RACS REFUGEE ADVICE & CASEWORK SERVICE

14 August 2018

RACS Briefing Note – Airlines and people seeking asylum in Australia

1. Overview

Human rights issues and risks for commercial airlines agreeing to transport people seeking asylum on behalf of the Australian Department of Home Affairs ('the Department') are acute.

Australia's domestic refugee law system contravenes international human rights law in a number of respects. Centrally, section 197C of the *Migration Act 1958* (Cth), which was introduced in 2014, explicitly provides that the requirement to remove unlawful non-citizens arises regardless of any non-refoulement obligations that may exist. The introduction of this section represents a significant and deliberate step by Australia away from honouring our international obligations, and means that the Department is obligated to attempt to remove certain people seeking asylum regardless of whether they have credible protection claims.

While the Minister has the power to intervene in circumstances where an individual's human rights are threatened, these powers are a non-compellable, discretionary, personal, and rarely exercised for the benefit of people seeking asylum.

In this context, noting the inadequacy of domestic mechanisms to ensure human rights are upheld, it is more important than ever that corporations involved in facilitating the transport of asylum seekers and refugees on behalf of the Department exercise a high level of caution in relation to their human rights responsibilities.

This briefing note identifies the legal scenarios and risks of which airlines should be aware.

Public concern over the complicity of airlines in such practices is highly topical,[1] and there exists precedent for airlines withdrawing from involuntary deportations in accordance with international human rights law and Australia's international treaty obligations.[2]

2. International human rights legal framework applicable to airlines operating in Australia

Australia has international human rights obligations under treaties such as the Refugee Convention, the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CROC) and the Universal Declaration of Human Rights (UDGR). The Australian government, in its dealing with asylum seekers seeking protection within its jurisdiction or control, routinely fails to discharge its obligations under these instruments.

A commercial airline's facilitation, through service provision to the Australian government, of acts which may contravene these international instruments brings into play the airline's responsibilities under the United Nations Guiding Principles on Business and Human Rights (UNGPs). The UNGPs note that business enterprises have a responsibility, independent of States, to avoid adverse human rights impacts

[1] See for example the recent actions of Elin Errson on a Turkish Airlines flight on 23 July 2018, Sydney Morning Herald, 27 July 2018, 'Swedish Student Protest of refugee deportation on plane goes viral' available at <https://www.smh.com.au/world/europe/swedish-student-s-protest-of-refugee-deportation-on-plane-goes-viral-20180725-p4ztlq.html>

[2] The Guardian, 30 June 2018, 'Virgin Airlines says it will no longer help to deport immigrants' available at: <https://www.theguardian.com/uk-news/2018/jun/29/virgin-airlines-no-longer-help-deport-immigrants-lgbt-windrush>

in their operations, products and services including through their business relationships, and that this responsibility exists ‘over and above compliance with national laws’.[3]

3. Human Rights Risks

a) People who barred from making an application for temporary protection

In May 2017, the Minister for Home Affairs Hon Peter Dutton announced a deadline of 1 October 2017 by which a large cohort of people seeking asylum who arrived by boat in 2012 and 2013 were required to apply for temporary protection visas.[4] The deadline was implemented despite the fact that many people within the cohort had been statutorily barred from making an application until 2016. This window of time, coupled with resource constraints on pro bono legal services, meant that 71 people missed the 1 October 2017 deadline across Australia. This means that those 71 people now cannot lodge a valid protection visa application, even though they may hold a credible fear of persecution in their home country and in some cases have attempted unsuccessfully to lodge a protection visa application after 1 October 2017.

RACS is assisting people who did not lodge by 1 October 2017. It is our experience at RACS that since 1 October 2017 the Minister for Home Affairs is refusing to “lift the bar” which would allow people seeking asylum to make a valid application and undergo a proper assessment of their protection claims.

The reasons people failed to lodge prior to 1 October 2017 included physical and mental ill health, trauma and social isolation; meaning they were unable to engage in the process or were unaware, or misunderstood the nature of the deadline. Despite these reasons being communicated to the Department, and despite the fact that a number of those people have raised credible and strong protection claims, the Minister has refused to intervene and “lift the bar”.

RACS assisted a client who was deported in December 2017 after the Minister did not “lift the bar”,[5] even though he made plausible claims for protection which were not assessed as part of a protection visa application. RACS assisted another man who was issued with a deportation notice after the Minister did not “lift the bar”; however litigation is on foot currently preventing his removal.

The United Nations High Commissioner for Refugees (UNHCR) stated that the deportation of those who missed the deadline is a worrying breach of Australia’s international obligations.[6] Particularly, returning people without conducting a full assessment of their protection claims raises a real risk that they would be subject to persecution and risks a breach of Australia’s non-refoulement obligations.

From mid-2018, temporary protection visas (TPVs) that have durations of 3 or 5 years will expire. People seeking asylum must re-apply for protection prior to the expiry of TPV.. Any person who does not re-apply for protection prior to their TPV expiring will be barred from making a valid re-application and we expect some refugees may be affected. We are concerned that the Minister for Home Affairs will not intervene in these cases to “lift the bar” and are concerned that removals may occur for people that have already been declared refugees by the Department of Home Affairs.

RACS is concerned that, as TPVs expire, removal activity will escalate. This exposes commercial airlines providing services to the Australian government to increasing of complicity in adverse human rights impacts.

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[3] United Nations, Office of the High Commissioner, 2011, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ available at <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> 13.

[4] Minister for Home Affairs Press Release, 21 May 2017, ‘Lodge or leave’ available at: < https://minister.homeaffairs.gov.au/peterdutton/2017/Pages/deadline-for-illegal-maritime-arrivals-to-claim-protection.aspx>.

[5] Melissa Coade, 10 january 2018, Lawyer’s Weekly, ‘Lawyers unable to help Tamil man’s deportation to Sri Lanka’ available at https://www.lawyersweekly.com.au/wig-chamber/22527-lawyers-unable-to-help-tamil-man-s-deportation-to-sri-lanka>.

[6] The Guardian, 22 December 2018, ‘UN condemns Australia's forced return of asylum seeker to Sri Lanka’ available at: <https://www.theguardian.com/world/2017/dec/22/un-condemns-australias-forced-return-of-asylum-seeker-to-sri-lanka>.

b) Separation of families seeking asylum

There have been recent cases, with some media interest, on the issue of families being separated by the Department.

Family separation can occur for a number of reasons. It may occur when families apply for visas separately due to the application of the different laws applying to different people who may have arrived at different times or at different locations. Families have been separated where family members arrived on different boats and were taken to different locations – including to Nauru or Papua New Guinea. Family separation can also occur where family members arrived by different modes, as the law treats people who arrive irregularly versus those who clear customs differently. Applications can also be assessed separately where partners marry or become de facto partners after one of them has a TPV already granted, and the other partner's visa application is refused.

The Minister has the power to intervene in such cases; however this personal power is non-compellable (i.e. the minister cannot be compelled by a court to use it) and is rarely exercised. In July 2018 a Tamil man who was both a husband and father was removed involuntarily to Sri Lanka, as his application was made and assessed separately to his wife and child.[7] We understand the wife and child were granted 5 year TPVs (known as Safe Haven Enterprise Visas), but they arrived on a later boat to the husband and father and so applied separately to him under a different legal framework.

The UN has also called on the Government to end the practice of separating family members through offshore processing. There are a number of families separated between Manus Island (PNG), Nauru and Australia.[8] In some cases, refugees have been faced with the impossible choice of choosing between their family and expressing interest in resettlement in the US.[9]

The removal and separation of family members contravenes the CROC, Article 9 of which provides that States will ensure that a child is not separated from their parents. Article 10 explicitly states that 'applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.' The ICCPR also prohibits arbitrary interference with the family, in Article 17 and 23.

The Australian Human Rights Commission has reported on some of these cases. The Commission has made findings against and recommendations to the Department in several matters relating to family separation.[10]

By carrying out involuntary deportations, which separate family members from their loved ones, the Department fails to meet Australia's international human rights obligations. Any company involved in these acts fails to discharge its responsibility to respect human rights under the UNGPs.

c) Deteriorating country conditions

Often, involuntary deportations occur years after a person had their protection claims assessed. This is due to delays in primary and merits review assessments, and due to waiting times in courts for appeals.

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[7] The Guardian, 17 July 2018, 'Australia deports ' available at: <https://www.theguardian.com/australia-news/2018/jul/16/australia-to-deport-tamil-asylum-seeker-and-separate-him-from-baby-daughter?CMP=Share_iOSApp_Other>.

[8] UNHCR, 24 July 2017, 'UNHCR chief Filippo Grandi calls on Australia to end harmful practice of offshore processing' available at: < http://www.unhcr.org/en-au/news/press/2017/7/597217484/unhcr-chief-filippo-grandi-calls-australia-end-harmful-practice-offshore.html>

[9] The Guardian, 22 September 2017, 'An impossible choice: the Nauru refugee forced to choose between family and freedom' available at: <https://www.theguardian.com/world/2017/sep/22/an-impossible-choice-the-nauru-refugee-forced-to-choose-between-family-and-freedom>.

[10] See for example Ms OR on behalf of Mr OS, Miss OP and Master OQ v Commonwealth of Australia (DIBP) [2017] AusHRC 119, Ms AR on behalf of Mr AS, Master AT and Miss AU v Commonwealth of Australia (Department of Immigration and Border Protection) [2016] AusHRC 110, available at: < https://www.humanrights.gov.au/our-work/legal/projects/human-rights-reports>.

While a person may have had their claims previously assessed at the primary and merits review stages, conditions in their home country could have deteriorated to increase the risk that they would face a real risk of harm if returned. If a person has already been refused at merits review, this new information does not form part of a consideration of their case at the court. Courts undertake judicial review, which is to consider whether the law itself was correctly followed, rather than whether a preferable outcome was reached.

While it is possible for a person seeking asylum to request that the Minister intervene to allow them to make a new application under section 48B of the *Migration Act 1958* (Cth), a person must demonstrate exceptional circumstances that justify considering new information or significant changes in circumstances. What is decided as 'exceptional circumstances' is a decision solely for the Minister. The Ministerial power is personal, non-compellable and discretionary, and there is no right for a person to appeal the Minister's refusal to intervene. This is so even where circumstances leading to persecution or requiring protection in the person's country of origin have considerably declined. We note that Ministerial intervention remains particularly rare and cannot be relied upon.[11]

There are numerous examples of countries where there is a fluid security situation or armed conflict, or changes to coercive government policies and restrictions on freedoms. In cases where there are deteriorating circumstances, participating in an involuntary deportation could lead an airline to return a person to real danger, and in breach of international human rights law.

d) Transport of people to detention centres

The practice of transporting people from one detention centre to another also brings into play serious human rights considerations fo companies. Transport of a detainee between onshore detention centres, such as Villawood Immigration Detention Facility in Sydney to the Yongah Hill Immigration Detention Centre in Western Australia, is often undertaken while the detainee is in handcuffs. While the Department's operational policy sets out relevant considerations when deciding whether to use handcuffs, in recent times it would appear that the policy of handcuffing is applied broadly, even where detainees have no history of criminal offending or pose any resistance, danger or risk of escape. The unnecessary use of handcuffs and restrains can inflict humiliation and physical and psychological suffering.

The manner in which transfers and deportations are carried out also causes distress to detainees. The Australian Human Rights Commission report on Yongah Hill Immigration Detention Centre notes that transfers are undertaken with little or no warning to detainees in the early hours of the morning. The Commission heard evidence that also suggested that the nature of transfers had created significant concern and anxiety among some people in detention.[12] This has also been RACS' experience, where our clients are often removed without prior warning, preventing them from communicating their transfer to us. RACS is also aware of detainees being transferred from a detention centre close to their community and family in Sydney or Melbourne to remote centres such as Christmas Island or Yongah Hill.

e) Nauru and Papua New Guinea immigration centres

In addition to involuntary deportations to a person's home country, the movement of people between Australia's onshore and offshore immigration centres in Nauru and Papua New Guinea also raises concerning breaches of human rights.

The UNHCR has made its position clear that offshore processing undermines the global refugee system and constitutes a failure by Australia to afford protection to refugees irrespective of their mode of arrival. The UNHCR has found that the conditions on both Manus Island (Papua New Guinea) and Nauru have

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[11] See, as an example of a case in which the Minister refused to interview, The Guardian, 27 July 2018, 'Australia deports Tamil asylum seeker despite father's murder' available at: <https://www.theguardian.com/world/2017/sep/22/an-impossible-choice-the-nauru-refugee-forced-to-choose-between-family-and-freedom>.

[12] Australian Human Rights Commission, May 2017, 'Inspection of Yongah Hill Immigration Detention Centre: Report' <https://www.humanrights.gov.au/sites/default/files/document/publication/17.12.XX%20YHIDC%20inspection%20report.pdf>.

caused harm to those detained there.[13] A senior UNHCR official recently described the mental health situation of offshore detainees as "very, very shocking".[14] The media and other reporting bodies have found the conditions on Manus and Nauru to constitute torture, and medical and other support services remain totally inadequate to meet the complex physical and mental health needs of the individuals there. 12 people have died in offshore detention since 2014.[15]

RACS recommends that no commercial airline transfer any detainee to offshore processing countries, currently Nauru and PNG, as the systems there cannot guarantee detainees' human rights.

4. Contact

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Yours sincerely,

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[13] UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees on the Inquiry into the Serious Allegations of Abuse, Self-harm and Neglect of Asylum-seekers in Relation to the Nauru Regional Processing Centre, and any like Allegations in Relation to the Manus Regional Processing Centre Referred to the Senate Legal and Constitutional Affairs Committee*, 12 November 2016, available at: <http://www.refworld.org/docid/591597934.html>.
[14] ABC News, 27 March 2018, 'UN official visiting Nauru detention centre concerned about 'shocking' mental health situation' available at: <http://www.abc.net.au/news/2018-03-27/unhcr-says-nauru-refugees-mental-health-situation-shocking/9591846>.
[15] The Guardian, 20 June 2018, 'Deaths in offshore detention: the faces of the people who have died in Australia's care' available at: <https://www.theguardian.com/australia-news/ng-interactive/2018/jun/20/deaths-in-offshore-detention-the-faces-of-the-people-who-have-died-in-australias-care>.