COUNCIL FOR INTERNATIONAL DEVELOPMENT
REFUGEE POLICY DEVELOPMENT

DISCUSSION PAPER
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This paper is a discussion document. It is only intended to cover some of the policy issues concerning asylum seekers in the New Zealand context. For detailed practice issues concerning the detention of asylum seekers, please see: Auckland District Law Society Seminar, "The Detention of Refugee Claimants: Law, Procedure and Practicalities" Deborah Manning, 25 November 2003 available on the RefNZ website, www.refugee.org.nz .

This is a critical time to consider refugee issues in New Zealand given the Government has announced it intends to review the Immigration Act. It is essential that any legislative amendments comply with New Zealand's international human rights obligations as this can not be assumed. Internationally, the rights of asylum seekers and refugees are being eroded and it is essential that New Zealand maintains its reputation as not only a follower of its human rights obligations but a world leader in setting the standard for human rights.

Policy trends

Asylum seeker issues present some of most challenging issues in New Zealand's human rights context. Asylum seekers are extremely vulnerable due to language difficulties, detention, cultural norms and past experiences. It is most often the refugee practitioner who is ethically called upon to protect the rights of their refugee client as there are no other watchdogs or human rights groups doing so – either structurally or because there is no funding.

There are many significant issues confronting asylum seekers in New Zealand, particularly since 11 September 2001. The Government has a policy to restrict asylum seekers coming into New Zealand, detaining those who do get to New Zealand as a deterrent and removing failed asylum-seekers with no monitoring of their human rights. There are inadequate procedural safeguards while refugee claimants are detained – the most significant being no legal aid for habeas corpus applications or for asylum seekers to review their detention in either the District Court or the High Court. Unlike other Western democracies, there are limited avenues for failed asylum seekers to have their humanitarian circumstances taken into account before they are removed and there is no protection for stateless persons.

The refugee determination system is characterized by its ad hoc nature and lack of transparency. There are no institutional watchdogs and there is no funding for human rights groups in this area. Some human rights groups and practitioners attempt to "plug the gaps" and to engage with policy makers and officials but there is no funding and the rights of asylum seekers are dependent on the goodwill of these individuals.

There are many issues currently being considered by Government agencies (for example Borders and Investigations, the Refugee Status Branch and the Legal Services Agency) at present which affect asylum seekers and the rights of this vulnerable group in our society are ever diminishing. It has become essential for lawyers working in this overstretched and under-resourced area to work together and to be vigilant in ensuring that the rights of asylum seekers are protected and promoted in Government policy and practice – as this cannot be assumed.

Prevention of asylum seekers coming to New Zealand - interdiction
A barely discussed topic is the practice of interdiction by the New Zealand Immigration Service ("NZIS"). Interdiction is the action of NZIS officials operating in overseas airports preventing passengers from boarding flights to New Zealand on the basis that they have incorrect documentation or meet a specific risk profile. Although the Government justifies its actions as "stamping out" people smuggling and potential illegal immigrants, interdiction also prevents genuine refugees from coming to New Zealand to seek asylum.

A media statement issued by the Hon Phil Goff "NZ sends stark warning to people-smugglers and boatpeople", dated 28 June 2002 is purportedly aimed at people-smugglers and potential illegal migrants. However, it is also targeted at potential genuine refugees coming to New Zealand. Pamphlets were distributed in Indonesia stating that in New Zealand refugee claimants would be put in prison – if they did not die on their way here.

Given that New Zealand has signed international conventions which protect the right of people to claim asylum, in our view serious questions should be asked and a proper debate should take place about the practice of New Zealand officials actively preventing refugees from making their way to New Zealand. At the very least, the New Zealand government should be open about this practice to refugee and human rights groups.

Towards the end of last year, the UNHCR Regional Representative based in Canberra, Roberto Mignone, met with NGOs at the Auckland Refugee Council Hostel. He outlined that Borders and Investigations, NZIS had agreed to a scheme by which all persons who had been "interdicted" would be referred to the local UNHCR office. Therefore, this issue needs to be followed up as this is the first time a government has agreed to do this.

Detention of refugee claimants – policy to not give permits
Since September 2001, there has been a policy to detain refugee claimants who arrive without passports and claim asylum at the border–, in other words, nearly all refugee claimants. Refugee claimants in this situation are typically detained on the purported basis that without knowing the person's identity, the risks of offending and absconding cannot be identified.

Typically, most refugee claimants are detained at the Mangere Centre and a small percentage at the Auckland Central Remand Prison. They are taken before the District Court after 28 days and thereafter every 7 days. Claimants are now able to apply for conditional release to stay at either an NZIS funded hostel or with a member of their family or community (who receive no financial assistance). For further detail on the law, procedure and practicalities, see Auckland District Law Society Seminar, "The Detention of Refugee Claimants: Law, Procedure and Practicalities" Deborah Manning, 25 November 2003 available on the RefNZ website, www.refugee.org.nz .

The wholesale policy of detention of asylum seekers was challenged by way of review in the High Court in 2002, and the High Court found the policy was unlawful. The Appeal by the Crown was successful, however the Court of Appeal did not make specific findings in relation to the claim that there was a policy of wholesale detention. The Court of Appeal stated it was not in a position to do so given there were insufficient plaintiffs. The issue of wholesale detention therefore, in the view of the writers, remains unresolved. Indeed, Glazebrook J in obiter commented that lack of travel documentation could not be a sufficient basis to detain refugee claimants given that refugees are often forced to travel without a genuine passport.

However, there is no legal aid funding to take this issue further (the High Court and Court of Appeal case were conducted, at considerable expense, on a pro bono basis by counsel, Dr Rodney Harrison QC, Deborah Manning, and Ryken and Associates, instructing solicitor).

Lack of transparency, ad hoc nature of decision making and funding
In light of the Court of Appeal decision, the NZIS is proposing a new Operational Instruction (OI). This should be announced by the end of the year. Typically, OIs are not publicly available and must be requested under the Official Information Act. Of concern, is that OIs can readily be suspended, amended or removed.

It is incumbent on the refugee practitioner to be familiar with all OIs and to ensure that the NZIS operate within their powers and the legislation at all times. It is also our obligation to ensure that the NZIS regularly reviews the detention of our clients.

Claimants can apply to the District Court to be conditionally released. They can only be released to a Hostel funded by the NZIS or to the community. If released to the community, the asylum seeker has no access to funds or even to identity documentation. The Hostels are typically full and there are obvious problems with the funding system and the fact that asylum seekers do not have documentation. There are ongoing problems with obtaining basic items for asylum seekers such as appointments with optometrists, dental treatment and mental health care.

Again, refugee practitioners are expected to look after these issues without funding. The Crown solicitor and the NZIS tend to "run" the District Court conditional release application if it is not contested, however again this is on an ad hoc basis and operates on a goodwill basis. "Social work" activities are not looked after by any organization and it is usually incumbent on refugee lawyers to plug the gaps – again without funding.

Lack of access to justice/legal aid to review detention
Despite assurances from the Minister of Immigration in mid-2002 to look into this issue, there is still no legal aid to represent refugee claimants in matters concerning their detention. With all due respect to the Court, there is a weekly charade of "review" at the Manukau District Court on a Friday whereby the detention of asylum seekers is extended for seven days.

The District Court refuses to consider applications to move asylum seekers between ACRP and Mangere as the Court holds there is no power to amend the institution of detention if it is not named on the Warrant of Commitment signed by the Deputy Registrar. The District Court can approve applications for refugee claimants to be released on conditions under s128AA of the Immigration Act and this process seems to be working smoothly in the Court.

There is no legal aid for counsel to appear at the District Court during the extension of Warrants of Commitment. Given the claimant is taken every Friday, it is simply unreasonable for counsel to be required to attend each week without any remuneration, although at times they are criticized by the Court for their non-attendance.

Conditions of detention
In May 2004, the UN Committee Against Torture criticized the fact that asylum seekers are being detained alongside those with criminal charges. No steps have been made by the government to stop this practice.

Given that most asylum seekers are being detained it falls to refugee practitioners to look after their client's conditions of detention. There are no social workers or watchdogs doing this and there are some concerning reports. The following are a number of examples the writers have been involved with:

- NZIS staff at the Mangere Centre were unable to move a detained refugee claimant who assaulted another refugee claimant. No action was taken

against the perpetrator and no victim support given to the claimant who was attacked.
- NZIS and medical staff failed to provide proper mental health assistance to a detained refugee claimant at the Mangere Centre despite his pleas that he needed help and he was considering hurting others. The solution by NZIS was to send the claimant to the police station, however counsel managed to intervene and have the CAT team and the nearby hospital give him medical attention.
- Claimants have been attacked in Auckland Central Remand Prison ("ACRP"). It falls to their counsel to follow up these issues.
- Suicide attempts – it falls to counsel to ensure adequate follow up in the mental health sector and to obtain appropriate reports.
- There are inadequate interpreting services used in ACRP and monitoring of conditions of detention for asylum seekers.

Quick turnaround at the first level by the Refugee Status Branch and moves to restrict claimants to choose counsel

The Refugee Status Branch (RSB) has policy imperatives to "turn around" RSB claims as soon as possible. This is despite the fact that if the application goes to the Refugee Status Appeals Authority the appeal can take some months to be finalised.

At present, there is considerable tension between the RSB and the refugee bar over the time frames for processing refugee claims. The RSB has tight, unrealistic time frames that even the Refugee Status Officers (RSOs) cannot meet as they are generally regarded as being overworked. We understand that the timeframes are being reviewed, however the RSB currently refuses to consult with the Auckland District Law Society, Refugee and Immigration Committee over how claims should be processed.

The Refugee Status Branch is a 3 step process:

1. Refugee Status Branch interview
2. Refugee Status Branch interview report
3. Refugee Status Branch decision

The RSB complains of delays in the determination process and for some reason focus on blaming lawyers for this due to purported delays in Step 1. However, nearly all delays in the refugee determination process are caused by the Refugee Status Branch in Steps 2 and 3.

Due to workload, RSOs routinely take weeks longer than their stated timeframes to issue reports and decisions. It is also common for interviews to be delayed (Step 1) because of RSO commitments. There are countless examples of Step 1 being delayed because of the RSB. For example RSOs who go on holiday, RSOs who are overworked and cannot set down interviews in a timely way, and airport files not being released in a timely fashion.

In particular, the RSB is trying to tightly circumscribe when the RSB interview should be held. The Branch is putting pressure on the claimant, counsel and even public health doctors about when interviews should be held. The RSB frequently wish to schedule interviews which need to be postponed because of the claimants mental health or problems with timely translations – neither of these are the fault of the practitioner, although the Refugee Status Branch often hold us accountable.

It is essential for refugee lawyers to ensure their clients are able to properly prepared for their interview. Of particular concern is ensuring that your client is seen by a doctor and their

mental health is looked at. Claimants need to be able to write detailed statements, their airport files need to be obtained and checked for mistakes and they need to be fully prepared for their Refugee Status Branch interviews. Claimants now are expected to investigate their refugee case from New Zealand and are expected to obtain evidence from their home country to support their claims.

Counsel must ensure their client does not attend an interview if they are not in a fit psychological state to do so. The Refugee Status Branch routinely decline claims on credibility grounds for reasons such as mistakes with dates, vagueness, inconsistencies etc which can all occur if the refugee claimant is suffering from undiagnosed Post Traumatic Stress Disorder and untreated depression, anxiety and sleeplessness.

Finally, the RSB and the LSA, without consultation with the refugee bar or the Law Society, has recently drafted proposals for refugee claimants to have assigned counsel. Lawyer found out about these proposals by accident through incidental conversation with RSB and LSA staff. The current proposal allows for a list of some 70-80 lawyers to be assigned to refugee claimants on a rotational basis. Given that the numbers of lawyers practicing in this area are far fewer and that counsel were not to even be consulted should be of great concern to practitioners. These are extremely important issues which relate to the need of vulnerable refugee claimants to have timely access to lawyers and to have lawyers of their own choice. That lawyers found out about proposals by accident is of great concern and should be monitored by all practitioners.

Inadequate mental health services which compromise the ability of refugee claimants to present their case

Many refugee claimants need access to mental health experts. Refugee claimants have access to Public Health doctors but their access to psychiatrists is limited. In particular obtaining reports from psychiatrists is extremely difficult – if not impossible – although they are frequently required. It is essential for counsel to always be alive to the mental health issues of their clients as they directly affect a claimant's ability to present their cases.

Psychiatric reports are essential in the refugee determination process (for adjournments and credibility issues) yet there are still no set procedures to ensure that claimants have access to psychiatric reports for either the Refugee Status Branch or the Refugee Status Appeals Authority. Given that claimants are detained or released on conditions with no access to funds, it should be incumbent on the public health system to provide such reports.

Lack of procedural safeguards to prevent removal of declined refugee appellants:

- **while exceptional humanitarian considerations are considered via a s35A application to the Minister of Immigration**
- **judicial review in the High Court is considered,**
- **an application under the Convention against Torture is considered and pursued**
- **if the person is stateless**

There are no procedural safeguards to protect the human rights of asylum seekers once the Refugee Status Appeals Authority issues a decline decision. NZIS policy is intent on removing the failed asylum seeker as soon as possible, regardless of further legal options or the human rights ramifications of removal.

There is no set procedure or safeguards concerning timeframes for counsel to consider further legal options, such as judicial review in the High Court or an application under the Convention Against Torture. Removal could be effected before a claimant has had an opportunity to pursue these avenues (to consider, give instructions or file documents).

There is still no legislative implementation of the non-refoulement obligation contained in the Convention Against Torture (CAT) of which New Zealand is a signatory. There is not even any published policy about how CAT applications are made in New Zealand. Few know that such applications are made to the Manager of Borders of Investigations, NZIS. There are no clear procedures in place to prevent removal while such an application is considered by the NZIS or if a complaint is made to the United Nations Human Rights Committee.

The issue of stateless persons is becoming a significant problem. It is our view that there needs to be proper procedures in place about how New Zealand treats stateless persons and that it is not acceptable to just blindly remove them if they have nowhere to go. To do so means New Zealand has no responsibility or care towards stateless persons being forced to use false documentation to obtain entry into another country and/or to be forced to live in airport lounges or to be detained in airport prisons. Stateless persons can apply for citizenship under the Citizenship Act, however there are no processes in place to allow the person to remain in New Zealand while the application is processed, if a person is a failed asylum seeker who can be removed under s128 of the Immigration Act.

Removal of failed asylum seekers – at any cost. Lack of monitoring

As a member of the international community and a country with an international reputation for upholding human rights, New Zealand cannot simply turn a blind eye when it comes to the removal of failed asylum seekers.

The policy of the NZIS is to remove failed asylum seekers as quickly as possible with no interest in what happens to them once removed. Now that most asylum seekers are detained under s128 of the Immigration Act 1987 they have no access to Part II of the Immigration Act which are appeals to the Removal Review Authority on the grounds that the person has exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for them to be removed and that it would not be contrary to public policy to have them remain in New Zealand.

No asylum determination process is perfect and there is no monitoring of removed asylum seekers (such monitoring happens by other Convention countries). A person may not meet the high threshold of being a refugee, but may face significant human rights problems in their country of origin. There are anecdotal reports of such failed asylum seekers being removed and ending up in prisons in their last port, or in fact being removed to torture, inhuman, cruel or degrading treatment in their home country. In one such case, a failed asylum seeker who was removed from New Zealand subsequently returned with visible signs of torture.

There is arguably more than merely a moral obligation on the part of the New Zealand immigration authorities to effectively monitor the removal of failed asylum seekers. The ICAO Convention, to which New Zealand is a signatory and under which New Zealand is only obliged to remove a declined asylum seeker to the last port of embarkation, reads as more of a procedural treatise than an instrument designed to ensure our consistency with international human rights obligations. Of equal – if not greater - significance to the removal of asylum seekers are New Zealand's obligations under a number of international human rights instruments and our own Bill of Rights Act.

Both Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights ("ICCPR") ratified by New Zealand on 28 December 1978 state that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. …"

To affirm, protect and promote rights and fundamental freedoms in New Zealand, and to affirm New Zealand's commitment to the ICCPR (long title), the New Zealand Bill of Rights

Act (BORA) was enacted in 1990. The provisions of the Immigration Act dealing with the removal of failed asylum seekers must also be interpreted in terms of s 6 BORA, with the interpretation consistent with the right in question being preferred whenever possible over any other meaning. Section 9 of the BORA affirms the rights of persons in New Zealand "not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment."

More significantly, Article 3(1) of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), ratified by New Zealand on 10 December 1989, directly prohibits deportation or removal of any person to face torture:

> 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Article 3(2) CAT goes on to require states parties to determine whether persons who are subject to removal might, in fact, be in such danger:

> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including where applicable, the existence in the State concerned of a consistent pattern of gross flagrant or mass violations of human rights

At present, the Convention against Torture is only availed of in New Zealand in the event of specific applications to the Committee Against Torture (together with simultaneous notice given to the NZIS), usually filed by legal practitioners for persons facing removal. Yet the New Zealand Government's obligations under Article 3 of the CAT arguably involve more than merely the receipt by our Immigration Service of notice of a CAT application. If the CAT is to have effective meaning in an immigration context, the NZIS ought properly to "determine" - in every instance of removal - whether there are substantial grounds for believing the person being removed could be in danger of torture. This requires a consideration of the human rights situation not only in their home country but also in the country to which they can be first removed under the ICAO Convention. In order to be meaningful, it should also require the securing of appropriate guarantees and/or follow-up monitoring by NZIS officials, particularly in cases where persons being removed come from countries with poor human rights records.

It is necessary for counsel to make submissions to the NZIS and the Minister of Immigration regarding New Zealand's international obligations and Bill of Rights if a failed asylum seeker is being returned to conditions where their human rights might well be breached (such as Somalia, Iraq and Afghanistan). It is also essential for refugee practitioners to ensure that failed asylum seeking clients are being removed on correct documentation. There are reports of overseas governments attempting to try and remove people on false documentation.

Use of classified information and the Zaoui case
Clearly, significant human rights issues have been raised in the context of the Zaoui case. It is essential that there is a proper review when this case is finalised to ensure that it cannot be repeated. The Zaoui case is not an exception but has highlighted the weaknesses in our democratic institutions and system.

The following government departments and organizations have been involved in the Zaoui case which warrant investigation and review in its handling of matters: New Zealand Immigration Service, Customs Service, New Zealand Police, Counter-Terrorism Police Unit, New Zealand Security and Intelligence Service, Ministry of Foreign Affairs and Trade, Department of Corrections, Department of Prime Minister and Cabinet, Department of

Labour, Crown Law Office, Office of the Ombudsmen, Parliamentary SIS Committee and the relevant Ministers.

It is essential that there is a review of the role of the SIS and the use of classified information in the New Zealand legal system. Further, national security matters should not be dealt with under immigration law, but only under the criminal justice system. This approach has been recommended by the House of Lords in its landmark decision issued in December 2004: *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56. Such an approach is essential to ensure basic legal protections such as the need for a legal charge and trial, burden of proof, presumption of innocence, right to bail etc.

Conclusion

There are numerous human rights issues and concerns arising in the asylum seeker and refugee sector and this is a critical time for such matters given announcements for legislative change and the international climate which is eroding the rights of asylum seekers and refugees.

It is essential that a human rights approach is followed in any policy framework concerning refugees and asylum seekers. Basic human rights such as the right to liberty, access to counsel, access to justice, the right to a nationality, the right not to be refouled, all need to be strongly advocated in any policy framework.