediately lodged refugee claims and instituted an action in the Federal Court seeking orders to prevent the removal of the six back to Nauru and to force the Australian Government to process the refugee claims of the group in Australia. French J denied the group relief, dismissing the rather tenuous claims that because the applicants were brought to Australia by the immigration authorities they could not be considered to be either 'transitory persons' as defined in s 189A of the *Migration Act* 1958 (Cth) or unlawful non-citizens.²⁴ His Honour also rejected the contention that the unfettered executive power of the government could be invoked by the applicants to somehow force the Immigration Minister to comply with Australia's international legal obligations so as to reconsider their refugee claims.²⁵ In both this case and in a second action brought by an unaccompanied minor from Nauru, *WAJC*, French J ruled that amendments to the *Migration Act* in September 2001 precluded the Federal Court from entertaining any legal challenges brought by or on behalf of individuals brought to Australia from either Nauru or Manus Island in Papua New Guinea. His Honour pointed out that the only court with jurisdiction to entertain constitutional or other challenges by such persons is the High Court of Australia.

In due course, *WAJC* brought an action in the High Court of Australia. This time the young man

was given the designation *PI*. His status as a 'transitory person'²⁶ mandated his detention in Australia, but also ensured that after the expiry of six months he could apply directly to the RRT to have his refugee status determined. In spite of the fact that his claim had been rejected by the DIMA authorities on Nauru, the RRT found that he was a refugee and he was granted a TPV in 2004.

The case of *PI* of 2003 began as a Case Stated by Gaudron J in December 2002 just as that judge was leaving office to go into retirement. Her Honour identified as the central question whether the legislative regime detaining and otherwise controlling the fate of aliens held outside of Australian territory could be regarded as constitutionally valid. The essence of his constitutional case seems to be twofold. First, it is accepted that the executive power of the government in combination with the aliens power extends to cover all matters relating to controlling the entry, presence and removal of non-citizens in Australia. However, for the regime governing off-shore entry persons to be valid, the aliens power would have to be regarded as being extended by the external affairs power. Put simply, *PI*'s argument is that there is no constitutional power to detain non-citizens outside of Australian territories, nor is there a constitutional power to bring a friendly alien to Australia by force against her or his will.²⁷ Accordingly, s 198A of the *Migration Act* is invalid and *PI*'s detention both on Nauru and in Australia was unlawful.

The second (non-constitutional) line of argument advanced by *PI* is based on the young man's minority and alienage, and the role that is ascribed to the Minister for Immigration by the *Immigration (Guardianship of Children) Act* 1946 (Cth). As explored earlier, that enactment has the effect of appointing the Minister as guardian of children aged less than 18 years who have no parent or other legal guardian to act on their behalf in Australia. The argument



here seems to assert (on the one hand) that minors have no capacity to make applications on their own behalf; and (on the other hand) that the Immigration Minister as legal guardian has a statutory interest to ensure that the best interests of the child are the paramount consideration in making any decision affecting the child. In this context, detention and or removal of the child represents an egregious breach of the legal guardian's duty of care.²⁸

In May 2006, it remained to be seen whether these arguments would ever get an airing in the High Court.

For present purposes, it suffices to note that the arrangements for the extra-territorial processing of asylum claims by Australian officials remain contentious from the multiple perspectives of law, human rights, economic rationalism and basic practicality.

13.5 Christmas Island

If both the government and the Opposition are to be believed, Christmas Island may represent the future of 'offshore' refugee status determination in Australia. In 2004 and 2005, plans were finalised for the construction of an 800-bed detention centre (with a contingency capacity of a further 400) on the northern tip of the island. The site was cleared in 2004 and construction of the buildings began in mid-2005.

Situated 360 kilometres south of Java in Indonesia, and some 2600 kilometres northwest of Perth in Western Australia, Christmas Island has a resident population of 1300 made up of an ethnic mix of Anglo-Saxon Australians, Chinese and Malay. The island is not dissimilar from Nauru as that island would have been in its natural state (before being mined). Like the original Nauru, it is rich in phos-

phate, although a good portion of the un-mined areas on the island are lush rainforests which are home to the red crab, blue swimmer crab and unique birdlife for which the island is famous. According to the local Council of Trade Unions, the main sources of income on the island in 2004 were mining, construction (most recently, of the immigration detention facility) and the running of the existing detention centre.²⁹ At the height of the influx of refugees in late 1990 and throughout the *Tampa* Affair and Operation Relex, Christmas Island was a staging post for virtually all asylum seekers who had transited through Indonesia. As noted earlier, both of the young men processed on Nauru who were interviewed for the project spent time on 'Christmas'. The now lengthening history of asylum seekers on the island has resulted in a growing economic dependency on the revenue generated by the immigration detention centre and related operations. The trade unionists made special mention also of the value of the well staffed and appointed hospital and school on the island. These were reported to have attracted students and patients respectively from nearby Indonesia.

Technically, Christmas Island has been excluded from Australia's 'migration zone'. In the result, non-citizens on the island cannot lodge a valid application for any kind of immigration visa.³⁰ The actual effect of the 'excision' at law, however, is far from clear. The island remains part of Australian territory for most purposes. As a matter of international law, Australia clearly maintains legal responsibility for any non-citizens found to be refugees pursuant to determination processes conducted on the island.

As at February 2006, no attempt has been made to process refugee claims on the island in a manner that differs from the way claims are processed on mainland Australia. This may be due to the fact that

the only asylum seekers presently on the island succeeded in 'landing' in mainland Australia before they were removed to Christmas Island. However, if government statements are to be believed, the intention appears to be to establish the new detention centre as an offshore processing location where asylum seekers detained en route to Australia will be subjected to processes similar to those employed on Nauru. Put another way, the intention appears to be to entrench the very basic processes followed for the *Tampa* refugees on Nauru and Manus Island. The objective is to 'level the refugee playing field' so as to remove the perceived advantages enjoyed by asylum seekers seeking protection in Western countries like Australia. In principle, this could mean removing the right to legal representation and access to the RRT.

In November 2004, the author visited Christmas Island and spent four days touring the island and interviewing refugee claimants detained at the existing immigration detention facility. Two young people identified as unaccompanied minors at time of arrival³¹ who had been detained on Christmas Island were also interviewed away from the island.

In December 2004, the existing detention centre on Christmas Island comprised a series of



demountable buildings in the centre of the island configured in a large rectangle. Two sides were made up of small rooms used as sleeping quarters, with a bathroom, shower, washing machine facilities and a little recreation and TV room along the other side of the rectangle. The facility could accommodate 200 people, although in 2003–2004 it was used to house only 53 asylum seekers, all from the boat.

The young people from Christmas Island interviewed for the project could not be considered truly ‘unaccompanied’ because they arrived with a cohort of asylum seekers who are essentially interrelated family groups with interlocking stories and claims. Nevertheless, the two were initially identified as at least potential ‘unaccompanied minors’ in so far as they appear to have been assessed individually as refugees. One aspect of the claims examined by the researchers is that, with one exception involving a baby born after arrival, the children in each of the family groups were included on the refugee claims of their parents (see 12.2.4 above).

When asked about their experiences of the status determination system on Christmas Island, the two young people interviewed stated that they considered themselves to have been treated in the same way as their adult relatives. They did not consider that they had been accorded special treatment either in the way they were accommodated or in the way their refugee claims had been assessed. Both had been interviewed separately both upon arrival and during the initial status determination process (where the refugee claims of all 53 asylum seekers were rejected). The pair appealed to the RRT and were accepted at that level. Both were keen to emphasise their family relationships with relatives who had shared their success in gaining recognition as refugees.

In relation to both the representation and processing of these cases, the similar patterns were apparent to those observed in studying processing

at the mainland detention centres. First, the representation of the entire group was allocated under an IAAAS contract to a single firm of lawyers. By 2004, that firm had allocated the entire caseload of 53 individuals to one young lawyer, although different lawyers had been involved in the preparation of detainees’ cases at earlier stages. The group was divided into the sub-groups in respect of which asylum claims were made. Although these groups reflected family groups in the main, the researcher came across at least one example of an apparent exclusion from a family group, with the result that one young woman who had been living with her uncle found herself rejected and alone while the rest of her household were accepted as refugees. This young woman presented in the camp as being particularly vulnerable. A social worker at the centre claimed that she had taken to sleeping during the day and staying awake all night because of her anxiety at having been separated from her family group.³²

The initial processing of the detainees appears to have been conducted using the same ‘task force’ methods as used on the mainland. Again, the shortcomings with this system are readily apparent. While the detainees spend long periods of time waiting for something to happen, when the authorities move in for hearings, the experience is intense and fraught. Multiple hearings are conducted each day, placing considerable stresses on both decision-makers and advisers. For the detainees the short periods of frenetic activity surrounded by months of waiting time appear to have added to the feelings of incomprehension and frustration experienced by the group.

Because of the common backgrounds of the asylum seekers, the IAAAS provider appears to have dealt with these pressures in part by preparing lengthy common submissions. By 2005, when some of the cases came before the Federal Court, these common documents approximated 1000 pages in length.

RRT Appeals on Christmas Island

During this visit, the author was invited to attend the hearing of an RRT appeal made by a baby born to two of the young members of the group. The case was the last of a series of appeals. The RRT had also adopted a 'task force' approach to the appeals, sending three members out to Christmas Island to hear all of the appeals. The IAAAS adviser had travelled to the island for these hearings but did not do so for the baby's appeal. Two members had rejected all the cases heard by them, while the third had recognised 12 of his caseload as refugees. This member was assigned to hear the baby's appeal, although her parents (as assessed previously by another member), had had their claims rejected.

The hearing was conducted in one of the demountable buildings used for administration purposes in conditions that can only be described as minimalist. The baby and her parents were shown into a room containing a large desk on which a 'hands free' telephone was placed. The handset was replaced when difficulties were experienced in hearing the lawyer, with whom the couple had spoken earlier in the morning. Once the hearing was convened by the RRT, the couple's communications were exclusively with the member using an interpreter provided by the RRT. The immigration officials at the centre closed the door to the interview room and the couple and their child were left alone. The lawyer, interpreter and RRT members were all located in Sydney, disembodied voices at the end of an uncertain telephone line. The proceedings were interrupted once when the RRT member directed that the parents be sent a facsimile copy of the UN definition of refugee in Vietnamese: the telephone interview was apparently being conducted using the designated fax line for the centre. On another occasion the line to Sydney dropped out and a reconnection had to be made.

The RRT member in Sydney worked hard to put the young couple at their ease in what were

plainly difficult circumstances. Even so, the young father (speaking on behalf of his child) exhibited considerable distress at the beginning of the interview. Although the outcome of the appeal was favourable for the appellant baby, the process as a fact finding exercise could only be described as deeply flawed. When asked about the possibility of video conferencing, as used for hearings in the mainland detention centres, the response was that the infrastructure on the island would not support this technology.³³

In early 2006, 43 asylum seekers from West Papua were housed briefly on the island. The group included at least nine unaccompanied children, all of whom were being accommodated in the community: only the adult males were being detained in the temporary detention centre. The processing of these claims was again undertaken in the form of a task force, although (as explored in the following section) the political sensitivity of the grant of protection to this group meant that the protocols adopted were far from standard.

13.6 The 'New' Pacific Strategy

 f the 43 asylum seekers from West Papua, 42 were recognised as refugees and granted temporary protection visas in March 2006.³⁴ The Indonesian Government responded by withdrawing its ambassador from Australia in protest and by threatening to withdraw from the border protection agreements reached with Australia in 2001. This was a cause of great alarm in Australia, with the government sending diplomats to Jakarta and then proposing legislation to demonstrate its commitment to discouraging asylum seekers from the troubled Indonesian province of West Papua.³⁵ If enacted, the Migration Amendment (Designated Unauthorised Arrivals)



Bill 2006 would mean that the processing of *all* asylum seekers who arrive without authorisation by boat would be done ‘offshore’ in places like Nauru. The result is that these asylum seekers would undergo an inferior assessment process and those found to be refugees will have no automatic right to refugee protection in Australia.

The thrust of the Bill is that future boat people will not be eligible to apply for any visa within Australia. This is so, whether they are intercepted before reaching the Australian mainland or whether they reach Australia. The Minister for Immigration will have a non-compellable, non-reviewable power to admit boat people to the refugee determination system on mainland Australia. The underlying policy is to transship all unauthorised boat arrivals to offshore centres to have their claims for refugee status assessed. Statements by Minister Vanstone suggest that her first preference is for Nauru. The immediate effect of the change is that refugee status decisions will be made offshore by Australian Government officials, presumably officers of the Department of Immigration and Multicultural Affairs. Those assessed as having protection needs will be eligible for ‘resettlement’ in third countries. UNHCR may be approached to facilitate this process, although in theory these people could also be con-

sidered for a range of ‘offshore’ humanitarian visas, some of which are broader in their decisional criteria than onshore protection visas.³⁶

If the processes used on Nauru between 2002–2005 are a guide, there will be no access to independent merits review by the RRT. Claimants will have no right to government funded legal advice, although they will have access to interpreters employed by the Australian Government.

The legislation is concerning both at the level of principle and in its likely practical impact. It places Australia at risk of returning people to persecution, in violation of the *non-refoulement* principle which is the cornerstone of the international refugee protection regime. It also undermines the principle that parties to the Refugee Convention should assume full responsibility for refugees on their own territory, unless there are serious reasons (such as mass influx or humanitarian emergency) for alternative arrangements. While it remained to be seen in late May 2006 whether or in what form the legislation would be passed,³⁷ the proposals are of particular concern in the case of vulnerable asylum seekers.

The group of 43 West Papuans granted temporary protection in March 2006 included nine unaccompanied or separated children, all of whom were granted protection as refugees.

Their presence demonstrates that the issue of children seeking asylum alone in Australia is not one that has gone away. Without the assistance of skilled representatives, these children are at particular risk of slipping through the cracks in Australia’s international protection regime.

Endnotes

- 1 See Amnesty International, Public Statement: 'Italy: Government must ensure access to asylum for those in need of protection', 6 October 2004 <<http://web.amnesty.org/library/Index/ENGEUR300012004?open&of=ENG-ITA>>.
- 2 See Migration Amendment (Designated Unauthorised Arrivals) Bill 2006. The proposals are very controversial because they have no precedent anywhere in the world and because many assert that they place Australia in breach of basic aspects of the UN Refugee Convention. See further 13.6 below.
- 3 Committee on the Rights of the Child, General Comment No 6 Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6 (2005), p 3.
- 4 Julian Burnside (ed), *From Nothing to Zero: Letters from Refugees in Australia's Detention Centres* (Lonely Planet Publications, Melbourne, 2003).
- 5 BBC Documentary, *Australia's Pacific Solution*, 29 September 2002, transcript available at <http://news.bbc.co.uk/1/hi/english/static/audio_video/programmes/correspondent/transcripts/2279330.txt>, accessed 6 May 2006.
- 6 HREOC, *A Last Resort? National Inquiry into Children in Immigration Detention* (AGPS, Canberra, 2004), para 3.1.9.
- 7 See <www.theage.com.au/news/Immigration/Home-is-where-the-broken-heart-is/2005/04/15/1113509922376.html>; <www.theage.com.au/news/Immigration/Naurus-forgotten-faces/2005/04/15/1113509926210.html>; <www.smh.com.au/news/World/Nauru-child-detainees-running-on-empty/2005/04/15/1113509927834.html>; and <www.smh.com.au/news/World/This-is-not-detention-this-is-hell/2005/04/15/1113509926903.html>. See also Michael Gordon, *Freeing Ali: The Human Face of the Pacific Solution* (UNSW Press, Sydney, 2005).
- 8 See David Marr and Marianne Wilkinson, *Dark Victory* (Allen & Unwin, Sydney, 2003), ch 20 'The Burning Issue'.
- 9 See WA Coroner, *Record of Investigation into Deaths of Nurjan Husseini and Fatimeh Husseini*, <www.humanrights.gov.au/legal/intervention/husseini.htm>, accessed 6 May 2006.
- 10 This was indeed the fate of two later boats, 'Suspected Illegal Entry Vessels' (SIEVs) 11 and 12. See Marr and Wilkinson, above n8, ch 22 'Aftermath'; and ABC TV, *4 Corners To Deter & Deny*, 2003.
- 11 For one account, see Julian Burnside, 'Hypocrisy and Human Rights' (Deakin University Law School Oration, 2002), available at <www.julianburnside.com/>.
- 12 Telephone conversation between the author and Ms Ellen Hanson of UNHCR, March 2002 and Alvin Gonzales, April 2005.
- 13 Interview with Mary Crock, 24 November 2004.
- 14 Ibid.
- 15 UNHCR, Briefing Notes 'Nauru: hunger strike symptomatic of refugee despair', 19 December 2003, <www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&page=home&id=3fe2dc394>, accessed 31 March 2005.



- 16 Interview with Senator Bartlett, 24 November 2004.
- 17 Ibid.
- 18 Ibid. See also HREOC, above n6, para 6.7.8.
- 19 This puts Australia at further risk of breaching its international obligations: see, in particular, Art 37(b) of CRC.
- 20 HREOC, above n6, para 6.7.8.
- 21 Ibid.
- 22 See IOM statistical report, 13 January 2006, reproduced at 2.2.3 above.
- 23 Three were rescuees from the *Tampa* and three were designated 'offshore entry persons' apprehended during Operation Relex before they could reach Australian territory. All had had their refugee claims rejected: three by UNHCR and three by DIMA. See *Applicants WAIV v MIMIA* [2002] FCA 1186 (20 September 2002).
- 24 See *Applicants WAIV v MIMIA* [2002] FCA 1186 (20 September 2002) at [22]–[24]
- 25 See *Applicants WAIV v MIMIA* [2002] FCA 1186 (20 September 2002) at [26]–[30]. The applicants referred to s 7A of the *Migration Act*, which purports to confer power on the immigration bureaucracy to act without the authorisation of legislation in any matter concerning the protection of Australia's borders. This section was inserted into the Act in response to comments made by French J on the power of the Executive arm of government in Australia in *Ruddock v Vardalis* (2001) 110 FCR 491.
- 26 See *Migration Act* ss 189B and 198C.
- 27 The basic arguments are rehearsed by French J in the context of that judge's refusal of interlocutory relief. See *P1/2003 v MIMIA* [2003] FCA 1029 (26 September 2003).
- 28 Note that similar arguments were advanced in the case of *MIMA v WAIK* [2003] FCAFC 307 (19 December 2003), which is currently on appeal to the High Court.
- 29 Interview with Gordon Thompson, Shire President, Christmas Island, 23 November 2004.
- 30 See *Migration Act* s 5 'excised offshore place'. According to the unionists interviewed on the island, the change to the law is having a negative impact on the island economy because of the uncertainty induced among potential foreign students. Interview with Foo Kee Heng, President, Christmas Island Workers Union and others, Christmas Island, 23 November 2004.
- 31 In fact, the two were found to have effective guardians. Both were accepted as refugees together with the immediate family group with whom they travelled to Australia.
- 32 Charlene Thompson, interview with Mary Crock, December 2004.
- 33 Informal question asked of the Shire President, Gordon Thompson by the author, 23 November 2004. It is noted that the analogue telephone system on Christmas Island was replaced with digital technology in early 2005.
- 34 On the claims made by the group, see Andrea Jackson and Tom Allard, 'Papuan tell of beatings and torture', *The Age* 30 January 2006, <www.theage.com.au/news/national/papuans-tell-of-beatings-and-torture/2006/01/29/1138469607144.html>. The remaining asylum seeker was denied a visa on the ground that because he was born to a Japanese mother, he could have sought protection in Japan.
- 35 See, for example, Elizabeth Krantz, 'Indonesia Threatens Australia over Papuan Refugees', *Australian News Commentary* 24 April 2006 <www.australian-news.com.au/Papua.htm>.
- 36 See, for example, the comments by Minister Vanstone on ABC 7.30 Report, 13 April 2006, <www.abc.net.au/7.30/content/2006/s1616260.htm>.
- 37 For submissions made to the inquiry instituted by the Senate Legal and Constitutional Legislation Committee in May 2006, see <www.aph.gov.au/Senate/committee/legcon_ctte/migration_unauthorised_arrivals/index.htm>.



In Search of Permanent Refuge: Life on and After the Temporary Protection Visa

14.1 Release from Detention: Adjusting to Life in Australia

Once granted their first (temporary) protection visas, the majority of the young people studied for this project left detention on buses destined for capital cities. They were met by community workers who had responsibility for their immediate care and settlement into the community.

Although the unaccompanied and separated children recognised as refugees seem to have been distributed to major cities all around Australia, significant numbers were sent initially to the regional capitals of Adelaide, Brisbane and Perth. Memoranda of Understanding were concluded between the Minister for Immigration (as official guardian of the young people) and the welfare agencies in each receiving State or Territory. In each State, attempts appear to have been made to concentrate the care of the separated child refugees in the hands of defined welfare agencies and

key migration lawyers or agents. Although the success of the arrangements varied in practice, the general idea of concentrated and focused programs of care was undoubtedly a good one in principle.

From the data collected by the researchers, the regional city to which the largest number of separated child refugees were sent initially appears to have been Adelaide in South Australia. Anecdotal accounts from lawyers and agents operating in that State suggest that well over 100 — and perhaps as many as 150 — unaccompanied and separated child refugees were released

into the community in Adelaide.¹ This is the city closest to the detention centres of Woomera (now closed) and Baxter and is also the city where many of the unaccompanied and separated children placed in ‘community detention’ were housed. In South Australia, the guardianship contract for the young refugees was concluded with the South Australian Department of Families and Youth Services (FAYS).² Free assistance in relation to ongoing immigration matters was provided under contracts with the South Australian Legal Aid Commission and with individual migration agents such as Libby Hogarth, then based at the Australian Refugee Association. Similar arrangements for the concentration of services were observed in Perth,³ Melbourne,⁴ Sydney⁵ and Brisbane.⁶

The care arrangements for the young people interviewed differed, depending on the State or Territory’s welfare agency arrangements and age of the child. Some lived in a flat with other unaccompanied and separated children with a live-in carer or in a flat by themselves with support from a case worker. Some of the participants, particularly those under 16, were assigned to foster families. The responsibility assumed by the carers for the children also varied greatly. While some foster carers were zealous in their supervision, others allowed the participant to spend the majority of time away from the family home, living with other teenage refugees in council flats.

Around Australia, attempts appear to have been made to keep groups of young refugees together. Friendship groups made within the detention centres seem to have been maintained.

Where young people were not sent to the same communities as their friends, many acted eventually to effect their own reunions. Whether this always operated to the benefit of the young refugees is open to question. The participants in this study seemed to be happiest living in the company of friends with



similar backgrounds and experiences. However, those who presented most obviously as being ‘successful’ (in terms of engagement with education and/or employment) had also formed significant ties with supporters within the mainstream Australian communities. In this regard, it is perhaps not surprising that the young refugees appear to have fared best in the smaller cities, where the web of community agencies and welfare services was most tightly knit and integrated.

An example of note can be seen in the Queensland capital city of Brisbane. Community workers in that city described the arrival of the first TPV holders as ‘organised chaos’, with newly released refugees arriving in groups of 40 and 50 at a time from June 2000 onwards. Clyde Cosentino, Principal Solicitor with the South Brisbane Immigration and Community Legal Service (SBICLS), recalls the refugees getting off buses after a 20-hour or more bus trip, exhausted, unkempt, (the men) unshaven and thoroughly disoriented. Cosentino opined that most probably intended to go on to Sydney or Melbourne where the communities of Afghans, Iraqis and Iranians are most established. He is convinced

that the large numbers who did not follow through with these plans are testament to the success of the coordinated settlement services that were developed by the Brisbane agencies:

“We would meet them with Centrelink, off the buses, and other agencies. They would throw all this information at them. DIMA in Brisbane bent over backwards to put all the agencies together to get people started.... The TPV people were sent here, but they intended to go on as quickly as possible to Melbourne or Sydney. We did such a good job that many stayed.”⁷

Indeed, in Brisbane a remarkable network was established between government and community agencies and private individuals to provide assistance with everything from life skills to legal advice. Within a short period of time after their arrival, the refugees identified by DIMA as unaccompanied minors were taken into what can only be described as a network of carers.

The formal day-to-day guardianship of those still under the age of 18 was eventually granted under contract to Mercy Family Services, a relief agency run by the Catholic Church in Brisbane. However, the State Government’s Department of Families was formally involved from the time of the first TPV arrivals. In the various interviews conducted in Brisbane (both among the young refugees and with service providers), special mention was made of two educational institutions specialising in the settlement of migrant and refugee children in Brisbane. The first was Milperra State School, which specialises in the initial reception and orientation of newly arrived migrant and refugee children. The second, Sunnybank High School, was the institution to which many of the young refugees progressed for their final years of schooling. Just as importantly, social support networks were established outside of

these formal structures through organisations such as the Queensland Pastoral Assistance for Survivors of Torture and Trauma, the Romero Centre⁸ and through the now famous ‘Tiger 11’ Soccer Club created by the one time pastoralist and advocate for Aboriginal Land Rights and Reconciliation, Camilla Cowley: see Box Story. These networks were to prove essential when the time came to assist the young refugees holding TPVs to make the transition to permanent protection visas (see 14.2 below).

If it is possible to make any general assessment of this part of the process, it is that the stand-out success stories do have some common features.

The State and Territory governments certainly played very significant roles in establishing programs for the reception and care of the young refugees. Special mention should be made in this context of the network of community agencies around Australia dedicated to the rehabilitation of victims of torture and trauma. However, it is the efforts of private individuals — inside and outside of the support agencies and most often acting in a voluntary capacity — that seem to have made the most difference in the lives of the young people studied. Each major centre seems to have such local heroes.



Most of the participants in the study seem to have moved around until they found an option that suited them. For example, when *Barry* was first released from detention he lived in a temporary flat with three other unaccompanied and separated children and a live-in carer, before moving in with a foster family. When they moved interstate he moved into the home of an Australian family. He now lives with a friend he met in detention, and receives occasional support from the relevant State community service. Many of the participants describe similar patterns in their living arrangements. After being sent to one major capital city, *GS* ended up living with a family friend in another who he had met by coincidence after release from the detention centre. He is presently living in rented accommodation with two young Afghan brothers — one of whom was still a minor in early 2005. The welfare of the little group is overseen by a State-funded social worker. Another participant is sharing accommodation with six other young people — in a two bedroom flat.

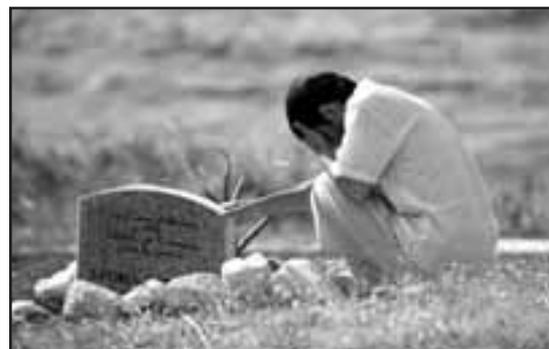
While many of the State or Territory welfare agencies include individuals who have gone to extraordinary lengths to mentor their young charges, a common problem with such governmental schemes is their compass. The schemes are designed across Australia to ensure the care and control of unaccompanied minors under the age of 18. The moment an individual comes of age, they move technically beyond the jurisdiction of the welfare authorities. In the cases of some participants, this divide does not appear to have been enforced very strictly. In at least one of the cases followed, State welfare workers continued to attend immigration hearings with a young man who had passed his 18th birthday. Having said this, a number of the advocates and community workers interviewed identified as problematic a tendency in State and Territory agencies to take unaccompanied child refugees ‘off the books’ as soon as the young people reached the age of 18.

There were many aspects of life in Australia that were spectacularly new, exciting, liberating and dangerous for the participants — most particularly for those brought up under the shadow of the Taliban in rural Afghanistan.

For many, adjusting to life in Australia was a challenge and a shock: it was a society for which some were ill prepared. Many came from societies and communities where the constraints on young people were considerable.

A number of the participants spoke of their anxiety with the newfound freedom they were experiencing, commenting on the difficulties they faced in knowing who they could trust. *Stephen* recounted that he was afraid of the welfare officers assigned to him when he was first released. When his case worker asked to see his documents, *Stephen* became anxious that he might be returned to detention. He said he was trying to decide which papers to give to the case worker and which to hide when the case worker reassured him he only wanted to copy them for his file.

Tony was placed initially in a flat by himself, with some support from a community service provider. He also spoke of the difficulties he had in trusting people in his new environment. He



Syyed Hussein grieving over the grave of his wife, Fatimeh, who died when the intercepted *Sumber Lestari* caught fire and sank, 2001. Photograph © Phil Oakley.

recounted his feelings of panic when he burnt some toast in his unit, setting off a fire alarm. His fear was that the police would come and take him away again. The incident illustrates the difficulties faced by young boys released into a community very foreign to them in terms of culture, practice and technology. *Tony* later moved in with an Australian family whom he met independently, who were able to provide him with a greater degree of support. He is presently a much-loved member of that family and has secured an apprenticeship and work as a skilled labourer.

In Adelaide, Steve Watkins⁹ highlighted the dangers facing the young boys in their exposure to life in a Western country like Australia. He spoke movingly of two Afghan boys who were killed in a car crash when driving between Adelaide and Melbourne. One, he said, had confided shortly before the accident that he was 'afraid of his freedom'. The hazards of learning to drive featured in a number of the discussions held with the participants, both alone and in groups. Another obvious topic of conversation was the challenge of learning about the effects of alcohol, in combination with both driving and the taking of drugs. According to both advocates and the participants themselves, a significant number of the young asylum seekers were prescribed anti-depressants while in detention. Some were also put on medication for the treatment of acne or other skins conditions, one of the side effects of which was an exacerbation of depression associated with post-traumatic stress. In some instances the effects of these medications when combined with alcohol were highly problematic.

In practical terms, the process of adapting to Australian society for many of the participants brought with it alienation from their cultural and religious origins. In purely aesthetic terms, the dress, make up and affect of the young people interviewed was dramatically different to the norms of the soci-

eties from which they had come. As explored further below, this represented a problem for some of the participants both in their relationships with other members of their communities and with their families. The transformations also heightened the young people's fear of being returned to the countries from which they had fled.

14.2 The Temporary Protection Regime and the Transition to Permanent Protection

14.2.1 Legal Issues

Asylum seekers who arrive in Australia with valid visas and who subsequently gain recognition as refugees are eligible for permanent residence. The subclass 866 protection visa gives visa holders immediate access rights to social security, education, settlement support, family reunion, work, language training and freedom of movement into and out of Australia. As noted in 6.5 above, asylum seekers arriving without the authorisation of a valid visa have fewer entitlements. Since October 1999, the norm for these refugees has been temporary residence for three years, with rights to work and basic income support and medicare assistance, but no entitlement to family reunion or to international travel.

It will be recalled that most of the unaccompanied and separated children who came to Australia as asylum seekers between 1999 and 2003 appear to have been recognised as refugees and granted temporary protection, receiving subclass 785 TPVs. In practical terms, this meant that the vast majority of participants in this study were faced with the task of re-applying for recognition as refugees at the expiry of their visas. In most instances, this second process involved applications for permanent residence in the form of a subclass 866 protection visa.

History of Tiger 11 Refugee Soccer Club | By Camilla Cowley

In November 2000, I began working as a volunteer ESL [English as second language] teacher at Milpera State High School in Chelmer, the school for refugee and migrant children of high school age in Brisbane, which teaches English to speakers of other languages, preparing students for mainstream high school, TAFE [technical and further education college] or joining the work force.

I began to meet the unaccompanied minors (UAMs) from Afghanistan, TPVs, who had all spent time in isolated detention centres before being determined to be bona fide refugees. As I got to know these vulnerable young refugees, the only fond memory they had of their time in detention, was when they had gathered to play soccer in the afternoons at Woomera, Curtin and Port Headland. They could forget for a while their fear and their loss, the worry about families left behind, their uncertain future, in gathering together to kick a soccer ball around the dirt of these outback detention centres. I thought I could build them a family, a community, here in Brisbane by helping them to come together as a soccer team. Musgrave Park was the only place that offered us a place to gather and each Saturday in early 2001 I would be with the steadily increasing numbers of the Hazara UAMs, with backpacks and joggers to mark the field and goals, a cheap ball I bought from K-mart and being taught the rudiments of playing soccer, a game I had never even watched before in my life.

After a month or so the numbers had grown to 22 and as more young Afghans arrived from detention, I would know as they showed up the very next Saturday, at Musgrave Park. They wanted more than just kicking a ball around a park. They wanted a proper field and a real soccer club. They wanted to be a real team and compete in competitions. The



soccer was giving them a sense of purpose, a unifying and community-building initiative that had begun to be that family they missed so much. These young refugees had no one, no family, no community and only grudging acceptance or support from Federal Government which had originally refused to fund their presence at State high schools if they were over 16 years of age. The State Government took on this gap funding and all the young Hazaras from Afghanistan could access high schools in Brisbane.

For some of the boys who had no access to education in their home areas, TAFE was a better option but as TPVs they were not eligible for free

English language lessons as PPV refugees were. I took some of the young Afghans to meet Matt Foley who had responsibility for TAFE. After listening to their stories, he told them he would be very proud of them if they were his sons, that he could not do anything about their temporary visa status but he could make sure they were able to have the same access to TAFE as any other refugee. The adult TPV refugees benefited greatly as well as the young minors who had put their case to the minister.

I began to take the boys to meet several politicians within local and State government with whom I had links from the native title and reconciliation issues I had been involved with while a grazier in southwest Queensland. The Lord Mayor Jim Soorley assisted me in accessing Baptist Church Council funding to set up a soccer field and Ronan Lee sponsored the boys for their first jerseys. Rocklea Rotary supplied their shorts and the Pine Rivers Soroptimists club paid for their socks. Ronan had found us a home ground at Chelmer and the soccer club finally began to take shape. The boys met with Judy Spence, the department overseeing their care and they were starting to feel welcome and accepted in Brisbane as they were listened to by Lord Mayors and State politicians, something that would never have happened in Afghanistan where they grew up knowing the Pashtun majority, the Taliban in particular, referred to Hazaras as the soles of their shoes. I took them to meet Rotary and church groups, and spoke of them at schools and public forums. Having brought them together into a community, it became easier to gather around them the much needed support. Teachers from their schools began to seek them out and offer extra assistance; volunteer tutors offered help; the Brisbane Edmund Rice

schools all came and played against them on their own home turf at Chelmer and shared a sausage sizzle after the game. Students of St Pats College at Shorncliffe wanted to do something to show the Tigers that they welcomed them to Australia no matter what the policies of Federal Government and sewed together a huge welcome mat covering a small soccer field and invited the Tigers as their special guests to a wonderful public signing ceremony, where all of us present were asked to sign our name on the multicoloured welcome mat after a past student of St Pats had flown over in a light plane and taken photos of the sight.

The media began to take an interest and they featured in a *7.30 Report* after 11 September and an *Australian Story* segment. Two supporters in Sydney got in touch and suggested a soccer tour as they believed the boys of Tigers were changing many hearts and minds across Australia with their honest young voices speaking of their dreadful history, the trauma of the trips here and the fear in detention and their dreams of a safe future here in the first



The "Tiger 11" is a soccer team from Brisbane comprised entirely of unaccompanied minors, March 2004. Team photo © Camilla Cowley.

peaceful place they had found in their young lives. A fund-raising dinner was held in Sydney with two of the UAMs flying down with me to speak at the dinner. Enough money was raised to hire a bus and travel to Toowoomba, Armidale, Tamworth, Gunnedah, Dubbo, Canberra, Braidwood, Sydney and Bellingen in the Easter school holidays of 2002. They were billeted with families wherever we went and played at such high profile places as The Armidale School in Armidale, and against the St Ives U18 soccer team, having stayed two nights with the Liberal party supporter families. These families were forced to re-think their support for detention, especially for children, and when we were leaving said they had changed their minds about the boat people, or at least those like the boys of Tigers whom the St Ives families were determined should all be given permanent residence.

We returned to Brisbane to begin our first real soccer competition, the Commercial league. The boys went on to win the grand final of that competition in September 2002, having a huge crowd of supporters from across the spectrum of Brisbane and surrounds, far more than the mainstream teams.

In 2003, I entered the Tigers in the Baptist Soccer League. To enter you need to be affiliated with a Christian Church and have a Christian Chaplain. The parish priest of Our Lady of the Rosary of Kenmore, Fr Neil Byrne, is the Chaplain of Tigers and the Kenmore parish is their affiliating Christian Church. On 16 March 2003, we opened a little club house for the Tigers. They call it Tigers House and painted murals across the front and back of the building which have never been graffitied despite being right beside a train station. Even the graffiti artists seem to respect the art of the young refugees.

The first official part of the opening ceremony for Tigers House, was a combined Muslim/Christian Blessing performed by Fr Neil and Reza Jaffari, the present captain of Tigers.

Fr Neil said that day, 'What a wonderful country Australia can be. Here I am, a Catholic priest, Chaplain for a Muslim Soccer team in a Baptist soccer competition'.

After the publicity of three *7.30 Reports*, an *Australian Story*, Channel 7 news report, SBS *Insight* program, newspaper stories and magazine articles in most major papers and interviews on radio, the Tigers have become some of the best known young refugees in Australia and have been able to change many hearts and minds. Their mates in other States do not have the same level of support at State Government level, at local government level, at community level but they say that since the Tigers became well known, they no longer fear telling people they are from Afghanistan. They are often asked if they know the Tigers from Brisbane and feel proud of their mates who have shown the way forward for all of us.



Until 26 September 2001, all persons holding a subclass 785 TPV were eligible for permanent residence if they could show that they still met the UN definition of refugee at the expiry of their three-year temporary visa. After that time, TPV holders could still gain permanent protection, but had the additional hurdle of showing that, before coming to Australia, they had not spent seven days or more in a country where they could have sought protection as a refugee (see 6.5 above). The legal issues facing the young participants in this project were twofold. First, changes in their countries of origin created potential problems lest it be thought that they were no longer refugees. The second obstacle for some was the ‘seven-day rule’.

The ‘Cessation’ Issue

Article 1C(5) of the Refugee Convention provides that the Convention shall cease to apply to any person falling within the scope of the definition contained in Art 1A where the circumstances in connection with which that person was recognised as a refugee have ceased to exist.

The Australian Federal Court has considered the proper construction of the cessation clause on a number of occasions, with two lines of authority emerging. In *NBGM v MIMIA*,¹⁰ a specially convened bench of five judges in the Full Federal Court concluded that Australia will only continue to have protection obligations to a person previously recognised as a refugee for so long as that person satisfies the definition under Art 1A(2).¹¹ In taking this view, the court refused to engage with debates that have raged in other jurisdictions about whether authorities wishing to assert change in circumstances carry a special burden of proof of some kind. In essence the view taken was that recognised refugees acquire no special advantages over new applicants at the point of determining whether they continue to merit protection under the Convention.

Another Full Federal Court, on the other hand, argued that a distinction needs to be made between entitlement for a visa under Australian law and the persistence of a right to protection as a refugee under Art 1C(5) of the Refugee Convention. The Full Bench ruled in *QAAH v MIMA* that unless the government could show that circumstances in the refugee’s home country had altered so much as to make it safe for him or her to return, the presumption should be that the refugee retained the status conferred earlier — together with the attendant right to be protected.¹² The fact that the two approaches are likely to produce different substantive outcomes for TPV holders is reinforced by the fact that the dissenting judge in *QAAH* found against the claimant, while the majority found that he was still a refugee. The Federal Court’s decisions in *QAAH* and *NBGM* have both gone on appeal to the High Court of Australia, with the appeals to be heard together in mid July 2006.

International observers have expressed the view that status determination authorities must be capable of concluding that, for the purposes of Art 1C(5), changes within a country are ‘substantial, effective and durable’ or ‘profound and durable’.¹³ In essence, the approach of the Federal Court in *NBGM* involves a strict and narrow construction of the cessation clause, rejecting any requirement to consider whether changes in the applicant’s country of nationality are substantial, effective or durable.¹⁴

In the wake of regime change in Afghanistan, a number of Afghani applicants, previously recognised as being entitled to Australia’s protection on the basis of their persecution by the Taliban, were denied further protection.¹⁵ In these cases, the court declined to require the tribunal to assess whether or not regime change constituted a ‘durable’ or ‘effective’ change in the circumstances prevailing in Afghanistan. Iraqi refugees are now encountering similar problems, in spite of the continuing unrest in that country.

The Seven-Day Rule

The ‘seven-day’ rule was established for the purpose of denying permanent residence to persons who have chosen not to avail themselves of protection otherwise available to them in other countries.¹⁶ The stated purpose of the rule is to send a message that ‘people who abandon or bypass effective protection opportunities will not be rewarded by the grant of a permanent visa in Australia’.¹⁷ The rule allows the Minister for Immigration to deny an applicant a protection visa if, prior to making an application for an Australian protection visa, the applicant has resided for a continuous period of seven days in another country where he or she was able to obtain effective protection but failed to make any attempt to do so.¹⁸

The essential questions when considering the application of the seven-day rule are whether the applicant has ever ‘resided’ in a country for a continuous period of at least seven days, and if so, whether he or she could have sought and obtained ‘effective protection’ of the country or through the offices of the UNHCR located in that country. The relevant terms are not defined in the Regulations. However, a line of jurisprudence suggests that the term ‘reside’ is not to be restricted to its ordinary meaning. Continuous physical presence for at least seven days in a relevant country will suffice for the purposes of the rule. Consequently, brief presence or clandestine or covert presence in a country may be caught by the rule.¹⁹ The phrase ‘effective protection’, however, is understood as ‘protection which would effectively ensure that there would not be a breach of Art 33 of the Convention by the country in question’.²⁰ Finally, the phrase ‘could have sought and obtained’ requires a retrospective examination of what protections an applicant could have sought and obtained. Whether an applicant could have sought and obtained effective protection will be a question of fact having regard to all the evidence,

including evidence about the country or countries in question, and about the applicant’s individual circumstances.

For the young refugees studied, the changes to the law in 2001 were particularly contentious. One IAAAS service provider stated that many of his young clients were angered by the fact that the minister (as their putative guardian) did not encourage them to lodge their applications for a permanent protection visa before 26 September 2001 when they could easily have done so.²¹ The date in question was of critical importance because refugee claims lodged thereafter are subject to the ‘seven-day rule’.

For individuals who have spent seven days or more in any country where they could have sought protection as refugees, the change in the law can mean that a person is condemned to a regime of rolling temporary protection visas — with no right to family reunification or the other benefits of permanent tenure.

It is easy to understand the annoyance and frustration of those caught by the changes in the migration laws. However, it will be recalled that the Australian courts have not been prepared to place any substantive obligations on the minister relative to the statutory title of guardian conferred by the *Immigration (Guardianship of Children) Act 1946* (Cth): under Australian law, the minister is not obliged to grant a visa to a child just because he or she is without the protection of a parent or guardian (see 6.5 above).

14.2.2 The Psycho-Social Impact of the Temporary Protection Regime

The universal assertion made in all of the interviews with the young refugee participants, advocates, service providers and general supporters was that the temporary protection scheme greatly impedes the

settlement, rehabilitation and general well-being of refugees.²²

For young refugees without family support and without other supporters to assist their understanding of the legal process, the impact is particularly severe. Without exception, every young person interviewed expressed anxiety about her or his future. While a number were still at school or in apprenticeships, several of those interviewed stated that they had abandoned language or vocational training because they could not see the use of it if they were to return to their country of origin. Many stated that they found it too hard to concentrate at school because of the stress they were experiencing in their lives.

Guillaume confided that he had left school in 2002 when he heard that the government had announced a return package of \$2000 for each asylum seeker who agreed to return voluntarily to their country of origin.²³ Thinking that this would be his eventual fate, the young man made a mental calculation, decided that this amount was not enough to achieve anything and determined that he should prepare for return by trying to earn as much money as possible. However, holding only a temporary visa, the young man found it difficult to get work. He slipped into a life of low-paid, casual work, ending up in a large city, sharing a two-bedroom flat with six other refugees and relying on welfare payments. When interviewed by the researchers, he said that he felt like he had been ‘running away’ ever since he left the detention centre. When we asked *Guillaume* what he would like to do with his life, given a chance, he barely hesitated: ‘I would like to be a gourmet chef — I love to cook’. He added, quietly, ‘You know, no-one has ever asked me that before’.

Brisbane solicitor, Nitra Kidson, offered these comments:

“I think the thing that really struck me in relation to the TPV transition process was the corrosive uncertainty. It was just dreadful.... What struck me with the minors was that because they were at school and at the end of being a minor they were at the point of making decisions about what they wanted to do next. So, it was a community of young people all facing the same uncertainties. They did not know whether they would be sent back within one month or one year, whether it was worth starting something. They were so bright. One of them had had two years of home schooling in Afghanistan from an aunt who had been to college in America. He won a scholarship to a private school. Another was winning English language poetry prizes for his writing seven months after his arrival.

Extraordinary stuff. They are an incredibly talented and resourceful bunch of people. It heightened the complete lack of their control over their futures because they were at a point in their life cycle where it is almost compulsory to make a decision about what you are doing. They were utterly incapable of doing that and yet were surrounded by people who were making these choices. It really heightened the uncertainty... So many of them had been through the process and were then faced with rejection because of the seven-day rule. There was one boy who had one assessment left. He discontinued. He just couldn’t do it. Couldn’t keep his mind on it to complete. It takes them such a long time to recover.”²⁴

Solicitor David Manne made comments to similar effect about his young clients in Melbourne:

“I think the [TPV regime has] had a devastating impact on many people’s lives. It’s mainly the uncertainty and the fact that they’ve had to go through all that they have and then be found to be a refugee and to live for many years with the guarantee of

only one thing: that they won't be with their family. There's no other guarantee about what follows and so it's had a devastating impact...

There's been a radical disjuncture, or halt, in their lives. One fundamental part of their lives — their family and their safety — has been put on hold and for many years. Yet at the same time they have started to grow up in a completely different country with completely different general values and have been getting on and rebuilding their lives, becoming part of another community. It's been like a collision of two completely different things and cultures.

And yet I have to say it's not an entirely dark tale because actually in reality, given all of that, most of them have done remarkably well. They have become really important parts of the community and achieved many wonderful things.²⁵

The fact that the young refugees had to undergo a second round of status determination processing complicated the research in so far as the young people were exposed to ongoing stress and uncertainty. Many potential participants who attended group interviews were reluctant to join the project on a formal basis. This appears to have been either because of uncertainty about involvement complicating their situation or (as some admitted openly) because they were simply tired of re-telling their story again and again. At the same time, a large number of participants consented to the tracking of their progress through this last and most important phase of their struggle to find a solution to their problems. In a small number of cases, the researchers were able to observe interview processes at both first instance (DIMA) decision-making stage (two cases) and on appeal to the RRT (two cases). One participant was followed through the process of an

application for the judicial review of an adverse RRT decision. In addition to seeking the comment of the participants themselves, interviews were conducted with key IAAAS service providers in Melbourne, Sydney, Adelaide, Perth and Brisbane who were charged specifically with the representation of TPV holders who had come to Australia as unaccompanied and separated children.

14.3 The 'Re-Application' Process

I am invited for an interview...I am happy as well as sad. I am happy because of an early interview, I am not happy because it is in the middle of year 12. I am very curious what will happen in the interview. The time after the interview till I get any result of the interview will be one of the toughest time in my life. I do not know how long it will take. During this time I will not be able to sleep at night and nor be able to concentrate on my studies. I will be stressed out. The result of the interview will be the turning point of my life. I hope the outcome will be positive. (Correspondence with *Stephen*)

14.3.1 Preparing the Application

For all of the young refugees studied, the re-application process involved considerable stress and anxiety. Some expressed little hope about the reliability of the refugee determination process. *Galileo*, for example, described it as 'a political thing'. This perception appears to have been encouraged by the frequent changes in official government policy about the safety of return to the key countries of asylum for the young people, Afghanistan and Iraq. In early 2004 the view of the Australian Government was that it was safe to return to Afghanistan. At that time, the majority of Afghan claims were being rejected. This was a major cause of concern for the participants for whom the fear of return remained

very real. By the end of 2004, circumstances had changed again and most of the Afghan asylum seekers were winning the fight to remain in Australia at the DIMA (first instance) stage. Even so, four of the young Afghans interviewed were rejected at DIMA level on the basis of improved country conditions. One failed before the RRT. By 2005, it was the turn of the Iraqis. In spite of the continuing unrest in that country, refugee claims were being rejected at DIMA level.

The observation that unaccompanied and separated children and young adult refugees remained vulnerable during this ‘re-application’ process would seem to be uncontroversial. By the time the young refugees returned to the refugee status determination process, published policies were in place to govern the interactions of the young people with the immigration bureaucracy at both primary decision-making (DIMA) level and at the appellate (RRT) stage. Just as importantly, many of the young refugees around Australia had available to them a well organised and proficient network of advisers. Cooperation between the various agencies means that advocates around Australia now regularly exchange information about such vital matters as ‘country information’, or the conditions in the countries from which the young refugees had fled. Information about cutting edge developments in the jurisprudence (case law) relevant to children seeking asylum alone is also shared.²⁶

There were still young refugees who were identified by the researchers as having ‘fallen through the cracks’ in the system.

However, the overwhelming impression of the regime now operating outside of the detention centre environment is of a process that is both friendlier and fairer to young refugee claimants seeking asylum alone. The critical change seems to be in the quality of the representation available to the young refugees and the improved articulation

and focus of the claimants themselves in those cases where support was available.

Discussions with the agents and lawyers handling these cases all suggest that the processes at both DIMA level and on appeal to the RRT were more orderly and satisfying affairs than the processes experienced at first instance. A number of the IAAAS providers interviewed — Libby Hogarth, David Manne, and the staff at the Refugee Advice and Casework Service (RACS), for example — had also represented individuals in detention during the first status determination process.

A cursory review of many of the case files examined for this project reveals a marked difference in the quality of the written submissions made in support of the participants’ first and second refugee claims. As noted earlier, most of the statements written in support of the participants during their first status determination process consist of a few paragraphs. Many hardly exceed one page. In contrast, it was not uncommon to find written submissions prepared for the same participants in relation to the second application process that extend over 40 pages or more. These submissions typically include both up-to-date country information and an analysis of relevant court and tribunal rulings as well as an articulation of the participant’s personal circumstances. The best submissions combine common country information with a succinct analysis of the particular situation of the claimant.

The benefits of having submissions prepared outside of the pressures and physical deprivations of the detention environment did not stop there. For the young participants, the administrative process appears to have been less mysterious. Whereas many could not identify the person allocated as their IAAAS adviser in detention, none had any doubt about who was helping them with their second application. Around Australia, many of the advisers

seem to have developed a real affection for their young clients, often going to great lengths to ensure their emotional as well as legal wellbeing.

In most of the major cities around Australia, attempts seem to have been made to concentrate the representation of separated and unaccompanied child refugees with a small number of IAAAS providers. For example, David Manne at RILC in Melbourne, RACS in Sydney, Libby Hogarth at the Australian Refugee Association in Adelaide, the Southern Communities Advocacy Legal and Education Service (SCALES) in Perth and the South Brisbane Immigration and Community Legal Service (SBICLS) in Brisbane all handled substantial numbers of such cases. It would be difficult to dispute the wisdom of such arrangements, given the expertise of these individuals and agencies and the efficiencies they represent. Of course, representation through these agencies did not guarantee success. Interestingly, however, most of the cases identified by the researchers involving TPV holders who encountered real problems in their second application phase were not part of such coordinated efforts.

The success enjoyed in Brisbane seems to have been as a result again of the cooperative arrangements made between the various agencies and individuals charged with the daily care and control of the young refugees. According to Nitra Kidson, former principal solicitor at SBICLS, the long-time principal of Milperra State School, Adele Rice, took the initiative in trying to obtain coordinated legal assistance for the young TPV holders in her care and in the care of Sunnybank High. Kidson recalls:

“Adele had been the principal for 20 years. She seems to have been there from day one. She is amazing. She contacted us and said that there were high levels of anxiety and could we come out there and see the children. We thought about it and thought, ‘Why not?’ It was a really good move. One, they did not

have to travel and two they lost minimal amounts of time away from their schooling. Mainly, they were in a safe environment: an environment where they felt confident and secure. We brought in an interpreter, who happened to be H–G–, so everybody — bar me — were people they already knew and trusted. We did it in groups of four at a time, with a number of volunteer law students who came out and transcribed. We did the forms as a session, sitting around a big table and having everyone completing the questions one by one. We had mass answering going on for each of the formalistic questions. Then we broke up into the four corners of the room to do the statutory declarations for Part C of the form. I had done up a series of key questions to be answered. So we took all the statements and then took it all back and lodged it all. Then Sunnybank had some of the students who had gone on there from Milperra. You need terrific people in the schools to make it work. The ESL teacher at Sunnybank organised everything. We went out there seven or eight times. I think we went out to Milperra 10 times....

I have to credit Milperra first. They contacted us because of the high levels of anxiety they were seeing at the school. After the legislative changes [in September 2001] there was a mad panic to get everyone’s permanent visa application lodged. Once we set up the systems at the two schools, it was really Adele who took it upon herself to identify every single TPV holder and to make sure that they were put through. You really need supportive people to do it this way, but really the schools identified the young people who needed assistance. They lined them all up for us to do the processing...It worked surprisingly well.”²⁷

The government’s commitment to the refugees who are still minors at the time of reapplying for refugee protection was (and is) to provide free immigration



assistance under the IAAAS. Across Australia, the decision to concentrate the cases of the young refugees in designated agencies seems to have worked well. Interestingly, a number of the providers who specialised in the care of the young refugees the second time round seem to have had prior experience working with young people from cross-cultural and/or refugee backgrounds. By 2003, the formulation of child-sensitive processing guidelines at both DIMA and RRT level would suggest that decision-makers were also better prepared this time to handle the refugee claims of young people seeking asylum alone.

Even within the Brisbane community, it is not certain that all the young TPV holders benefited from these developments. The social and cultural dislocation of some young refugees meant that some inevitably fell through the cracks. Cosentino spoke of his concern for two young ones who relocated to Melbourne (the pair eventually returned to Brisbane). In the bigger city centres, where young refugees have not had the same social support as their Brisbane counterparts, understanding of the status determination process seems to have been much more varied. The unaccompanied and separated children in these centres who are no longer minors are particularly vulnerable because many were excluded from government funded support and assistance programs upon reaching their majority. Some of these young

people still have little information or knowledge about the process.²⁸ For example, one participant did not attend his re-application DIMA interview when it was first scheduled because the letter advising him of his interview time either went astray or was beyond his comprehension. While a community legal centre had assisted him with his written application, the young man was essentially unrepresented at the crucial point of negotiating the all-important interview. The young man patently required assistance in spite of the assumption made that he had reached his majority.²⁹

There is one aspect of the re-application process for the young people that does not appear to have changed much in comparison with the procedures followed the first time around. Although the young people all received their TPVs at different times, the DIMA interviews for permanent visas were (again) conducted in intensive blocks.

Teams of people were sent to the various regional cities (in Perth, Adelaide and Brisbane) in what were referred to as ‘task forces’. Case officers were given three hearings to complete each day: two in the morning and one in the afternoon, over five-day periods. With up to five case officers in a team, DIMA would conduct up to 75 cases in a week. For the IAAAS lawyers and agents, this was a punishing regimen, as it required both intensive preparation and an exhausting routine of hearings. For the DIMA offices involved, the effort must have been close to super-human.

Cosentino’s account of the interviewing processes for the young refugees the second time around suggests that it was not all smooth sailing, although improvements were made through negotiation:

“The first lot of interviews started in September 2003 — all Afghans. It was the first time that the

case officers had done 50/ 75 cases in one hit. There was a lot of angst and tension culminating there and a lot of learning of the process for the case officers, for us and all the other persons involved. There were a lot of complaints made of insensitivity of case officers concerning the interviewing process. To be fair to them too, they were saying that it was new for them and they had to do one after the other over an entire week. They had to absorb this pressure over an entire week. I found that the unaccompanied minors who were being interviewed at this stage were treated very well. There was no indication that they were going to be treated any more specially than the adults. However, I had no concerns — although there were some officers who were more pointed in their interviewing than others. That's just the way things are.

After that first interview, as a result of feedback to the powers that be in DIMA and ONPRO [DIMA's Onshore Protection Unit], the next lot of interviews had a new feel to them. The numbers were cut down to about 50 in the week [instead of 75 — between five officers], which gave the case officers more time to do the interviews and to have breaks. There was less tension involved...The officers were still doing three [interviews] a day, but they took the time to debrief among themselves and arranged meetings with us. We had a meeting before the start of the process. They were always very open to us contacting them. They were open to us approaching them during breaks and raising issues that were of concern. We were very lucky here in Queensland as a result of that.”³⁰

Apart from the unnecessary stresses of this intensive mode for processing cases, one problem that was identified by a number of the agents and lawyers interviewed was the tendency for DIMA officers to treat cases in blocks, either accepting all or rejecting all the cases allocated. In Perth, director

of SCALES, Mary Anne Kenny, stated that in 2004, DIMA appear to have decided to allocate all of the unaccompanied minors to one officer. In the first block of four cases, he rejected every one. In Adelaide, Libby Hogarth claimed that similar outcomes were observed of the intensive processing of the young refugees in South Australia:

“The commonest problem in the end during the task forces was the DIMA officer you got allocated. And [the agents would ask each other]: ‘Who've you got?’... ‘Oh, well you may as well go home and start preparing the RRT submissions’. It got to the point where you could pre-empt the decision... Then, one DIMA officer got a death threat. After that the DIMA officers wouldn't give out their names, just their position number... The officer causing most problems went right through all the task forces, and was doing the re-application (TPV) hearings as well... until so many people complained... and he was sent off to XXX. He would cut and paste the same material into his decisions three years after he began, raising the same credibility issues.”³¹

14.3.2 The DIMA Interview

Given the promulgation of policy guidelines on the processing of claims by ‘unaccompanied minors’ in late 2002, an obvious question arose as to whether the skills of DIMA officers were demonstrably improved in the re-application interviews. The comments of the lawyers and agents interviewed suggest a mixed report card. David Manne (RILC, Victoria) commented:

“Our basic experience has been with our minors being re-assessed is that there's been a fairly beneficial approach taken in the broad sense. How that plays itself out in an actual interview is a different question. I'll give you some examples. I've had interviews that have gone for 10 minutes. There's

not much you can ask in 10 minutes and then the person has been granted refugee status. A lot of the interviews have been very short and all of our minors have succeeded thus far.”³²

Similar comments were made by Libby Hogarth of the Adelaide processing, where, as noted earlier, the largest number of young refugees appear to have been located. The experiences of the young people themselves, of course, was far from uniform. While many reported that the second time through was much less intimidating than their first encounters with Australia’s immigration bureaucracy, at least one found the reverse to be true. One of Camilla Cowley’s young protégés claimed that he sailed through his first interview in detention: ‘The second time, they wanted to eat me’. This young man was eventually granted a permanent visa, but fought a long and quite arduous battle against an adverse application of the ‘seven-day rule’: see 14.2.1 above.

The procedures followed in the cases observed by the researchers were certainly above reproach, although the background information provided on the project may have encouraged the decision-makers to take special care. Whether DIMA officers are generally adopting special procedures for unaccompanied and separated children is an open question, however. The consistent response from the young people’s advocates was that no special treatment was accorded to the children. Like Cosentino (SBI-CLS, Brisbane), Mary Anne Kenny (SCALES, Perth) was adamant:

“There’s no difference to me. I don’t see that there’d be any difference in the way that they interview adults to the way they interview unaccompanied minors. The only variation that you do get is it depends on the case officer. But that depends — it’s the same for adults. Their interview approach to people differs in respect of who the case officer is.

But there certainly seems to be no consistency or no difference in approach in terms of the way that they structure the interview. Interviews are structured exactly the same.”³³

The role of the agent or adviser in the DIMA interview remains as limited as was the case when the young refugees first made their protection claims in Australia. Intervention is actively discouraged. If an adviser wishes to say anything, he or she may be given an opportunity to say something at the end of the interview. However, the more usual practice — observed by the researchers and confirmed by those interviewed — is for the DIMA officer to call a 10-minute break shortly before the conclusion of the interview. The break is referred to by officers as ‘the natural justice break’ and is supposed to allow advisers to speak with their clients so as to have them address any outstanding issues. Mary Anne Kenny (SCALES, Perth) recalled one young refugee whom she counselled during such a break to bring up the fact that he was taking medication for his depression:

“It’s not particularly relevant to his claim but it’s important to who he is and how he presents in terms of the information he’s giving... And so he told [the DIMA officer] he was taking Zoloft which is a very common antidepressant. The officer didn’t even know how the word was spelled. He had never even heard of it. And he said, ‘Well, why is that relevant?’ He got quite aggressive. He said, ‘Why is that important?’ And [the young man] said, ‘Well, it’s just that I have very bad memory problems. I have a lot of problems remembering. I’m very depressed and I can’t remember things’. And the officer goes, ‘Well you didn’t seem to have any problems remembering today. Are you saying it’s affected your ability to talk in the interview today?’ And the kid sort of said, ‘Yes’. Good for him. He said, ‘Yes, because I can’t

remember. You ask me questions but I can't remember everything'. And the officer said, 'Well, you've answered all the questions. You agree you had a chance to talk to your lawyer'. It was like he was sort of thinking that we were setting him up...

At that point I did intervene and say, 'The relevance of it is that he's tried to put forward his best claims but it's affected his whole ability to put forward his case... You're asking him questions about what's happened to him. But he's only 17. He's suffering from depression and issues about remembering what happened to him in XXX. So it's important that you know that. It's not that we're trying to say today that in the interview he hasn't done his very best'. [The officer] did not respond well.... There's that suspicion... that they see you as a lawyer as being someone who is trying to trick them or set them up in some way. And it wasn't like that. I was just trying to make the point that this is an important factor [to be taken into account]."³⁴

14.3.3 Appeals to the RRT

Accounts of the RRT hearings of young asylum seekers whose cases were rejected during the re-application process were generally positive. By this stage, of course, the young people were much more experienced with the administrative process, and most — although not all — had access to good advice and assistance. The RRT members may also have been more accustomed to dealing with applications by young asylum seekers. It has to be said also that by the time many of the young people came to appeal their second refugee ruling, they were no longer as manifestly vulnerable in either fact or appearance.

The cases observed by the researchers were fairly unremarkable in terms of process. Again, the members appeared a little self-conscious: it is uncommon for tribunal hearings to be observed by anyone who is not directly associated with a refugee

claimant. In one case, the members' concern to ensure that every point of law was considered may have prolonged the hearing somewhat. The expected period of two hours for the hearing stretched to nearly five hours (including lunch break in the middle).

Clyde Cosentino's account of his experiences in representing young refugees before the RRT during this second application process was also positive. Because Brisbane is a regional city, RRT hearings are not conducted face to face. Rather, a video link-up system is used. He commented:

"Our system here is wonderful; the technician is very good. He sits down and explains to everyone how it works... I would say that video link is always a second best option. The face to face picks up a lot more things. That being said, the system in place is a good system because of its clarity, and its preparation of the client, saying this is what you are going to face."³⁵

RRT hearings for applicants in Perth are also conducted using video conferencing facilities. Mary Anne Kenny noted the obvious shortcomings of the arrangements but suggested that the young people generally cope well with the technological challenges:

"It's not ideal because you don't have the person actually in the room and you don't have that sort of instant... feedback but they don't seem to have a huge difficulty.... They understand the technology because of the time they have spent here.... If they'd been here when they first arrived this technology would have been just... you could imagine it would have just blown them away. They wouldn't have understood... But because they've been here for three or four years, they do understand concepts of video link-up and that it's instantaneous and so on. So they have... they don't seem to struggle with the

concept of it but you do feel very removed in the way that they conduct the hearings.”³⁶

As noted earlier, the representation of the young people before the tribunal continues to be of paramount significance.³⁷

The high proportion of cases lost by young people who are not represented would seem to confirm the anecdotal information collected by the researchers. In our experience, the young people who seem to have encountered most difficulty in progressing from TPV to permanent protection are those who have somehow slipped through the net of agencies and welfare groups now operating around the country. *Guillaume* was an example in point.

14.4 Complementary Protection: Other Options for Obtaining Permanent Residence

In 2004, pressure to resolve Australia’s backlog of refugee cases (among both primary applicants and TPV holders) led the government to institute changes that should allow many of those who fail to gain permanent protection as refugees to change their status to permanent resident. In April 2005, at least one of the young refugees interviewed was considering these options. The new schemes operate to enable both TPV holders and unsuccessful refugee claimants to apply for non-refugee visas within Australia. Unsuccessful claimants must first accept a subclass 695 ‘return pending visa’, which grants them an 18-month period of grace during which to arrange for sponsorship on either family or business grounds. In practice, the concessions will only benefit refugees who are capable of either forming a relationship with an Australian or of

being employed. On the other hand, a loosening of the policy regarding regional migration means that refugees who are willing to work in a regional area can gain permanent residency if they can find an employer willing to sponsor them. The work can be seasonal in nature. ‘Regional area’ is defined broadly to include most areas outside of Australia’s most populated cities (although Adelaide is included).

Most TPV holders appear to have pursued permanent residence on refugee grounds as a first line of approach. In February 2005, only 20 applications for mainstream visas (covering 35 persons) had been lodged. It is not known whether any of these include unaccompanied and separated children who had previously held a TPV.³⁸

For the young (former) refugees or failed refugee claimants, the problems with gaining residence through these schemes are obvious. First, the scheme requires the young people to travel to areas where they may not have support networks (although for some the move could plainly be beneficial). More importantly, applying for non-refugee visas is expensive and means that applicants are denied access to the settlement and social welfare services granted to refugees. These benefits include language tuition, torture and trauma counselling, housing relief and income support. In contrast, refugees who are granted permanent migration visas are subject to the standard two-year waiting period for access to social security benefits.

Australian laws also include inducements to TPV holders to return to their home country voluntarily upon the expiry of their visas. The package includes a cash grant of up to \$2000 per refugee (to a maximum of \$10,000 for a family with dependent children under the age of 18) and the costs of airfares to the country of destination for those who sign a declaration of voluntary return. The offer of the repatriation package expires once the refugee has ceased to hold a TPV or a subclass 695 return pending visa.



14.5 Alienation and Family Problems

By 2005, most of the young participants in this study had gained permanent protection in Australia on the basis of continuing fears for their safety should they return to their countries of origin. Particularly for those who are remain very young, the prospect of permanence raises questions about family reunification. The general assumption is that it is in the best interests of a child to be with family: this principle is recognised as fundamental in both international and domestic laws all around the world. What is interesting in the case of the young people studied for this project is the variety of responses given by the participants when we asked about the prospect of bringing family members to Australia.

The participants were all separated from their family members at formative periods in their lives. For some, the issue of family continues simply and tragically to be one of enduring pain and loss. *Halimi, Tony, Denzel, and Barry* have all lost contact with their families. While some have attempted to contact their relatives through the Red Cross tracing services, many have lost contact altogether and are not sure if their relatives are alive.

“I heard now from people from that area, who came here. I asked them. They said they knew my family. They said that [my family] had gone from there. I don’t know where they gone, they told me they gone somewhere.” — David

By 2005, the picture had improved somewhat. The young people assisted in Brisbane, for example, seem to have had some success in tracing family. Cosentino commented:

“Many of them who have been granted their permanent residence, they have gone to Quetta or to Pakistan — one after the other. This was at the forefront of their mind, to go and see if their families were there. To know that they could perhaps never go was such an anxious time for them.”³⁹

For those who do locate their families, it would appear that the government has been prepared to facilitate family reunification. According to advocates around Australia, however, the avenues available for the sponsorship of families are sometimes inadequate. Once a young person reaches the age of 18, for example, ‘split family’ provisions for the reunification of refugee families cease to apply. As Cosentino notes, attempts by the young Afghan refugees in Brisbane to find their families has sometimes lead to more heartache and frustration.

“Most of the young ones were from Jagoury and Ghazni — their families seem to be congregating in Quetta. Once they are arriving there, people know someone who knows someone... And they are talking, they are staying there two months or three months. A couple have come back very distressed. I have had one young man who went to Quetta and found his father, who died three days later. So, after five years, he got to see his father, and he died three days later. In a way it was a bittersweet pill. He is

In Search of Permanent Refuge | GS's Story

When GS first came to see us he was very tense, although very polite and obviously eager to be included in our project. GS's age was recorded as 15 when he arrived in Australia, although (three years later) we were not at all convinced that he had yet reached his majority. With an impish grin and a slight but well-muscled body, GS is instantly likeable.

He presented as a fine young man who, although he struggled initially after his release from detention, was now focusing all of his energies on gaining a permanent foothold in the country. Happily, his administrative journey was to reach a successful conclusion during the course of his time with us: a fitting conclusion to a long struggle.

Like many of the young people we interviewed, GS has told his story many times. It had a familiar ring for us. He is another young Hazara who grew up under the heavy hand of oppression and threat. He too lost an older brother to the Taliban. What made us appreciate his extreme youth, however, was his account of life in Afghanistan, and how he felt about leaving. GS told us that any loneliness and isolation he feels now is tempered by the relief he feels in being free to be himself — free in body and in spirit. Sadly, he associates his family with imprisonment — and seems to have little appreciation of the love that might have motivated

his parents' protective behaviour: 'For three years I was kept in our house. You can't go out. I am disgusted because when I was in Afghanistan they did not allow me to go to school. Always I was at home like a prisoner. I do not want to go back to see them'.

It became particularly bad after the Taliban came and took his older brother. He has resisted offers to try and trace his family through the Red Cross: 'Maybe they don't want me. Maybe I don't want to tell them I'm alive or not'.

In his DIMA interview for a permanent visa, GS was adamant that he did not want to return to either Afghanistan or his family. He stated:

'If I return my parents would not accept me because I do not practise my religion. My fellow villagers would not accept me because they would judge me like my parents.... Maximum time they will accept me is one week'.

trying to get his mother and his family over and he was refused because he is over 18 and the split family provisions no longer apply. They are refusing them quickly and it looks like the department is saying, 'Let's look at the immediate family: spouses, children and parents.' Anyone else, you still have to prove your case.'⁴⁰

For some young refugees, the issue of family reunification was (and remains) complex. A small number of the participants were vehement that they did not

want to re-establish contact with family. These tended to be the same young people who showed least understanding (and most resentment) of the family's decision to send them to Australia in the first place.

GS expressed anger at how he was treated by his parents in Afghanistan: he described his early youth as 'stolen' from him because his parents had not allowed him to venture outside of the family home. *Man* expressed his anger with his father for sending him to Australia: he saw his voyage to

In Search of Permanent Refuge | *David's Story*

David smiles softly and considers his words before speaking. He has a warmth that makes one feel at peace in his company. He exudes a wisdom beyond his 17 years. His gentle manner is more evocative of a man than a teenage boy. His young arms are spotted with burn marks. As he notices you looking he responds, 'McDonalds, I keep burning myself at work. I've been doing a lot of hours lately, they know if someone pulls out or anything they can ask me and I'll come'.

David fled Afghanistan to avoid forced conscription. When *David* was 13, the Akbari party, a group made up of Hazaras and Tajiks, came to his house and asked his father to send him to fight. His father convinced them to wait until *David* was 16. He managed to escape Afghanistan a year later at the age of 14, before he was forced into battle. His older brother fought for another political party. Since his arrival he has heard that his brother was killed and his family have moved away from their village: 'I don't know where they are... I think about them all the time. When I think of my brother I get very upset and depressed'.

David works during the day and studies at night: 'It's a bit hard studying but I like it'. He says thoughts of his family keep him awake: 'I try to keep busy...you know...so I don't think too much'.

He has an appealing calmness about him as he speaks of tolerance and acceptance. He believes in

rights and equality and is eager to share his thoughts, talking with great enthusiasm:

"I have learnt good things in my time here. I've met Christians here and they are very nice. All religions, all religions are good, they are all equal. Everyone has a right to their religion. Men and women they are equal... My mind is against the different ideology in Afghanistan. We have to be more open-minded... if they send me back to Afghanistan I will have no place to go. When I talk about rights, like equal rights, they will know I have been here and will take advantage of me. I have good friends here, teachers, others... where will I go in Afghanistan?"

Asked how he copes, he responds: 'I try not to think about it. People are good you know...everyone's good inside. They will find the good in them. I have faith that they will help me here.'

Australia as a form of exile. After the trials of the voyage and the difficulties of the detention environment, these young people still blame their parents for sending them away. They now feel doubly alienated by the separation and the loss of belief in their traditional culture and religious practices. In 2005, neither seemed to be coping particularly well with their new lifestyle.

Some of the participants who have managed to regain contact with their families have found their relationships irreversibly changed as a result of their enculturation into Australian society. A number of the participants reported that they are no longer observant Muslims, and expressed the fear that this would cause their families to reject them. *David* described the difficulty of growing up separated

from family, and the confusion between the way his traditional Afghan family thought and the way he now thinks. For example, he said, 'I was taught not to touch or eat with non-Muslims. Now I think Muslim ways are wrong. I'll return with a different mind and ideology'.

Tony has managed to re-establish contact with his family, and reported that his changed lifestyle has been a matter of concern — particularly for his father. *GS*, who no longer fasts at Ramadan nor eats halal food, also expressed his concern about how his family would react if they knew that he no longer practised Islam. He believes that his family will not want him, and that he will be ostracised from his village, because of his beliefs. *Man* now describes himself as a Christian but is presently not attending church. When he told his family that he is no longer a Muslim, his father was very angry.

14.6 What Now?

Our research with the participants and the many others who are slowly joining the project suggests that there is a growing tendency for groups of unaccompanied and separated children to move in together. For many, the other Afghan refugee teenagers appear to have assumed the role of 'family'. Whether this is universally good for the young people is a moot point. The participants have faced all of the issues that challenge teenagers in the Australian community such as negotiating relationships with the opposite sex, handling the pressures of school, financial security (including the management of debt) and peer pressure. What sets many of them apart from other teenagers in the community, however, are their cultural and linguistic difficulties and isolation compounded by the trauma of their flight and detention. Many of the young people in the study

have found themselves in situations where they depended on their peers for support: peers often as young, alienated and traumatised as they themselves.

In spite of the manifold obstacles they have faced (and continue to face), some of the participants have achieved amazing results. At the time of writing, eight of the participants were still at high school. *Gandhi* was dux of his high school, progressed into a university course on a scholarship, discontinued his studies at the end of his first year but later went on to resume them.

Tony is well advanced in his apprenticeship. *Sam* has undertaken English language classes and is working part time and pursuing an active social life. Others were attending TAFE and/or formal English language classes. *Galileo* is relishing his new role as father and has started a course at TAFE.

The achievements of some of the unaccompanied and separated children who play for the Tiger 11 soccer team in Brisbane are equally impressive. Two successive captains of the team have won awards as Queensland Teen Challenge Multicultural Student of the Year (2003 and 2004 respectively). Camilla Cowley writes:

There are four Tigers at uni in Brisbane and one who has gone to Sydney where he received a scholarship to do engineering. All these have now received permanent residence here and have a future to look forward to in the city they all think of as home. They have been to Sydney and Melbourne and Adelaide and told me that they cheer as they cross the border back into Queensland. This place has given them the care, the respect and the support they so badly needed and they think of it now as home. Mates of theirs from detention who were sent to other cities often phone them to thank them for all they have done to raise the profile of young refugees from Afghanistan.⁴¹

Sadly, not all the young participants in this study have made such positive transitions. *Man* was unable to finish his high school education, finding the whole environment and learning experience too stressful. He appears to have made few Australian friends, and spoke openly about his feelings of loneliness and isolation. He acknowledged that he had lost large amounts of money in gambling. Another of the participants abandoned his scholarship and his university studies shortly before his first set of end-of-year examinations. *GS* was enrolled in high school when he was released from detention but left after finding the school environment too difficult. In May 2006 he had been unemployed for over two years. He has good conversational English and has worked extremely hard on his physical fitness. Life remains a struggle and the way ahead is not yet clear, although his self-discipline and commitment should stand him in good stead.

A number of the young people, even those now well settled with friends, mentors and even spouses, talked about the difficulties of establishing a new life in a country where much of the discourse of refugees has been negative. *Adris* confessed that he was often made to feel like a second-class citizen. *David* confided that being identified as an Afghan was a problem:

“I used to like this girl at TAFE and I used to talk to her. When she say ‘where are you from?’ I say: ‘Afghanistan’ and she say ‘Oh, a terrorist’. Sometime I feel like I’m nothing.” [crying]

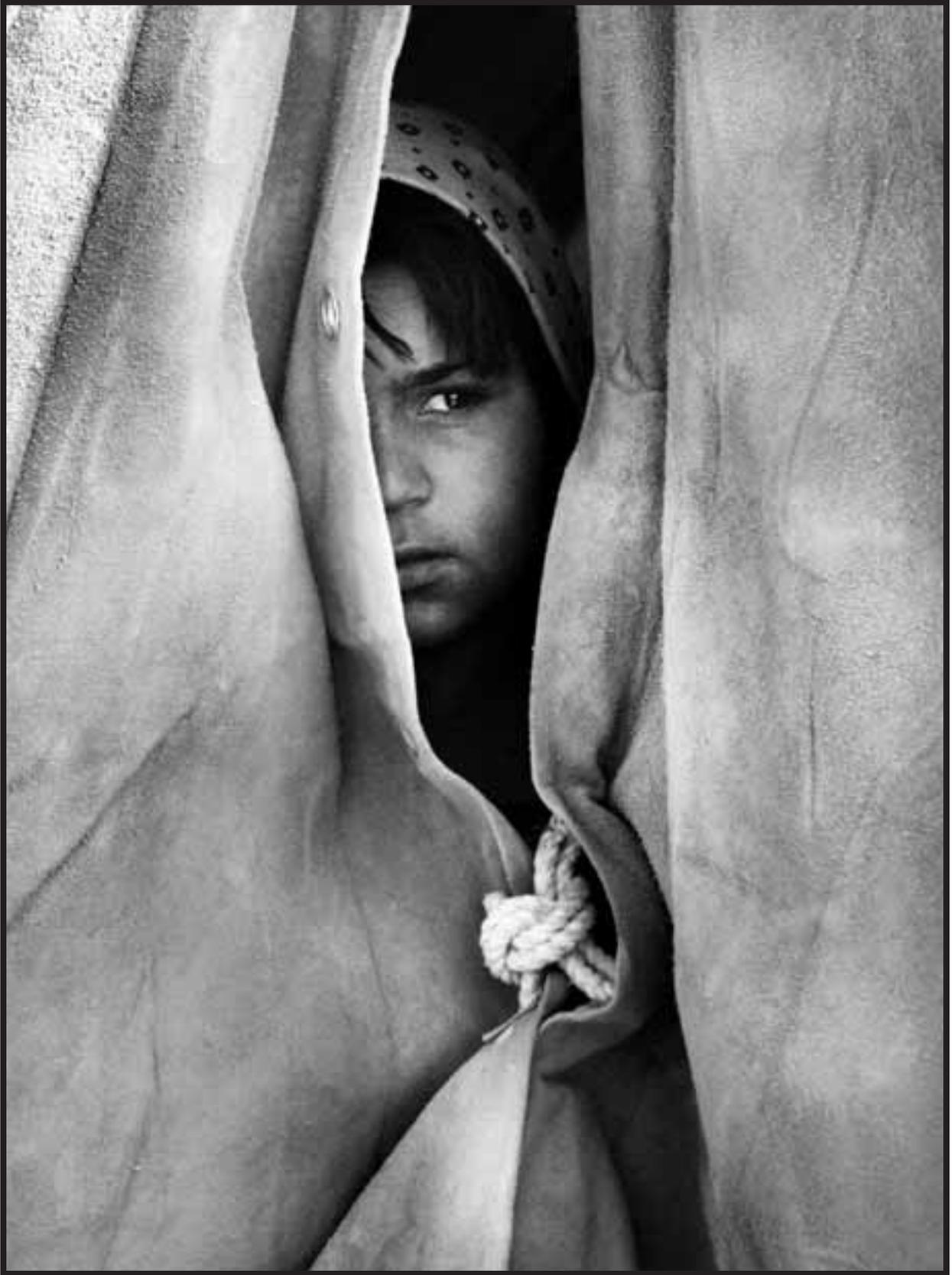
Endnotes

- 1 Many of these young people made their ways to other cities around Australia. For example, participants in this study who went first to Adelaide turned up in Perth, Melbourne, Brisbane and Sydney!
- 2 Officers from this department were friendly and very cooperative with the researchers, but were not given

(federal government) authorisation to do ‘on the record’ interviews for the project.

- 3 In Perth, the guardianship contract was let to the Department for Community Development, while the legal assistance of many of the young refugees in that city was carried out by the Southern Communities Advocacy Legal and Education Service (SCALES).
- 4 In Melbourne, the guardianship contract was let to the Department of Families, while the legal assistance of many of the young refugees in that city was carried out by the Refugee and Immigration Legal Centre (RILC).
- 5 In Sydney, the guardianship contract was let to the Department of Community Services, while the legal assistance of many of the young refugees in that city was carried out by Legal Aid solicitors, the Refugee Advice and Casework Service (RACS) and private IAAAS advisers.
- 6 In Brisbane, the initial reception of the young people was the responsibility of the Department of Families, but was eventually contracted to Mercy Family Services, a private organisation: see further below. Legal assistance was concentrated in the South Brisbane Immigration and Community Legal Centre (SBICLS).
- 7 Interview with Mary Crock and Jessie Hohmann, 20 April 2005.
- 8 The Romero Centre is a community based organisation working with refugees. The centre targets and welcomes the most disadvantaged, those with least rights and legal standing. See <www.esjgws.org.au/issues/refugees/romerocentre.htm>.
- 9 Steve Watkins is a presenter with ABC Radio in Adelaide who has devoted hours to the care and support of separated child refugees in Adelaide. Together with one of Australia’s most loved and respected Aboriginal elders, Lowitja O’Donohue, he created a space in his home known as the ‘Afghan Room’. This became an important focal point for young Hazara refugees in 2002–2004.
- 10 *NBGM v MIMIA* [2006] FCAFC 60 (12 May 2006).
- 11 This approach was also adopted by Emmett J at first instance in this case (see *NBGM v MIMIA* [2004] FCA 1373, 25 October 2004) as well as in a number of other Federal Court judgments. See, for example, *SWNB v MIMIA* [2004] FCA 1606 (16 November 2004) (Selway J); *SVYB v MIMIA* [2005] FCA 15 (20 January 2005) and

- MIMIA v SWZB* [2005] FCA 53 (19 December 2003) (Finn J); and *NBEM v MIMIA* [2005] FCA 161 (7 March 2005) (Jacobsen J).
- 12 *QAAH v MIMA* [2005] FCAFC 136 (27 July 2005) (Lander J in dissent).
 - 13 See for instance UNHCR, Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees, 10 February 2003.
 - 14 See *NBGM v MIMIA* [2006] FCAFC 60 (12 May 2006), [82]–[89]; *NBGM* [2004] FCA 1373 (25 October 2004) at [44] and *SFTB v MIMIA* [2002] FMCA 222 at [46].
 - 15 At first instance. Most appear to have been granted visas on appeal.
 - 16 See *Migration Regulations* cl 866.215.
 - 17 See DIMA, Fact Sheet 70 ‘Border Control’, <www.immi.gov.au/facts/70border.htm>, accessed 13 February 2006.
 - 18 The minister may waive the requirement if it is in the public interest to do so: *Migration Regulations* cl 866.215(2).
 - 19 See, for example, RRT Reference NO4/48762.
 - 20 *MIMA v Thiyagarajah* (1998) 80 FCR 543.
 - 21 David Manne, interview with Mary Crock, 3 March 2005. This point was also made by Mary-Ann Kenny.
 - 22 For an account of more detailed research on the impact of the temporary protection on refugees in Australia, see Michael Leach and Fethi Mansouri, *Lives in Limbo: Voices of Refugees Under Temporary Protection* (UNSW Press, Sydney, 2004).
 - 23 See ‘Reintegration Assistance Package’, described at <www.immi.gov.au/refugee/tpv_thv/2.htm>, accessed 13 February 2006.
 - 24 Interview with Mary Crock, 20 April 2005.
 - 25 Interview with Mary Crock, 3 March 2005.
 - 26 Special mention should be made in this regard of the Refugee and Immigrant Legal Support (RAILS) Project coordinated by Nitra Kidson in Brisbane. See <www.qpilch.org.au/RAILS.htm>, accessed 13 February 2006.
 - 27 Interview with Mary Crock, 20 April 2005.
 - 28 It is worth noting that in a number of instances observed, welfare officers have maintained personal relationships with these young people and have tried to ‘keep an eye’ on their former charges where possible even though they are not officially required to do this.
 - 29 GS’s actual age is a matter of contention as he was very young when he arrived in Australia and had no idea of his date of birth: he still had the appearance of an adolescent in 2005. Shortly before his re-scheduled interview, GS called and asked the researcher to help him. In the result, he attended with various supporters and had little difficulty in gaining his permanent visa.
 - 30 Interview with Mary Crock and Jessie Hohmann, 20 April 2005.
 - 31 Interview with Mary Crock and Jessie Hohmann, 6 January 2005.
 - 32 Interview with Mary Crock, 3 March 2005.
 - 33 Interview with Mary Crock, 24 November 2004.
 - 34 *Ibid.*
 - 35 Interview with Mary Crock and Jessie Hohmann, 20 April 2005.
 - 36 Interview with Mary Crock, 24 November 2004.
 - 37 It will be recalled that a decision to ‘affirm’ a ruling indicates that the RRT has rejected the appeal. See 10.1 above.
 - 38 See Answer to question on notice by Senator Andrew Bartlett, Senate Estimates Committee, Additional Hearing, 15 February 2005. The full answer provided was as follows:
Only small numbers of applications have been received so far as most TPV holders are awaiting the outcome of their permanent protection visa applications.
As at 25 February 2005, 20 applications for mainstream visas had been lodged (covering 35 people). Eight applications (18 people) had been finalised with 15 permanent visas granted, 1 temporary visa granted and 1 application (covering 2 people) withdrawn as the applicants were granted permanent protection visas.
 - 39 Interview with Mary Crock and Jessie Hohmann, 20 April 2005.
 - 40 *Ibid.*
 - 41 Camilla Cowley, email to author dated 28 September 2005, on file with author. See also *Byron Shire Echo* 12 August 2003, p 3.



WITH JACQUELINE BHABHA

Towards the Future: Conclusions and Recommendations

15.1 The Protection Deficit

The phenomenon of children leaving their homes and countries and travelling alone in search of protection is not new, but the scale and nature of child migration around the world today is without precedent. There are many factors that lead children to travel in isolation from their families.

Such children are most often forced migrants, separated from families by the effects of war; persecution; natural disasters; civil, political and economic upheaval; or a combination of these. The children's journeys can be just as varied. While some might travel in comfort, for most the trauma of separation from family is compounded by arduous, terrifying journeys. Sadly, arrival in a state of refuge rarely brings an end to the children's troubles. They enter alienating and confusing administrative processes, too frequently given an unsympathetic and even punitive reception by poorly trained officials. As a result, stories of children in distress,

withdrawn into deep depression, or paralysed by acute anxiety are commonplace.¹

This report highlights the protection deficit at the heart of Australia's immigration system. It speaks of a regime that has been blind to the needs (and at times even the existence) of children travelling alone and in need of protection. In spite of Australia's claimed embrace of the principles of child protection, its immigration practices mark unaccompanied and separated children as marginalised to the point of victimisation. The 'normal' exclusion of children as a voiceless group of citizens is exaggerated in the case

of the population studied in this report by two aggravating circumstances — their non-citizen status, and their lack of access to parental or other protective adult involvement.

This chapter concludes the report by revisiting the major concerns and deficiencies identified in the legal frameworks, procedures and outcomes at each step of the asylum-seeking process experienced by unaccompanied or separated children. As well as highlighting findings of good and bad practice, recommendations are made for policy makers and advocates responsible for the treatment of these children.

Australia has subscribed to all the major human rights instruments relevant to the treatment of unaccompanied and separated children travelling alone, even if it has not implemented into domestic law all of the relevant provisions.² The divergence between these international undertakings and the reality of children encountering Australia's border control, refugee processes and general immigration enforcement mechanisms is marked. The tension between migration control, law enforcement and a children's rights perspective has inhered in almost all stages of the asylum seeking process. Although international law has begun to address both the substantive and procedural aspects of child migration, the need to translate these international standards into binding domestic law in Australia is pressing.

15.2 The Phenomenon of Child Migrants Travelling Alone

Accounting for the children

Although Australia has a long history of taking in unaccompanied and separated children as migrants, the phenomenon of children arriving in the country alone, in search of protection, is a relatively new one. Two aspects of this research suggest immediately that insufficient attention has been paid to the phenomenon.

First, the statistical data supplied by Australian government authorities is poor, contradictory and incomplete. Indeed, it could be described as radically unreliable. Second, the official figures provided on the numbers of unaccompanied and separated children entering Australia are at odds with estimates offered by non-government agencies working in the field. This suggests not only that record keeping is inadequate: there may also be a systemic failure to identify children at risk who are travelling alone or without appropriate guardians. The failures point to both inadequacy in data collection and to an almost complete lack of accountability on behalf of agencies, responsibility for the reception and care of children travelling alone.

In comparison with the experience in other developed countries, the number of unaccompanied and separated children seeking asylum in Australia is very small, largely because Australia sees comparatively few asylum seekers in total. While States neighbouring conflict zones might expect to receive unaccompanied and separated children seeking asylum, Australia's lack of land borders appears to have isolated it from these types of refugee flows. Most asylum seekers in Australia arrive by air with valid visas, and apply for protection after being immigration cleared. This route has not been used typically by separated or unaccompanied children because of tight visa controls and extensive supervision of airline flights.

In view of the tightness of Australia's immigration controls and the small number of unaccompanied and separated children entering the country, the absence of reliable data on migrant children travelling alone is inexcusable. The fact that Australia has not recorded any child as a victim of trafficking since 1994 suggests that the procedures for the identification of *separated* children are poor: see further 15.3 below.



RECOMMENDATION ONE

- *DIMA* should collect accurate statistics on unaccompanied and separated child migrants entering Australia either with or without visas. These should be updated periodically and shared among relevant agencies and authorities concerned with the care and welfare of children and immigration control. The statistics should be available publicly: *UNHCRG*, 5.19; *CRC General Comment*, VIII(b).

How and why children travel alone

A clear majority of the children whose cases were examined in this study appeared to have left their country of origin in response to serious and immediate threats to their life and livelihood.

The evidence collected suggests that most of the 85 participants studied:

- had little or no control over the decision to leave their homes and countries; and
- had no access to authorities or facilities that would have enabled them to migrate through regular means.

Most child migrants arriving in Australia without appropriate visas have been treated as smuggled persons. This is so in spite of the fact that many may have carried with them burdens of debt requiring repayment after entry into Australia. The presumption that smuggled persons are consenting and voluntary participants in the enterprise of gaining illicit entry into another country may also be false in the case of children. On the other hand, being identified as a victim of trafficking has not guaranteed preferential treatment.

RECOMMENDATION TWO

- Greater attention needs to be paid to the causes of child migration within government. Consideration should be given to the establishment of a special task force within *DIMA* to study all aspects of the phenomenon and assist in the formulation of appropriate reception and settlement policies: *CRC General Comment*.

15.3 The Identification of Unaccompanied and Separated Child Migrants

Little information was available about either the training of government officials or the adoption of specific practices for the identification of unaccompanied and separated child migrants. Evidence from the young people studied and from secondary sources suggest that identification of child migrants appears to be a haphazard process, reliant on either the visual identification of children travelling without an obvious guardian or on the self-identification of such children. Again, the failure to identify any child trafficking victims between 1995 and 2006 is a matter of particular concern.

Practices in the United Kingdom (in Operation Paladin Child) demonstrate that much more can be

done to train officials and to place them so as to optimise the chances of locating child migrants at risk.

RECOMMENDATION THREE

- **3.1** The Federal Government should institute specific identification procedures for unaccompanied and separated children to find out: first, whether or not the child is unaccompanied; second, whether the child is an asylum seeker or not; and, third, whether the child is a victim of trafficking. These identification processes should accord with those recommended by UNHCR: *UNHCRG, 5 and Annex II; CRC General Comment, V(a)*.
- **3.2** Processes for the identification of child asylum seekers and victims of trafficking should be instituted. These should apply both to officials operating at ports of entry into Australia and to immigration officers and law enforcement officials who might encounter unaccompanied and separated child migrants living in the community: *CRC General Comment, 95–97*.

Age Determinations

Another issue of concern is the manner in which the age of children is determined. Where an estimate of age is not forthcoming from the child, initial assessments seem to be made on the basis of appearance. In disputed cases, heavy reliance has been placed on objective assessments of physical attributes, without reference to the child's psychological maturity or other factors. Measures such as bone density testing have a strong physiological bias, ignoring consideration of matters such as paediatric development and psychology. Surrounding circumstances such as personal, family and cultural background do not seem to feature in the age determination process. Assessments were not directed at determining whether children demonstrated 'immaturity' or 'vulnerability', as UNHCR has recommended.

Scientific procedures used to determine the age of the children have usually been considered decisive of age, and virtually no margin of error allowed. All the young people who took part in the study reported that the immigration authorities, at least initially, relied on them to identify their own age. However, where there was uncertainty, the children were not afforded the benefit of the doubt. On the contrary, age assessments were often taken as a decisive basis from which to draw adverse factual inferences. Many of the children did not know their date of birth. In these cases, excessive reliance was placed on self-assessment and reporting. In these cases, subjective assessments often proved inaccurate. There is no evidence to suggest that those charged with determining the age of the children were trained in the holistic assessment of age.

RECOMMENDATION FOUR

- **4.1** Age assessment should be based on the totality of available evidence, taking account of: claims made by the child; physical and psychological maturity; documentation held (such as passport or identity cards); evaluation by healthcare professionals; information from family members; and any x-ray or other examinations. Where the outcome of age determination affects decisions about detention, independent experts should make the final determination: *UNHCRG, 8; CRC General Comment, V(a)A*.
- **4.2** The accurate assessment of age should be viewed as a child welfare issue, rather than an immigration enforcement issue. The assessment should be used to determine the type of care to be given to the child, rather than the credibility of his or her claim to refugee protection.
- **4.3** No process for the determination of an asylum claim should be instituted until an assessment is made of the applicant's age and identity as a child.

15.4 Access to Territory

In recent years Australia has deliberately denied some unaccompanied and separated children access to its territory for the purposes of seeking asylum. These children have been sent to Nauru and to Christmas Island where their refugee claims have been determined. In the case of those sent to Nauru, the asylum process offered was markedly inferior to that offered on mainland Australia.

The policy of sending asylum seekers who arrive by boat to Christmas Island and/or to Nauru for refugee processing is a matter of grave concern. As well as increasing the costs of the system, the potential for abusive processes developing in these remote locations is considerable. Proposals to extend the Pacific Strategy to include all unauthorised boat arrivals are regrettable.

RECOMMENDATION FIVE

- The Federal Government should follow the guidelines set by UNHCRG, 4. Unaccompanied and separated children should never be interdicted and deflected from mainland Australia, either by being returned to their country of origin or sent to an offshore processing centre. Their claims should always be considered under the normal refugee determination procedure.

15.5 The Reception of Unaccompanied and Separated Children: Guardianship, Care and Control

The Australian system presents children with significant hurdles in trying to gain access to asylum processes. All unaccompanied and separated children who arrive without a valid visa are subjected to a ‘screening-in’ process which involves ‘questioning’ and then ‘separation’

detention. In order to access Australia’s asylum procedures, a child who enters Australia without a valid visa must demonstrate *without legal assistance of any kind* that he or she is a person in respect of whom Australia owes ‘protection obligations’. This is an extraordinarily punitive and challenging approach to the protection of asylum seeking children.

Children have no right to an adviser, ‘responsible adult’ or any other representative at the initial, screening-in stage, despite the fact that the screening interview is recorded and is critical in establishing whether a full asylum claim can be made. This practice is profoundly detrimental to children’s best interests and urgently needs to be changed.

Under Australian law, the Minister for Immigration is the official guardian of all immigrant children who are in Australia without the protection of a parent or other responsible adult. For children travelling alone who do not possess a valid visa, the law places this minister in a position of impossible conflict of interest. The end result is that when children first engage with immigration authorities they often do not have an effective guardian appointed for the purposes of either immediate care and control or assistance in negotiating administrative processes. Guardianship is only delegated to State and Territory welfare bodies when the children are released from immigration detention.

RECOMMENDATION SIX

- **6.1** Australia should abandon its current methods of screening all unaccompanied and separated children arriving by irregular means. Any screening process should be simply a mechanism for eliciting basic information about a child. It should be designed to be child-sensitive rather than demanding and punitive.
- **6.2** Identification of unaccompanied or separated children should result immediately in the involvement of State or Territory welfare agencies. Children

travelling alone should be allocated a guardian and should be informed about the process they are entering. The guardian person should have the necessary expertise to ensure that the interests of the child are safeguarded and that her or his immediate needs are met. Children should only be interviewed after being given access to professional or legal advice: *UNHCRG*, 5.7; *CRC General Comment*, V(b); *HREOC*, rec 3.

- **6.3** Immigration policies and practices should be changed so as to require immigration officials to explain to unauthorised arrivals (including children) their rights to seek protection as refugees. This information should be provided to children in the presence of their guardian in a manner appropriate to age and stage of development.
- **6.4** The Federal Government should follow the recommendations made in *UNHCRG*, 5.8–5.9 and *CRC General Comment*, VI. In particular:
 - No screening interview should take place if an unaccompanied child is not assisted by an appropriate adult and his or her own legal representative.
 - An adult should not be deemed to be an appropriate (or ‘responsible’) adult until it has been ascertained that he or she has the necessary training and experience to fulfill this role.
 - The screening interview should not be used to probe the credibility of an unaccompanied child’s substantive asylum application or to reach a conclusion as to his or her overall credibility or willingness to tell the truth. Any evidence of credibility obtained at this stage should not be taken into account when making the decision, or upon appeal to the RRT.
 - The screening interview should primarily be used to check an unaccompanied child’s identity or to resolve any child protection concerns.



- The screening interview should not be used to resolve any disputes about the separated child’s age.
- The interviewer should always ensure that the unaccompanied child has fully comprehended the precise purpose and limitation of the screening interview and the type and extent of information he or she is expected to provide.
- The interviewer should always ensure that an unaccompanied child fully understands any interpreter being used in the screening interview and that he or she is also happy about the gender and nationality or ethnic or tribal origins of the interpreter. Interpreters should also be specially trained to interpret for unaccompanied children seeking asylum.

Detention

Until 29 June 2005, it was usual practice in Australia to make no distinction between non-citizen adults and children found in Australia without a valid visa. Mandatory immigration detention was the norm, even though some discretion existed to allow children to be released. For the young people studied in this report, this practice was extremely damaging at both the level of personal development and administrative efficiency. The government is to be commended for abandoning the policy of mandatory detention of children who arrive without a visa. However, State practice in this country still falls short of the benchmarks set by UNHCR and the Committee on the Rights of the Child in so far as there remains no absolute prohibition on detaining children, including unaccompanied and separated children.

RECOMMENDATION SEVEN

- **7.1** No unaccompanied or separated child should ever be detained in an immigration detention centre. The detention provisions of the Migration Act 1958 (*Cth*) should, at a minimum, be repealed in so far as they apply to unaccompanied and separated children: *UNHCRG*, 7.6–7.8; *CRC General Comment*, V(c); *HREOC*, rec 2.
- **7.2** Where a child's age is being disputed, they should be given the benefit of the doubt and should not be detained in immigration detention.
- **7.3** Beyond this, the Australian Government should follow the recommendations made in UNHCRG, 7 and CRC General Comment, V(c): Unaccompanied or separated children are children temporarily or permanently deprived of their family environment...
[T]he particular vulnerabilities of such a child, not only having lost connection with his or her family environment, but further finding him or herself outside of his or her country of origin, as

well as the child's age and gender, should be taken into account. In particular, due regard ought to be taken of the desirability of continuity in a child's upbringing and to the ethnic, religious, cultural and linguistic background as assessed in the identification, registration and documentation process. Such care and accommodation arrangements should comply with the following parameters:

- Children should not, as a general rule, be deprived of liberty.
- In order to ensure continuity of care and considering the best interests of the child, changes in residence for unaccompanied and separated children should be limited to instances where such change is in the best interests of the child.
- In accordance with the principle of family unity, siblings should be kept together.
- A child who has adult relatives arriving with him or her or already living in the country of asylum should be allowed to stay with them unless such action would be contrary to the best interests of the child. Given the particular vulnerabilities of the child, regular assessments should be conducted by social welfare personnel.
- Irrespective of the care arrangements made for unaccompanied or separated children, regular supervision and assessment ought to be maintained by qualified persons in order to ensure the child's physical and psychosocial health, protection against domestic violence or exploitation, and access to educational and vocational skills and opportunities.
- States and other organizations must take measures to ensure the effective protection of the rights of separated or unaccompanied children living in child-headed households.

- In large scale emergencies, interim care must be provided for the shortest time appropriate for unaccompanied children. This interim care provides for their security and physical and emotional care in a setting that encourages their general development.
- Children must be kept informed of the care arrangements being made for them, and their opinions must be taken into consideration.

15.6 The Treatment of Trafficked Children

While most of the smuggled children have been allowed to lodge refugee claims, the same is not true of a child identified as a victim of trafficking in Australia's recent past. We acknowledge the initiatives that have been taken to combat trafficking in persons in Australia. These include a \$20 million package to fund: the establishment of a 23-member Australian Federal Police mobile strike team to investigate trafficking and sexual slavery; the posting of a senior immigration official at the Australian Embassy in Bangkok to investigate people trafficking; increased regional cooperation to overcome the issue of trafficking and people smuggling; the introduction of new visa arrangements for potentially trafficked people; the establishment of a 'comprehensive' victim support scheme; the initial development of federal offences to criminalise trafficking in persons; and the establishment of reintegration assistance to trafficking victims who are repatriated.

However, the new trafficking visas are primarily focused on the prosecution of traffickers. The focus is on the criminal, not the victim. There is no permanent or temporary visa granted for trafficking victims who fall outside these regulations, that is,

victims who decline or are unable to assist in the investigation or prosecution of a trafficker. The link between prosecution and the treatment of victims has been applied to the operation of victim support schemes in Australia. In reality, the only people able to access victim support services in Australia are those people assisting police investigations or prosecutions. In spite of the apparent dual focus, the package is not accessible to all victims. As it currently stands, the support services extend only to 'victims who agree to stay in Australia to assist trafficking investigations'. In our view this is a major shortcoming that needs redress.

RECOMMENDATION EIGHT

- **8.1** Access to the trafficking visas should not be dependent on a child's cooperation with police investigations and prosecutions.
- **8.2** Greater consideration should be given to the protection needs of trafficked children. In particular, such children should be given access to asylum procedures where reunification with family and return to country of origin is not in their best interests.

15.7 The Provision of Legal Advice and Representation: The IAAAS

In relation to the process of seeking asylum *within* Australia, the most serious deficit of the Australian legal framework is that the *Migration Act* contains no provision requiring government officials to inform unauthorised arrivals of their rights. Advisers and application forms are only provided if specific requests are made. In practice unaccompanied and separated children have been provided with an adviser under the IAAAS, at least for the



application phase of their quest for asylum. However, a number appealed adverse rulings to the RRT and the Federal Court without such assistance.

Most of the children in this study appear to have spent little time with the IAAAS adviser appointed to assist them. Some of the participants were not aware that the advisers were there to assist and described the advice sessions as their ‘second interview’. The perception that advisers are part of the government may be due in part to the passive role played by the adviser during any of the interactions with immigration officials: at no stage does the adviser ‘put’ the case of the asylum seeker or otherwise speak on his or her behalf. Some participants expressed open distrust of their earliest adviser.

The agent’s role for an individual in detention is inherently limited as agents are rarely physically present to explain the significance of developments outside of the formal hearings. Service providers agreed that the earliest stages of application process were the most crucial to an applicant’s success. It

was found that those who did not receive adequate representation from the start were likely to suffer throughout the process.

RECOMMENDATION NINE

- **9.1** The Federal Government should ensure that guardians and IAAAS advisers are assigned to represent and advise unaccompanied and separated children as soon as such children are identified. Both guardians and IAAAS advisers should have specific training and experience in dealing with vulnerable children.
- **9.2** The procedures for interviewing children should be adjusted so as to ensure that IAAAS advisers have adequate time to gain the trust of unaccompanied or separated children.
- **9.3** IAAAS advisers should only interview unaccompanied or separated children in the presence of a guardian.

15.8 Formal Status Determination Processes

DIMA interviews are supposed to be non-adversarial. However, most participants in the study found the interview process to be very confronting — even where their claims were accepted.

The interview transcripts examined and observations made by service providers suggest that some DIMA officials used interview techniques that were insensitive to the age, culture, experience and psychological state of the young interview subjects, including the over use of closed and leading questions, and an expectation that children would be capable of providing highly sophisticated information about their experiences and recollections.

Language analysis was often carried out in an

attempt to determine the ethnic identity and origin of the applicants studied. The agency used by DIMA for this purpose is based in Sweden. The cases studied suggest that this analysis was not always accurate: insufficient account appears to have been taken of the diversity of the children's experiences and of the variety of factors influencing both accent and choice of words. Adverse language analysis findings led to delays in the finalisation of decisions and in some cases had lasting repercussions for the credibility of the participants. The advocates interviewed as part of this study agreed that insufficient information was provided about the agency's methodology, which made it very difficult to challenge these assessments. Children had particular problems when attempting to challenge the 'expert opinion' of analysts.

Credibility is of vital importance in all refugee status determinations. Service providers agreed that some decision-makers were more likely than others to question the credibility of refugee claimants; and to reach adverse findings on the basis of credibility assessments.

Analysis of the participants' cases raises issues about the adequacy and cultural appropriateness of interpreters used in the DIMA interviews. In many instances, interpreters used were Pashtun or Tajik, coming from ethnic or religious groups viewed by ethnic Hazara as traditional persecutors.

It is unclear whether appropriate training regimes were in place for either the DIMA officers charged with conducting the interviews, or for interpreters. Evidence from the children's interviews suggests that such training, if provided, was inadequate. In none of the cases examined was a child interviewed by a person of the same cultural background or mother tongue. DIMA officers and interpreters do not appear to have been provided with training in the psychological, emotional and physical development and behaviour of children. DIMA asserts that adequate training programs are now in place.

The participants' poor understanding of the process indicates that they were not kept informed in an age-appropriate manner.

The UNHCR Handbook (1997) sets out three key principles for deciding a child asylum seeker's legal status: expert advice on child development, a focus on objective country conditions, and a generous exercise of the benefit of the doubt in favour of children. *All three principles should be adhered to more widely in Australia.*

RECOMMENDATION TEN

■ 10.1 The training of officials

The UNHCRG should be used as the basis for the training of all officials involved in assessing refugee claims lodged by unaccompanied and separated children. Training should cover topics such as international guidelines and practice, child development, interview considerations, and the legal analysis of claims. Existing training programs used in the United States include a documentary film related to refugee children, role-play, and instruction by officers who have conducted interviews with children themselves. Similar training programs should be instituted in Australia.

■ 10.2 The expertise and role of interpreters

Interpreters need to be carefully chosen to ensure their linguistic and social compatibility with the child applicant. They need to be screened for competence and impartiality, and the same interpreter should be allocated to a case for its entirety. Interpreters should never be accessed over the telephone but should attend in person during asylum hearings; nor should children meet their interpreter for the first time immediately before being called to give evidence or answer questions in hearings.

See Generally, UNHCRG, 5.12–5.13; CRC General Comment, VI(c) and (d), VIII(b).



Interview techniques

RECOMMENDATION ELEVEN

- **11.1** At a minimum, *DIMA* decision-makers should be trained in and familiar with the specialist requirements for eliciting information from traumatised and frightened children: CRC General Comment, VIII(b).
- **11.2** The Federal Government should follow the recommendations made in UNHCRG, 2, 11 and CRC General Comment, VIII(b) and VI(c):
 - It is desirable that all interviews with unaccompanied children be carried out by professionally qualified persons, specially trained in refugee and children's issues. In so far as possible, interpreters should also be specially trained persons;

- In all cases, the views and wishes of the child should be elicited, and considered;
- Children seeking asylum, particularly if they are unaccompanied, are entitled to special care and protection;
- Considering their vulnerability and special needs, it is essential that children's refugee status applications be given priority and that every effort be made to reach a decision promptly and fairly;
- Interviews should be conducted by specially qualified and trained officials; and
- In the examination of the factual elements of the claim of an unaccompanied child, particular regard should be given to circumstances such as the child's stage of development, his/her possibly

limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her special vulnerability.

- It is desirable that agencies dealing with unaccompanied children establish special recruitment practices and training schemes, so as to ensure that persons that will assume responsibilities for the care of the children understand their needs and possess the necessary skills to help them in the most effective way.

15.9 Challenging Adverse Decisions

While the RRT is portrayed as an independent merits review system, the Minister for Immigration retains significant control over the method of appointment, the duration of appointment and the remuneration of members, as well as the funding of the review body. Lawyers are largely excluded from the merits review process and hearings are conducted in secret without public scrutiny.

IAAAS advisers provided to assist applicants before the RRT, in the past, have been poorly resourced and often inexperienced. Again, complaints were made that interpreting services have been inaccurate and indifferent to nuances in dialect and culture.

RRT guidelines address the treatment of children who are giving evidence, demonstrating that some thought has been given to the problems associated with children seeking asylum alone. Advocates suggested that, in practice, RRT procedures have often made no distinction between adult and child applicants. On the other hand, some aspects of UNHCR guidelines appear to be observed, with priority given to applications made by children and efforts being made to reach decisions promptly: UNHCRG, 2. For

individuals exercising a right of appeal outside of the detention environment in more recent times, compliance with RRT guidelines was more apparent.

The shortcomings in the processes observed appear to be due in part to the legislative framework within which the tribunal operates. For example, the closed nature of proceedings was identified as a factor that might explain the culture of defensiveness and introspection observed. Again, children have no right to be represented in tribunal hearings, but must speak for themselves even if they have an adviser present.

The RRT's guidelines are deficient in the attention paid to emergent jurisprudence on children as refugees.

RECOMMENDATION TWELVE

- **12.1** Special attention needs to be given to the way in which the RRT handles hearings involving unaccompanied and separated children. Training programs should include modules that provide members with knowledge of child development, child psychology and cross-cultural understandings specific to children coming before the tribunal. Members should not be allocated cases involving children until they have undergone specific training to equip them for this task.



- **12.2** The Federal Government should follow the recommendations made in UNHCRG, 5.7 and CRC General Comment, VI(e). In particular:
 - An asylum-seeking child should be supported in any appeal process by a guardian who is familiar with the child's background and who would protect his/her interests;
 - Such children should be afforded assistance in relation to their appeal by an IAAAS adviser;
 - In the examination of the factual elements of the claim of an unaccompanied child, particular regard should be given to circumstances such as the child's stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her special vulnerability.

15.10 Judicial Review and Other Avenues of Appeal

Unaccompanied and separated children who are unsuccessful in an RRT appeal may seek judicial review of that ruling, but only on very narrow grounds. The success rate on appeal is extremely low. The terms of the migration legislation and the absence of a federal Bill of Rights mean that there are few safeguards in place to deal with the particular needs of these children. Australian Courts have been largely unwilling to make use of international law to inform the interpretation of either procedures or law in relation to children.

Legislative time limits have played a role in denying child applicants access to judicial review. Many advocates indicated that it was extremely difficult to obtain access to child clients (particularly those in detention) within the timeframes set by the legislation. The default was particularly acute for unaccompanied children because of the additional challenges

they faced in trying to understand what was happening to them.³ Having said this, applicants have been assisted by High Court rulings on the constitutionally entrenched right to have fundamental legal errors corrected.⁴

Advocates indicated that the abstract process of judicial review was substantially detached from the experiences of child applicants. This detachment increased at each appellate level, partly due to the long delays in getting cases heard. The children typically have no idea whatsoever about the mysteries of the judicial review process. This incomprehension is exacerbated by the apparently random effects of 'wins' and 'losses'. Some unsuccessful applicants have nevertheless been granted permanent residence, while others have won and yet only been granted temporary visas.

The right of access to courts encompasses matters such as access to legal representation, interpretation and translation facilities, relevant costs and fees, as well as broader concepts of due process and fair trial. Although the Refugee Convention does not expressly mention these aspects of the right, they are inherent to it and exist under general human rights standards.⁵

The regime for the judicial review of immigration decisions has been the subject of protracted debate over the years. It was beyond the scope of this research to revisit the various controversies other than to note UNHCR's view that a cautious approach is warranted in any attempt to reduce unmeritorious litigation in asylum cases. Measures taken to penalise applicants and their advisers in the *Migration Litigation Reform Act 2005* (Cth), for example, may have the unintended affect of discouraging applications that are not certain of success, but are nonetheless not abusive. Such measures may detract from what is currently a positive aspect of Australia's system.

RECOMMENDATION THIRTEEN

- **13.1** Consideration should be given to the institution of special measures for the judicial review of decisions involving unaccompanied and separated children. For example, such children should not be subjected to the punitive measures contained in the *Migration Litigation Reform Act 2005* (Cth).
- **13.2** Programs should be created for training the federal judiciary in matters relating to both the processing of refugee claims by children and the emergent jurisprudence on children and refugee status.

Ministerial Discretion

Other mechanisms available to persons who were unable to obtain protection involved the personal intervention of the Minister for Immigration through the exercise of what is known as non-compellable, non-reviewable discretions. IAAAS advisers expressed the view that the formal guidelines for the minister's exercise of discretion are inadequate and that the process remains an arbitrary one, lacking in transparency.

The diversity of outcomes produced by the ministerial appeal process supported the view that the regime is arbitrary in its operation. The researchers agreed with conclusions reached by a Senate Committee in 2000 that these arrangements are not an adequate substitute for mechanisms that facilitate the grant of protection in cases where applicants should be recognised as having protection rights under human rights treaties other than the Refugee Convention.

RECOMMENDATION FOURTEEN

- **14.1** The Federal Government should enact legislation to allow for the grant of complementary protection to persons who are not refugees but who have a genuine fear of returning to their

country of origin for reasons that engage the *non-refoulement* obligations of the Torture Convention or similar human rights instruments: CRC General Comment, VI(f).

- **14.2** The Federal Government should enact legislation to create visas similar to the *Special Immigrant Juvenile Status* visas used in the United States. These would allow for the grant of permanent residence to children travelling alone who are found to be in a situation of particular vulnerability in Australia.

15.11 Use of the Refugee Convention

The grant of asylum or permanent protection under the Refugee Convention represents the most protective State response for many unaccompanied and separated children who have reason to fear return to their country of origin. Chapter 12 explored ways in which the Refugee Convention has and has not been used in cases involving vulnerable children. Some of that discussion is summarised here.

Establishing Well-Founded Fear

In general the applicant must both show a subjective fear of persecution upon return to his or her country of origin *and* demonstrate from an objective viewpoint that the fear is 'well founded'. Unaccompanied and separated children may have greater difficulty than their adult counterparts satisfying both parts of this test. The child's capacity for subjective fear may be impacted by his or her developmental stage as well as particular experiences. (In many of the cases reviewed for this study, the decision to flee was made by parents, guardians or other adults conscious of a threat to the minor rather than by the child him or herself.) Moreover the child's access to

the resources necessary to corroborate the objective claim may be very limited; this reduces the child's chances of assembling the evidence required to make a compelling case.

Granting Asylum under the Refugee Convention

It has been difficult to ensure the likelihood of a finding of persecution for unaccompanied and separated children both because of the absence of a rigorous or authoritative account of what constitutes persecution from a child's perspective and because of the difficulty in accessing the asylum determination system. As a result the grant of asylum under the Refugee Convention to separated or unaccompanied child applicants often represents the exception rather than the rule, despite compelling and convincing evidence of persecution. In the case of children interdicted and sent to Nauru for processing, well over half (32 of 55) failed in their attempt to gain recognition as refugees and were returned to Afghanistan.

Child-Specific Persecution

In Chapter 12 it was argued that consideration needs to be given to the particular way in which children can suffer persecution. Children can face harms that are indistinguishable from those facing adult asylum seekers. In all three countries it was found that decision-makers seem to be most willing to recognise as refugees children in this category.

In addition, however, children can suffer persecutions that are particular to childhood. Examples in point are children conscripted as child soldiers, sold into slavery or oppressive marriages and children suffering persistent discrimination as 'black' (unauthorised) children. The recognition of this type of persecution as a basis for asylum is more uneven.

Finally, there are forms of persecution that involve harms that are only persecutory in nature because of the minority of the children. These are

harms that might cause distress in adults but prove to be debilitating for children. It is in these cases that we argue that more consideration needs to be given to interpreting the Refugee Convention through the eyes of the child.

The failure to effectively articulate a doctrine of child-specific persecution to complement the generic concept of persecution is a reflection of a broader blindness to the needs and interests of children, particularly those who are unaccompanied and separated from their families. It is an instance of the widespread finding that children are practically invisible and inaudible in migration policy and in international law more generally.

This lacuna surrounding the needs and interests of children has several consequences common to the three countries studied. It results in a dearth of human rights reports which detail the persecution targeted at children. As a result, information gathering and substantiation of children's claims



is problematic. It also leads to incredulity or scepticism about children's testimony, another problem in securing positive asylum outcomes. Finally it produces a paradoxical set of obstacles for children. On the one hand, they encounter an attitude that discredits their particular suffering and needs and assimilates their situation to that of adults. On the other, they have to overcome discriminatory assumptions about their veracity, their vulnerability to attack and their risk of persecution.

Australia has not promulgated guidelines concerning children's asylum applications. This constitutes an impediment to the development of a body of case law that develops and explores child-specific persecution. It also allows decision-makers and adjudicators to evade the importance of granting full asylum, as opposed to temporary forms of subsidiary protection, to children with well-founded fears of persecution. The precedent from and the relevance of the related field of women's asylum claims seems clear, but so far Australia has chosen not to explore the relevance of this approach. The developing jurisprudence on gender persecution is highly relevant. This expansive application of the Convention is a challenge for both advocates and decision-makers to take on.

RECOMMENDATION FIFTEEN

■ **15.1** An understanding of child-specific persecution is critical to the recognition of asylum claims made by children. The youth of an asylum seeker may be central to the harm experienced or feared. In these cases, decision-makers should take a more expansive approach to notions of persecution to correct adult-centred and static conceptions of refugee status. The Refugee definition, and in particular the open-ended ground of 'membership in a particular social group' could be applied much more widely and creatively to children's persecution cases than has been the case to date. The

adoption of guidelines on children's asylum applications would be a positive step forward.

■ **15.2** Much greater consideration needs to be given to the categorisation of vulnerable immigrant children as refugees. A more systematic consideration of child-specific needs and vulnerabilities is urgently required.

15.12 Protection Outcomes

In Australia, no child who enters the country without a valid visa (the vast majority of unaccompanied and separated children fall into this category) can ever receive permanent refugee status at first instance. Children sent to Nauru for processing offshore can face years in a state of limbo, even if their refugee claims are accepted. Within Australia, if a child succeeds in obtaining temporary protection, that status will continue for three years, after which the whole asylum application process has to be undertaken once again. The introduction of the 'seven-day' rule and other changes relating to convictions for certain criminal offences has the potential of leaving some refugees on perpetual temporary protection visas (TPVs), requiring them to be re-processed every three or so years. For the unaccompanied and separated children, this process has presented many challenges. One critical drawback is that children holding TPVs are not eligible for family reunion. Nor can they readily access government funded education and training (as they are treated as overseas students).

It is uncommon for victims of trafficking to be recognised as refugees. The research suggests that many are simply not identified, and those that are lack the specialist assistance needed to pursue an asylum claim or are hesitant about coming forward for fear of retaliation by their abusers. Despite the

existence of specific visas for victims of trafficking, no children have been identified as victims of trafficking so as to receive protection in this way. The amount of public attention to and outcry over this issue is not paralleled by effective intervention in practice.

RECOMMENDATION SIXTEEN

- **16.1** The regime for the granting of temporary protection to persons recognised as refugees after entry into Australia should be abolished — most particularly in respect of unaccompanied and separated children. Such children should be granted permanent residence as soon as refugee status is granted.
- **16.2** Children found to be refugees should be given immediate assistance to find and sponsor family members. The right to family reunification should extend to children who reach their majority during or shortly after the refugee determination process.

- **16.3** Specialist intervention programs should be instituted to assist the development of all unaccompanied refugee children and young adults (to the age of 25).

15.13 Conclusion

The protection deficits highlighted above need to be recognised as a refusal to acknowledge and provide for the particular vulnerability of unaccompanied or separated children. To varying degrees, Australia has persisted with policies that advance the immigration control agenda in the face of troubling and predictable human rights violations against children. Child migration is not an exceptional or occasional occurrence, but a regular phenomenon. It needs to be recognised, acknowledged and given an appropriate response. The research undertaken for this study demonstrates



Hunger strikers, Main Compound, Woomera Immigration Detention Centre, South Australia. Photograph obtained from the Human Rights and Equal Opportunity Commission's National Inquiry into Children in Immigration Detention.

that Australia falls short of desirable child protection practice, in respect of statistical data collection; government planning and legal structures; and in addressing the social needs of unaccompanied and separated children seeking asylum.

The second focal argument in the research is that many unaccompanied and separated child migrants have a stronger claim to asylum than is generally recognised or acknowledged. The concern here is that children with claims analogous to those of adults are being left out of the refugee protection system because asylum is implicitly assumed to be an adult remedy. In this context we assert that more attention needs to be paid to the interpretation of the Refugee Convention in the context of claims made by children.

Over the last 20 years or so, developments in refugee jurisprudence have expanded greatly the scope of the Refugee Convention for adults. Similar reasoning should now be adopted in cases involving children. This is not an argument for preferential treatment, but simply a claim for equal protection for children. Just as a broader range of adults have benefited from asylum than might have been expected half a century ago, in line with social and political developments, so the same dynamic and rights-based approach should benefit children. Sexuality and other aspects of gender persecution, harms by non-State actors (including abusive parents), infliction of persecution without intent to harm (as with female circumcision), have all formed the basis of successful adult asylum claims. The approach to children, in contrast, has generally been conservative. Children's claims have been ignored because policy makers, administrators and immigration judges have tended to operate with an adult-focused lens, missing the opportunity to listen to (and even to elicit) the factual basis for children's asylum claims. These are the cases of unaccompanied and separated children being trafficked into domestic slavery



or radical discrimination at the hands of government by reason of their birth status or other actual or perceived disability. They should all be entitled to international protection under the terms of the Refugee Convention.

The third claim is that the problems identified in this report can be solved relatively easily, without jeopardising Australia's migration management programs. The solutions proposed do not involve open door immigration policies or reckless incentives to use children as migration anchors or investment commodities. Children need and deserve protection and where that is available in the home country, normally that is the best place for children to be. States do have a right to return children who are not entitled to protection in the destination State to family (though not institutional) care in the State of origin where there are no child protection concerns about doing so. In this sense, there is no call for a ban on return of all unaccompanied or separated children. Indeed, in many cases a more

child-focused asylum system would allow for the speedier assessment of cases in which return is a viable option. In all cases, the views of the children in question need to be elicited with care. Trafficked children and children destined to bonded domestic service or other forms of forced labour should be entitled to effective State intervention, instead of the current vacuum of illegality or irregularity into which most unaccompanied and separated children slip.

However, where children clearly lack protection at home, they should be granted asylum or analogous and permanent protection in Australia. This should be done in recognition of the primacy of their claim to protection as children. A protective status should be accompanied by law enforcement measures directed against those who would exploit and blackmail unaccompanied and separated child migrants. This approach would have several immediate and beneficial consequences. It would reinforce and render consistent fundamental ethical standards already accepted in principle in Australia. These are standards reflected in domestic child welfare laws and policies. It would uphold legal obligations derived from international human rights law regarding protection from persecution and torture, and promotion of the best interests of the child. And it would bolster new developments in international criminal law, by undercutting the incentives for traffickers and smugglers to use children as their most valuable commodities.

A rights-based approach to unaccompanied and separated children would have a broader social impact. It would place the State's role as *parens patriae* at centre stage, privileging the health and welfare of children — all children. The questionable political benefits of stigmatising and traumatising a particularly vulnerable subset of immigrant children through interdiction, detention, interrogation, exclusion, abandonment and fear would be exposed. To be sure, a rights-based approach might end up grant-

ing a secure immigration status to some children who could have remained in their home countries. However, it would also result in the protection of children who otherwise would be returned to harm in their countries of origin. This is a reasonable price to pay in the interests of the larger goal of child protection. Since irregular migration is rarely the 'fault' of the children themselves, punishing them is certainly unjust and most likely ineffective. Indeed, the use of harsh immigration control measures which re-traumatise already damaged children harms the civility and ethical basis of Australian society. This cannot be in the national interest.

Endnotes

- 1 Jacqueline Bhabha, 'Demography and Rights: Women, Children and Access to Asylum' (2004) 16 *International Journal of Refugee Law* 227.
- 2 In this chapter, particular reference is made to UNHCR, Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (UNHCR, Geneva, February 1997), (hereafter UNHCRG); and to the General Comment of the Committee on the Rights of the Child, see General Comment No 6 Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6 (2005) (hereafter CRC General Comment). Where relevant, acknowledgment will be made also of the key recommendations made in HREOC, *A Last Resort? National Inquiry into Children in Immigration Detention* (AGPS, Canberra, 2004).
- 3 See Mary Crock, 'Lonely Refuge: Judicial Responses to Separated Children Seeking Refugee Protection in Australia' (2005) 22(2) *Law in Context* 120.
- 4 See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
- 5 Universal Declaration of Human Rights Art 10; International Covenant on Civil and Political Rights Art 14.

Interviews Conducted

Interviews with Children: 50 Focus group interviews conducted in: Adelaide, Perth, Brisbane and Sydney

Interviewers: Mary Crock, Jessie Hohmann, Cathy Preston-Thomas, Azadeh Dastyari and Riz Wakil

Date and Locations Name, Position & Organisation	Interviewer
Various Dates — Christmas Island, Sydney Andrew Bartlett , Senator, Australian Democrats	Crock
4.1.2005 — Adelaide Desley Billich , Coordinator, Refugee Advisory Service, South Australia (RASSA); IAAAS service provider	Hohmann
Various Dates — Sydney Liz Biok , Solicitor, Legal Aid Commission, NSW; IAAAS service provider	Crock
Various Dates — Perth John Cameron , Barrister	Crock
Various Dates — Sydney Christian Carney , Refugee and Casework Service, Sydney, NSW; IAAAS service provider	Crock
5.1.2005 — Adelaide Steven Churches , Barrister	Hohmann
Various Dates — Brisbane Clyde Cosentino , Principal Solicitor, South Brisbane Community Legal Centre; IAAAS service provider	Crock / Hohmann
19.4.2005 — Brisbane Camilla Cowley , Refugee Advocate	Crock
Various Dates — Melbourne Pamela Curr , Refugee Advocate	Crock
21.4.2005 — Brisbane Sister De Lourdes , Romero Centre; Mercy Refugee Service	Crock
23.11.2004 — Christmas Island Foo Kee Heng , President, Christmas Island Workers' Union	Crock

11.1.2005 — Adelaide	Catherine Forsayeth , Assistant, Libby Hogarth and Associates, Migration Consultants	Hohmann
5.1.2005 — Adelaide (and various)	Abby Hamdan , Solicitor, Adelaide	Crock / Hohmann
Various Dates — Adelaide and Sydney	Libby Hogarth , Principal, Libby Hogarth and Associates, Migration Consultants, IAAAS service provider	Crock / Hohmann
Various Dates — Brisbane	Genevieve Kathrit , Romero Centre	Hohmann
Various Dates — Perth, Christmas Island	Bernard Kaye , Refugee Advocate	Crock
Various Dates — Perth and Sydney	Mary-Ann Kenny , Director, Southern Communities Advocacy, Legal & Education Service; Snr Lecturer, Murdoch University; IAAAS service provider	Crock
Various Dates — Brisbane	Nitra Kidson , Coordinator, Refugee and Immigrant Legal Support Project, Queensland Public Interest Legal Clearing House	Crock
Various Dates — Adelaide	Thomas Mann , Former Social Worker, Woomera IDC	Crock
3.3.2005 — Melbourne	David Manne , Coordinator, Refugee, Immigration and Legal Centre Inc, IAAAS service provider	Crock
5.1.2005 — Adelaide	Robert McDonald , Barrister	Hohmann
7.3.2005 — Melbourne	Debbie Mortimer , Barrister	Crock
Various Dates — Adelaide	Lowitja O'Donohue , Refugee Advocate/community support	Crock / Hohmann
21.4.2005 — Brisbane	Frederika Stein , Volunteer, Romero Centre Former DIMIA Officer	Crock
Various Dates — Christmas Island	Charlene Thompson , Social Worker, Christmas Island	Crock
23/11/2004 — Christmas Island	Gordon Thompson , Shire President, Christmas Island	Crock
2.3.2005 — Melbourne	Michael Walker , Migration Agent, AMPI (Australian Migration Program Investments); IAAAS service provider	Crock
Various Dates — Adelaide	Stephen Watkins , Refugee Advocate/community support	Crock / Hohmann

A P P E N D I X 2

Glossary of Terms

ACM = Australasian Correctional Management

AMPI = Australian Migration Program Investments

BVE = Bridging Visa E

CEDAW = The Convention on the Elimination of All Forms of Discrimination Against Women

CRC = Convention (or Committee) on the Rights of the Child

DIEA = Department of Immigration and Ethnic Affairs

DIMA = Department of Immigration and Multicultural Affairs

DIMIA = Department of Immigration and Multicultural and Indigenous Affairs

ECPAT = End Child Prostitution and Trafficking

FAYS = Family and Youth Services (South Australia)

HREOC = Human Rights and Equal Opportunity Commission

IAAAS = Immigration Advice and Application Assistance Scheme

ICCPR = International Covenant of Civil and Political Rights

IDC = Immigration Detention Centre

IDS = Immigration Detention Standards

IGOC Act = *Immigration (Guardianship of Children) Act 1946* (Cth)

ILO = International Labour Organization

IOM = International Organization for Migration

IPEC = International Programme on the Elimination of Child Labour

IRPC = Immigration Reception and Processing Centre

MIEA = Minister for Immigration and Ethnic Affairs

MIMA = Minister for Immigration and Multicultural Affairs

MIMIA = Minister for Immigration and Multicultural and Indigenous Affairs

MSI = Migration Series Instructions

OPC = Offshore Processing Centre

PAM = Procedures Advice Manual

PTSD = Post Traumatic Stress Disorder

RACS = Refugee Advice and Casework Service (New South Wales)

RILC = Refugee and Immigration Legal Centre (Victoria)

RRT = Refugee Review Tribunal

SBICLS = South Brisbane Immigration and Community Legal Service

SCALES = Southern Communities Advice and Legal Education Service (Western Australia)

TPV = Temporary Protection Visa

UAM = Unaccompanied Minor

UN = United Nations

UNHCR = United Nations High Commissioner for Refugees

The Refugee Convention

United Nations Convention relating to the Status of Refugees 1951 (as amended)

Smuggling Protocol

Protocol Against the Smuggling of Migrants by Land, Sea and Air

Trafficking Protocol

Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children

The Torture Convention

United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

A P P E N D I X 3

Legislation and Cases Cited

Legislation Cited

Children and Young People Act 1999 (ACT)

Children and Young Persons (Care and Protection) Act 1998 (NSW)

Criminal Code Amendment (Trafficking in Persons Offences) Act 2005 (Cth)

Empire Settlement Act 1922 (UK)

Evidence Act 1995 (Cth)

Immigration (Guardianship of Children) Act 1946 (Cth): IGOC Act

Judiciary Act 1903 (Cth)

Migration Act 1958 (Cth)

Migration Amendment (Detention Arrangements) Act 2005 (Cth)

Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth)

Migration Amendment Act 1979 (Cth)

Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Act 2001 (Cth)

Migration Litigation Reform Act 2005 (Cth)

Immigration (Guardianship of Children) Regulations 2001 (Cth)

Migration Regulations 1994 (Cth)

Federal Court Rules (Cth)

Cases Cited

Al Masri v MIMIA (2002) 192 ALR 609

Al-Kateb v MIMIA (2004) 219 CLR 561

Applicant S v MIMIA (2003) 217 CLR 387

Applicant WAFV v MIMIA [2003] FCA 16 (17 January 2003)

Applicants A and B v MIMA (1997) 190 CLR 225

Applicants WAIV v MIMIA [2002] FCA 1186 (20 September 2002)

B & B v MIMIA [2003] FamCA 451 (19 June 2003)

Baldev Singh v MIEA [1997] 472 FCA (30 May 1997)

Bedlington and MIMA; ex p Chong, Re [1997] 1416 FCA (15 December 1997)

Bedlington: ex p Chong, Re (1998) 157 ALR 436

Behrooz v MIMIA (2004) 219 CLR 486

Bennett v Minister of Community Welfare (1992) 176 CLR 408

Chan Yee Kin v MIEA (1989) 169 CLR 379

Chen Shi Hai v MIMA (2000) 201 CLR 293

Chu Kheng Lim v MIEA (1992) 176 CLR 1

Clay v Clay (2001) 202 CLR 410

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194

Craig v South Australia (1995) 184 CLR 163

Dietrich v The Queen (1992) 177 CLR 292

Jaffari v MIMA (2001) 113 FCR 10

Jaffari v MIMA (2001) 113 FCR 524

Kable v DPP (1996) 189 CLR 51

Kolotau v MIMIA [2002] FCA 1145 (5 September 2002)

Kruger v Commonwealth (1997) 190 CLR 1

Kuldip Ram v MIEA and RRT (1995) 130 ALR 314

Latif v MIMIA [2001] FCA 1701 (21 November 2001)

Martizi v MIMA (2002) 122 FCR 29

MIEA v Teoh (1995) 183 CLR 273

MIEA v Wu Shan Liang (1996) 185 CLR 259

MIMA v Haji Ibrahim (2000) 204 CLR 1

MIMA v Ozmanian (1996) 141 ALR 322

MIMA v Thiyagarajah (1998) 80 FCR 543

MIMA v WAIK [2003] FCAFC 307 (19 December 2003)

MIMA v Zamora (1998) 85 FCR 458

MIMIA v Al-Kateb (2004) 219 CLR 561

MIMIA v Al-Khafaji (2004) 219 CLR 664

MIMIA v B (2004) 219 CLR 365

MIMIA v SWZB [2005] FCA 53 (2 February 2005)

MIMIA v VFAY [2003] FCAFC 191 (22 August 2003)

MIMIA; ex p Applicant S190 of 2002, Re [2002] HCA 39 (19 August 2002)

Morato v MILGEA (1992) 111 ALR 417

NBEM v MIMIA [2005] FCA 161 (7 March 2005)

NBGM v MIMIA [2004] FCA 1373 (25 October 2004)

Odhiambo v MIMA (2002) 122 FCR 29

Odhiambo v MIMA (2002) 69 ALD 312

Ozmanian v MIMA (1996) 137 ALR 103

P1/2003 v MIMIA [2003] FCA 1029 (26 September 2003).

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476

Pyrenees Shire Council v Day (1998) 192 CLR 330

QAAH v MIMA [2005] FCAFC 136 (27 July 2005)

R v Hickman; ex p Fox and Clinton (1945) 70 CLR 598

RRT; ex p Aala, Re (2000) 204 CLR 82

RRT; ex p H, Re [2001] HCA 28 (24 May 2001)

Ruddock v Vardalis (2001) 110 FCR 491

SBAX v MIMIA [2002] FCA 582 (10 May 2002)

SBBI v MIMIA [2002] FCA 552 (10 May 2002)

SBBR v MIMIA [2002] FCA 842 (3 July 2002)

SCAS v MIMIA [2002] FCA 598 (10 May 2002)

SCAW v MIMIA [2002] FCA 810 (4 July 2002)

SCAX v MIMIA [2003] FCAFC 86 (9 May 2003)

SFTB v MIMIA [2002] FMCA 222 (11 October 2002)

SFTB v MIMIA [2003] FCAFC 108 (27 May 2003); (2003) 129 FCR 222

SHBB v MIMIA [2003] FMCA 82 (11 April 2003); (2003) 175 FLR 304

SVYB v MIMIA [2005] FCA 15 (20 January 2005)

SWNB v MIMIA [2004] FCA 1606 (16 November 2004)

VFAA v MIMIA [2003] FMCA 389 (12 September 2003)

VFAY v MIMIA (2004) 134 FCR 402

WACB v MIMA (2002) 122 FCR 469

WACB v MIMIA [2004] HCA 50 (7 October 2004)

WAEF v MIMIA [2002] FCA 1121 (10 September 2002)

WAEY v MIMIA [2003] FCA 1314 (17 November 2003)

WAJC v MIMIA [2002] FCA 1631 (23 December 2002)

X v MIMA (1999) 92 FCR 524

Canada (Attorney General) v Ward [1993] 2 SCR 689

Mei Dan Liu v Ashcroft, 7th Circuit, 380 F 3d 307 (2004)

International Instruments Cited

Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour

Convention on the Elimination of All Forms of Discrimination Against Women : CEDAW

Convention on the Rights of the Child : CRC

International Covenant of Civil and Political Rights : ICCPR

International Labour Organization Convention concerning Forced or Compulsory Labour

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

Protocol Against the Smuggling of Migrants by Land, Sea and Air : Smuggling Protocol

Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children : Trafficking Protocol

Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention : Slavery Convention

United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment : Torture Convention

United Nations Convention Against Transnational Organized Crime

United Nations Convention relating to the Status of Refugees and attendant Protocol : Refugee Convention and Protocol

Universal Declaration of Human Rights

Bibliography

ABC TV 2003 *Four Corners: To Deter & Deny*

ABC/ Film Australia 1992 *Admission Impossible*

Akullo, M and Spindler, P 2004 *Paladin Child: The Safeguarding Children Strand of Maxim funded by Reflex: A Partnership Study of Child Migration to the UK via London Heathrow* Reflex, Metropolitan Police, the United Kingdom Immigration Service, Association of Directors of Social Services

Amnesty International 2004 Public Statement 'Italy: Government must ensure access to asylum for those in need of protection' <<http://web.amnesty.org/library/Index/ENGEUR300012004?open&of=ENG-ITA>>

Aronson, Mark, Dyer, Bruce and Groves, Matthew 2004 *Judicial Review of Administrative Action* 3rd edition Law Book Co

'Australia named in sex slave report' *Sydney Morning Herald* 16 June 2004

Ayotte, Wendy 2001 *Separated Children Coming to Western Europe: Why They Travel and How They Arrive* Save the Children

BBC Television 1993 *The Leaving of Liverpool*

BBC Television 2002 *AustralianAustralia's Pacific Solution* 29 September 2002 transcript at <http://news.bbc.co.uk/hi/english/static/audio_video/programmes/correspondent/transcripts/2279330.txt> (accessed 6 May 2006)

Bean, Philip and Melville, Joy 1989 *Lost Children of the Empire* Unwin Hyman

Bhabha, Jacqueline 2002 'Boundaries in the Field of Human Rights: International Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights' *Harvard Human Rights Journal* 15: 155

Bhabha, Jacqueline 2004 'Demography and Rights: Women, Children and Access to Asylum' *International Journal of Refugee Law* 16: 227

Bhabha, Jacqueline and Crock, Mary 2006 *Seeking Asylum Alone: A Comparative Study of Laws, Policies and Practices Regarding Unaccompanied and Separated Children in the United States, the United Kingdom and Australia* Themis Press

Brennan, Susan 1995 'Centering attention in discourse' *Language and Cognitive Processes* 10(2): 79

Bruck, Maggie and Ceci, Stephen 1998 'Reliability and Credibility of Young Children's Reports' *American Psychologist* 53(2): 136

Bull, Ray 1998 'Obtaining Information from Child Witnesses' in Memon, Amina, Vrij, Aldert and Bull, Ray *Psychology and the Law: Truthfulness, Accuracy and Credibility* 2nd ed McGraw-Hill

Burnside, Julian (ed) 2003 *From Nothing to Zero: Letters from Refugees in Australia's Detention Centres* Lonely Planet Publications

Burnside, Julian 2002 'Hypocrisy and Human Rights' (Deakin University Law School Oration) <www.julianburnside.com/>

Carney, Terry 1991 *Law at the Margins: Towards Social Participation* Oxford University Press

Charlesworth, Hilary 1991 'Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights' *Melbourne University Law Review* 18: 428

Charlesworth, Hilary, Chiam, Madelaine, Hovell, Devika and Williams, George 2003 'Deep Anxieties: Australia and the International Legal Order' *Sydney Law Review* 25: 423

- ChilOut <www.chilout.org/>
- Chisholm, Richard and Parkinson, Patrick 2003 'The Immigration Cases' *Australian Journal of Family Law* 17: 219
- Clark, Michele 2003 'Trafficking in Persons: An issue of Human Security' *Journal of Human Development* 4(2): 247
- Cohn, Ilene and Goodwin-Gill, Guy 1994 *Child Soldiers: The Role of Children in Armed Conflicts* Oxford University Press
- Coldrey, Barry 1991 *Child Migration and the Western Australian Boys' Homes* Tamanaraik Publishing
- Coldrey, Barry 1993 *The Scheme: The Christian Brothers and Childcare in Western Australia* Argyle-Pacific Publishing
- Coldrey, Barry 1999 *Good British Stock: Child and Youth Migration to Australia, 1901–83* National Archives of Australia
- Connell, Nicola 2003 'Conflicts and resolutions arising from the Petrovs defections' <www.naa.gov.au/education/challenge/2003_winner.html>
- Crawford, James and Hyndman, Patricia 1989 'Three Heresies in the Application of the Refugee Convention' *International Journal of Refugee Law* 1: 155
- Crawley, Heaven 2001 *Refugees and gender: law and process* Jordan
- Crock, Mary 1998 'Apart from Us or a Part of Us: Immigrants' Rights, Public Opinion and the Rule of Law' *International Journal of Refugee Law* 10: 49
- Crock, Mary 1999 'Privative Clauses and the Rule of Law: The Place of Judicial Review Within the Construct of Australian Democracy' in Kneebone, Susan (ed) *Administrative Law and the Rule of Law: Still Part of the Same Package?* Australian Institute of Administrative Law
- Crock, Mary 2002 'You have to be stronger than razor wire: Legal issues relating to the detention of refugees and asylum seekers' *Australian Journal of Administrative Law* 10: 33
- Crock, Mary 2003 'In The Wake Of The Tampa: Conflicting Visions Of International Refugee Law In The Management Of Refugee Flows' (2003) *Pacific Rim Journal of Law and Policy* 12: 49
- Crock, Mary 2004 'Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law' *Sydney Law Review* 26: 51
- Crock, Mary 2005 'Lonely Refugee: Judicial Responses to Separated Children Seeking Refugee Protection in Australia' *Law in Context* 22(2): 120
- Crock, Mary and Santow, Edward 2006 forthcoming 'Privative Clauses and the Limits of the Law' in Matthew Groves and Hoong Phun Lee *Australian Administrative Law: Fundamentals, Principles and Doctrines* Cambridge University Press
- Crock, Mary and Saul, Ben 2002 *Future Seekers: Refugees and the Law in Australia* The Federation Press
- Crock, Mary, Saul, Ben and Dastyari, Azadeh 2006 *Future Seekers II: Refugees and Irregular Migration in Australia* The Federation Press
- Cronin, Kathryn 1992 'A Culture of Control: An Overview of Immigration Policy-making' in Jupp, James and Kabala, Maria (eds) *The Politics of Australian Immigration* Australian Government Publishing Service
- Dauvergne, Catherine 1998 'Chinese Fleeing Sterilisation: Australia's Response against a Canadian Backdrop' *International Journal of Refugee Law* 10: 77
- Dauvergne, Catherine 2000 'Dilemma of rights discourses for refugees' *University of New South Wales Law Journal* 23(3): 56
- Department of Education and Youth Affairs 1983 *Immigrant and Refugee Youth in the Transition from School to Work or Further Study* Australian Government Publishing Service
- Department of Foreign Affairs and Trade 2005 'Trafficking in Persons' 16 June 2005 <www.dfat.gov.au/illegal_immigration/introduction.html>
- Department of Immigration and Ethnic Affairs 1987 *Refugee Policies and Refugee Status Determination Procedures: Background Paper* Mimeo
- Department of Immigration and Multicultural Affairs 2002 Fact Sheet 71 'New Measures to Strengthen Border Control' <www.immi.gov.au/facts/71border_1.htm>
- Department of Immigration and Multicultural Affairs 2002 Fact Sheet 74A, available formerly at <www.immi.gov.au/facts74A.html>, now at <http://sievx.com/articles/psdp/DIMIA74a_boatarivals.pdf>
- Department of Immigration and Multicultural Affairs 2003 *Interpreting the Refugees Convention: An Australian Contribution* Department of Immigration and Multicultural Affairs

Department of Immigration and Multicultural Affairs 2003 *Procedures Advice Manual 3* Department of Immigration and Multicultural Affairs

Department of Immigration and Multicultural Affairs 2005 'Border Control' <www.immi.gov.au/illegals/border.htm>

Department of Immigration and Multicultural Affairs 2005 'Immigration Detention Standards' <www.immi.gov.au/detention/standards_index.htm>

Department of Immigration and Multicultural Affairs 2005 'Managing the Border: Immigration Compliance 2004-05' <www.immi.gov.au/illegals/mtb/index.htm>

Department of Immigration and Multicultural Affairs 2005 Fact Sheet 4 'More than Sixty Years of Post-war Migration' <www.immi.gov.au/facts/04fifty.htm>

Department of Immigration and Multicultural Affairs 2005 Fact Sheet 77 'The Movement Alert List' <www.immi.gov.au/facts/77mal.htm>

Department of Immigration and Multicultural Affairs 2005 Fact Sheet 86 'Overstayers and People in Breach of Visa Conditions' <www.immi.gov.au/facts/86overstayers.htm>

Department of Immigration and Multicultural Affairs 2005 Fact Sheet 76 'Offshore Processing Arrangements' <www.immi.gov.au/facts/76offshore.htm>

Department of Immigration and Multicultural Affairs Fact Sheet 68 'Temporary Protection Visa Holders Applying for Further Protection' <www.immi.gov.au/facts/68tpv_further.htm>

Department of Immigration and Multicultural Affairs Fact Sheet 69 'Caring for Unaccompanied Minors' <www.immi.gov.au/facts/69unaccompanied.htm>

Department of Immigration and Multicultural Affairs Fact Sheet 70 'Border Control' <www.immi.gov.au/facts/70border.htm>

ECPAT International <www.ecpat.net>

Freckelton, Ian 2003 'Migration law, the Family Court and therapeutic jurisprudence' *Journal of Law and Medicine* 11: 133

Gallagher, Michael 2001 'Soldier Boy Bad: Child Soldiers, Culture and Bars to Asylum' *International Journal of Refugee Law* 13: 310

Geneva Expert Round Table 2001 'Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees — Revised' United Nations High

Commissioner for Refugees <www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3bf4ef474>

Gill, Alan 1997 *Orphans of the Empire* Millennium Books

Goodwin-Gill, Guy 1996 *The Refugee In International Law* Clarendon Press

Goodwin-Gill, Guy 2001 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection' Department of International Protection for the United Nations High Commissioner for Refugees Global Consultations <www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3bcfd64>

Gordon, Michael 2005 *Freeing Ali: The Human Face of the Pacific Solution* University of New South Wales Press

Hart, Jason 2001 *Children and Adolescents in Conflict Situations* (Forced Migration Online Research Guide) <www.forcedmigration.org/guides/fm0008/fm0008-01.htm>

Hathaway, James 1990 'A Reconsideration of the Underlying Premise of Refugee Law' *Harvard International Law Journal* 31: 129

Hathaway, James 1991 *The Law of Refugee Status* Butterworths

Hathaway, James 2001 'Immigration Law is Not Refugee Law' in United States Committee for Refugees *World Refugee Survey 2001* United States Committee for Refugees

Holden, Robert 2000 *Orphans of history: the forgotten children of the First Fleet* Text Publishing

Human Rights and Equal Opportunity Commission 2004 *A Last Resort? National Inquiry into Children in Immigration Detention* Australian Government Publishing Service

Humphreys, Margaret 1994 *Empty Cradles* Corgi Books, republished as *Empty Cradles: One Woman's Fight to Uncover Britain's Most Shameful Secret* Doubleday

Hutchinson, Terry and Martin, Fiona 2004 'Australia's Human Rights Obligations Relating to the Mental Health of Refugee Children in Detention' *International Journal of Law and Psychiatry — Special Issue on Migration, Mental Health and Human Rights* 27: 529

International Organization for Migration 2003 'Trafficking in Persons: An Analysis of Afghanistan' <www.iom.int/iomwebsite/Publication/ServletSearchPublication?event=detail&id=2992>

International Programme on the Elimination of Child Labour 2002 *Unbearable to the Human Heart: Child Trafficking and Action to Eliminate it* International Labour

Organization <www.ilo.org/public/english/standards/ipecc/publ/childtraf/unbearable.pdf>

Jackson, Andra and Allard, Tom 2006 'Papua tell of beatings and torture' *The Age* 30 January <www.theage.com.au/news/national/papua-tell-of-beatings-and-torture/2006/01/29/1138469607144.html>

Kevin, Tony 2004 *A certain maritime incident: the sinking of SIEV X* Scribe Publications

Krantz, Elizabeth 2006 'Indonesia Threatens Australia over Papuan Refugees' *Australian News Commentary* 24 April <www.australian-news.com.au/Papua.htm>

Lachore, Peter 2002 'Australia's Treatment of Unaccompanied Child Asylum Seekers Considered in the Context of International Human Rights Law' Unpublished Honours Thesis, Murdoch University

Leach, Michael and Mansouri, Fethi 2004 *Lives in Limbo: Voices of Refugees Under Temporary Protection* University of New South Wales Press

'Life After Tampa: Calling NZ home' *The Age* 24 March 2004 <www.theage.com.au/articles/2004/03/26/1079939851279.html>

Machel, Graca 1996 *The Impact of Armed Conflict on Children: Report of Graca Machel, Expert of the Secretary-General of the United Nations* United Nations <www.unicef.org/graca/>

Manderson, Lenore, Kelaher, Margaret, Markovic, Milica and McManus, Kerrie 1998 'A Woman without a Man is a Woman at Risk: Women at Risk in Australian Humanitarian Programs' *Journal of Refugee Studies* 11: 267

Marr, David and Wilkinson, Marianne 2003 *Dark Victory* Allen & Unwin

McAdam, Jane 2006 'Seeking Asylum Under the Convention on the Rights of the Child: A Case for Complementary Protection' 14 *International Journal of Children's Rights* (forthcoming)

Memon, Amina, Vrij, Aldert and Bull, Ray 1998 *Psychology and the Law: Truthfulness, Accuracy and Credibility* 2nd edition McGraw-Hill

Myers, John, Goodman, Gail and Saywitz, Karen 1996 'Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Court-Room Testimony' *Pacific Law Journal* 28: 1

'No change on Papua recognition stance: Downer' *ABC News online* 24 March 2006 <www.abc.net.au/news/newsitems/200603/s1599871.htm>



O'Brien, Natalie 'Sex slaves are victims of crime, senator says' *The West Australian* 10 March 2005

O'Brien, Natalie 'Sex-slave traders in sights' *The Australian* 17 June 2004

'Plan on people trafficking unveiled' *Sydney Morning Herald* 17 June 2004

Refugee Review Tribunal 2002 'Guidelines on Children Giving Evidence' <www.rrt.gov.au/publications/RRT%20Guidelines%20on%20Children%20Giving%20Evidence.pdf>

Renland, Astrid 2001 *Trafficking of Children and Minors to Norway for Sexual Exploitation* ECPAT Norway/Save the Children

Ressler, Everett, Boothby, Neil and Steinbock, Daniel 1988 *Unaccompanied Children: Care and Protection in Wars, Natural Disasters, and Refugee Movements* Oxford University Press

Roberts-Smith, Len 1989 'Communication Breakdown: The Importance of Cultural Language Awareness in Court' *Law Society Journal* 27(7): 70

Rothwell, Don 2002 'The Law of the Sea and the MV Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty' *Public Law Review* 13: 118

Ruxton, Sandy 2000 *Separated Children Seeking Asylum in Europe: A Programme for Action* Save the Children

Senate Community Affairs References Committee 2001 *Lost Innocents: Righting the Record — Report on child migration* 30 August 2001

Senate Legal and Constitutional References Committee 2000 *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Processes* June 2000 <http://www.aph.gov.au/SENATE/committee/legcon_ctte/completed_inquiries/1999-02/refugees/report/contents.htm>

Senate Select Committee on Ministerial Discretion in Migration Matters 2004 'Inquiry into Ministerial Discretion in Migration Matters Report' March 2004 <www.aph.gov.au/Senate/committee/minmig_ctte/report/index.htm>

Sherrington, Geoffrey 2001 'Fairbridge Child Migrants' in Lawrence, Jon and Starkey, Pat (eds) *Child Welfare and Social Action in the Nineteenth and Twentieth Centuries: International Perspectives* Liverpool University Press

Sherrington, Geoffrey and Jeffrey, Chris 1998 *Fairbridge: Empire and Child Migration* University of Western Australia Press

Spijkerboer, Thomas 2000 *Gender and refugee status* Burlington

Steel, Zachary, Frommer, Naomi and Silove, Derrick 2004 'Failing to Understand: Refugee determination and the traumatized applicant' *International Journal of Law and Psychiatry — Special Issue on Migration, Mental Health and Human Rights* 27: 511

'Stepping up the fight against slavery' *The Age* 27 October 2003

Storer, Des and Faulkner, Arthur 1982 'Out of the Shadows: A Review of the 1980 Regularisation of Status Program in Australia' (International Migration For Employment ILO Working Paper) International Labour Organization

United Nations High Commissioner for Refugees 1979, 1992 *Handbook on Procedures and Criteria for Determining Refugee Status* United Nations High Commissioner for Refugees

United Nations High Commissioner for Refugees 1994 *Refugee Children: Guidelines on Protection and Care*

United Nations High Commissioner for Refugees 1997 *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*

United Nations High Commissioner for Refugees 1999 *Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*

United Nations High Commissioner for Refugees 2003 Briefing Notes 'Nauru: hunger strike symptomatic of refugee despair' 19 December 2003 <www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&page=home&id=3fe2dc394>

United Nations High Commissioner for Refugees and Save the Children 2000 *Statement of Good Practice*

of the Separated Children in Europe Programme Save the Children/ United Nations High Commissioner for Refugees

United Nations High Commissioner for Refugees Population Data Unit 2001 *Trends in Unaccompanied and Separated Children Seeking Asylum in Industrialized Countries, 2000* United Nations High Commissioner for Refugees

United Nations High Commissioner for Refugees Population Data Unit 2004 *Trends in Unaccompanied and Separated Children Seeking Asylum in Industrialized Countries, 2001–2003* United Nations High Commissioner for Refugees <www.unhcr.org/cgi-bin/texis/vtx/statistics/opendoc.pdf?tbl=STATISTICS&id=40f646444>

United Nations 1984 *The Slavery Report of the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Minorities, updating the 1966 Report on Slavery* United Nations

United Nations 1985 *Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*

United Nations 1990 *Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines)*

United Nations 1990 *Rules for the Protection of Juveniles Deprived of their Liberty*

United Nations 1990 *Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)*

United States Department of State 2004 'Trafficking In Persons Report 14' June 2004 <www.state.gov/g/tip/rls/tiprpt/2004/>

Wagner, Gillian 1982 *Children of the Empire* Weidenfeld and Nicolson

Waterman, Amanda, Blades, Mark and Spencer, Christopher 2001 'Do children try to answer nonsensical questions?' *British Journal of Developmental Psychology* 18: 211

Western Australian Coroner 2002 *Record of Investigation into Deaths of Nurjan Hussein and Fatimeh Hussein* <www.humanrights.gov.au/legal/intervention/hussein.htm> (accessed 6 May 2006)

World Vision Australia 2004 Submission to the Senate Legal and Constitutional Legislation Committee on *Criminal Code Amendment (Trafficking in Persons) Bill 2004* 28 October 2004 <www.aph.gov.au/Senate/Committee/legcon_ctte/trafficking/submissions/sub12.pdf>

For more information contact the author at:

Faculty of Law
The University of Sydney
173–175 Phillip Street
Sydney NSW 2000
Australia



The University of Sydney

This report is available on-line at
<http://www.humanrights.harvard.edu>

PHOTOGRAPHY CREDITS

Photographs on pages 13, 22, 25, 38, 56, 63, 76, 78, 79, 81, 98, 118, 140, 143, 149, 156, 166, 167, 198, 204 © Phil Oakley

Photograph on page 50 © Lynsey Addario/Corbis

Photographs on pages 46, 111, 202, 203 © Peter Mathew

Photograph on page 79 © News Limited

Photograph on page 154 © Dirck Halstead/Getty

Photograph on page 168 © Richard Wainwright/Corbis

Photographs on pages 186, 197 © Andrew Bartlett

Photograph on page 191 © Kaye Bernard

Photograph on page 207 © Camilla Cowley

Photograph on page 226 © Ami Vitale/Getty

Photographs on pages 7, 18, 28, 30, 42, 54, 58, 59, 60, 64, 72, 93, 97, 107, 112, 124, 129, 136, 139, 146, 151, 152, 184, 200, 206, 208, 215, 220, 238, 241, 244 © Fotolia

Photographs on pages 84, 109, 114, 133, 243 obtained from the Human Rights and Equal Opportunity Commission's National Inquiry into Children in Immigration Detention

Photographs on pages 21, 67, 82, 100 obtained from the United Nations High Commissioner for Refugees:

page 21 © UNHCR/L. Taylor

page 67 © UNHCR/L. Slezic/Global Aware

page 82 © UNHCR/N. Behring

page 100 © UNHCR/A. Hollman

Photographs on pages 66, 105, 108, 128 from the collection of the National Library of Australia:

page 66 photograph by Loui Seselja, 2001, nla.pic-an23638070

page 105 photograph by Penelope Iredell, 1999 © ACL, nla.pic-an22814573

page 108 photograph by Damian McDonald, 2002, nla.pic-an24382228

page 128 photograph by Damian McDonald, 2002, nla.pic-an24392974

Photographs on pages 34, 164 from the collection of the National Archives of Australia:

page 34 NAA: A12111, 53/8A/36

page 164 NAA: A8746, KN11/7/80/4

Inside Back Cover in Separate File

Back Cover in Separate File