



# Refugees and Asylum Seekers

## Who is an asylum seeker?

An asylum seeker is someone who has fled their country and applies to the government of another country for protection. Anyone experiencing or fearing persecution has a fundamental human right to seek asylum in other countries. This right is recognised in the *United Nations' Universal Declaration on Human Rights*.

In 2002, there were 13 million refugees around the world.<sup>1</sup> Between July 2001 and June 2002, Germany received 83,836 applications for asylum, the UK received 99,000, and the US received 62,073, while Australia received 8,512.<sup>2</sup>

## CASE STUDY

### Indefinite detention

Kamar fled India on a false passport in 1997 because he feared political persecution. He sought asylum in Australia, but his application was rejected by the Department of Immigration and on appeal to the Refugee Review Tribunal (RRT) in January 1999. Since then, the Australian Government has been trying to send him back to India. However, the Indian Government will not provide Kamar with a passport or travel documents, as they have been unable to verify his identity and nationality.

Kamar has been in detention for over five years, since his arrival in Australia in 1998. There is no real prospect of him being sent to India. Kamar has committed no crime and is being detained indefinitely.<sup>3</sup>

## Who is a refugee?

According to the United Nations' Refugee Convention, a refugee is someone who is outside their country and cannot return because of a well-founded fear of persecution on the basis of their race, religion, nationality, political opinion, or membership of a particular social group.

## CASE STUDY

### Detention

Zahra and her three children escaped from Iraq and came to Australia by boat in 2001. They were put in the Woomera Detention Centre. No schooling was available to Zahra's 15-year-old daughter Fadia. Facilities in Woomera were inadequate and the women had to join long queues to use the few available toilets, bathrooms and washing machines. Zahra's children witnessed other detainees harming themselves. The children developed problems like not eating, nightmares, not sleeping, and bed-wetting.

Despite being recognised as refugees by the Refugee Review Tribunal (RRT) in 2002, it took over six months before they were issued with protection visas and released from detention. Throughout this time they were not told when they would be released. The psychological problems for all family members increased and their recovery post-release has been problematic.<sup>4</sup>

## Refugee and asylum seeker rights in international conventions

Countries that have signed the *United Nations Convention and Protocol relating to the Status of Refugees* (the Refugee Convention),

including Australia, are committed to providing refugees with the opportunity to apply for asylum and obtain legal advice.<sup>5</sup>

Under the Refugee Convention and other international conventions signed by Australia, refugees are entitled to protection and respect for their basic human rights while in Australia.

*The International Covenant on Civil and Political Rights* (ICCPR) and the *Convention on the Rights of the Child* (CRC) both prohibit arbitrary detention. The ICCPR provides for access to a lawyer, the right to appeal, and the right to be treated with dignity. The CRC protects the right to family reunion. The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) protects rights to education, health and family, all of which apply to anyone within Australia, including asylum seekers and refugees, in and out of detention.

## Current Australian policy and asylum seekers' and refugees' rights

### Refusing to accept asylum seekers

In September 2001, the Australian Government developed the "Pacific Solution" in response to the "Tampa crisis". This so-called solution involves turning asylum seekers away and removing or "excising" parts of Australian territory from our "migration zone" (e.g. Ashmore Reef and Christmas and Melville Islands). People landing in "excised territories" cannot make onshore Protection Visa applications without the permission of the Minister for Immigration. Instead they are transferred to a "declared country", such as Nauru or Papua New Guinea, while the United Nations High Commission for Refugees (UNHCR) and the Australian Government assess their refugee applications.

## CASE STUDY

### Temporary protection for refugees

Farid, a 23-year-old Afghan man, was granted a Temporary Protection Visa (TPV) in August 2000. He has a young wife and child in Afghanistan. In his home country he did not have access to schooling. After being released from detention he was not given English lessons. He wants to study in Australia, but he cannot afford the high overseas student fees TPV holders must pay. In late 2001 he received news that his wife and child had disappeared. If he had a Permanent Protection Visa (PPV), he would have been able to sponsor his family to come to Australia. Farid's original 3-year TPV has expired and he has an interim visa while he waits for a decision on his new TPV application. He is trying to find work but it is difficult because employers prefer staff to have long-term visas.<sup>6</sup>

"Unauthorised" asylum seekers who are accepted as refugees in Australia are only granted temporary visas with limited rights.

The "Pacific Solution" is the Government's attempt to avoid both international and Australian laws that oblige the Government to treat all asylum seekers arriving in Australia with dignity, respect their basic human rights, and process their refugee applications efficiently.

### Detention

In 1994 Australia became the only western country to have a policy of mandatory non-reviewable detention for all "unauthorised" arrivals in Australia – both adults and children. This detention only ends when the person is recognised as a refugee and granted a TPV, or not recognised and removed from Australia.

Australia's migration laws provide that "unlawful non-citizens" must be detained until they are granted a visa or are removed to another country. An "unlawful non-citizen" is someone who:

- entered Australia without a valid visa ("unauthorised arrivals")
- entered Australia with a valid visa but stayed past the expiry date ("overstayers"); or
- has broken the conditions of their visa and had their visa cancelled (e.g. by working).

### Indefinite detention

Based on the common law principle of respect for fundamental rights (such as the right to liberty) the Full Federal Court found in the *Al Masri* case (April 2003), that the *Migration Act 1958* (Cth) did not authorise indefinite detention.<sup>7</sup> The *Al Masri* case established that where there is "no real likelihood or prospect of an applicant's removal [from Australia] in the reasonably foreseeable future, an applicant's continued detention is unlawful". The *Al Masri* case is currently on appeal to the High Court.

This case demonstrates that the common law can provide limited protection for the right to liberty. However, the government could pass a law to over-rule this at any time.

### Temporary Protection Visas

A Temporary Protection Visa (TPV) provides very limited access to government settlement assistance. TPV holders cannot sponsor family members to join them, so families may be separated for years while TPV holders apply for permanent protection. TPV holders also require special approval to re-enter Australia if

they leave. This means that if one member of a family is granted a TPV in Australia but the rest of the family is in another country, they can neither apply for their families to join them, nor easily leave Australia to visit them.

### Improving asylum seeker and refugee rights in Australia

The UNHCR has stated that even though asylum seekers are "unauthorised" arrivals, this "does not deprive them of any rights regarding access to fair and effective protection and assistance measures."<sup>8</sup>

Australia's migration laws, policies and practices have been criticised by the international community. The United Nations Human Rights Committee concluded in 1997 that the arbitrary and prolonged detention of asylum seekers (especially children) and long visa processing periods were in breach of Australia's obligations under ICCPR.<sup>9</sup>

### "What form should the protection of human rights take?"

➡ For options about protecting human rights through a Charter or Bill of Rights see fact sheet N° 1: **Background to Human Rights**



Technical information contained in this fact sheet is based on the Human Rights and Equal Opportunity Commission's *Face the Facts – Some Questions and Answers about Refugees, Migrants and Indigenous People*, 2003.

### REFERENCES

- <sup>1</sup> United States Committee for Refugees, *World Refugee Survey 2003*.
- <sup>2</sup> UNHCR, Asylum applications submitted in 28, mostly industrialised, countries January 2001–June 2002, 10 September 2003: [www.unhcr.ch](http://www.unhcr.ch) (accessed on 1/4/2004).
- <sup>3</sup> Case study provided by the Public Interest Advocacy Centre.
- <sup>4</sup> Case study provided by Refugee Advice and Casework Service, NSW.
- <sup>5</sup> Refugee Convention, Article 33.
- <sup>6</sup> Case study provided by Refugee Advice and Casework Service, NSW.
- <sup>7</sup> *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* [2003] FCAFC 70.
- <sup>8</sup> UNHCR Press Release, *UNHCR concerned about Australia's handling of boat people*, 11 Nov 2003, [www.unhcr.ch](http://www.unhcr.ch) (accessed on 24/3/2004).
- <sup>9</sup> *A v Australia*, Communication No. 560/1993: Australia, 30/4/1997, UN Doc CCPR/C/59/D/560/1993.