Australian Immigration Law and Procedures Pertaining to the Admission of Refugees

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Australia is a country populated by immigration. Early Australian immigration policy was restrictive to such an extent that the desire to limit immigration was a significant factor leading up to the federation of the Australian states in 1901. This restrictive attitude began to change in the post-World War II era. In this study, the author undertakes to describe the law and procedures which govern Australian immigration, with particular emphasis on refugee policy. The author begins with a discussion of the role of international conventions in Australian domestic immigration law, in particular of the definition of "refugee", and later proceeds with an analysis of the principal statute governing the subject in Australia, the *Migration Act 1958*. After describing the various administrative institutions and procedures pertaining to refugees — the DORS Committee, applications for and determination of refugee status, and special programmes — she then discusses the right of review of applicants, focussing on the indigenous caselaw. The author concludes that the Australian immigration system is not only very discretionary and extremely susceptible to changing political pressures, but moreover is relativcly immune from judicial review. She therefore suggests that the international definition of "refugee" be adopted in Australian domestic law and that the *Migration Act 1958* and other governing policies and procedures be amended, clarified and subject to review. These changes would demonstrate a real commitment on the part of the Australian government to the principle of temporary refuge.

L'Australie s'est peuplée par l'immigration. La politique originelle en matière d'immigration s'est faite très restrictive, à un point tel que le désir de limiter l'immigration a été un facteur déterminant dans la création de la fédération des États australiens en 1901. Cette attitude restrictive a commencé à évoluer après la seconde guerre mondiale. Dans cette étude, l'auteure cherche à décrire le droit et les procédures qui gouvernent le droit australien de l'immigration, portant une attention plus particulière aux politiques relatives aux réfugiés. L'auteure débute par une discussion du rôle des conventions internationales dans le droit australien de l'immigration, en particulier celui de la définition de la notion de « réfugié ». Elle analyse alors la principale loi consacrée à cette question, la *Migration Act 1958*. Après avoir décrit les différentes institutions administratives et procédures relatives aux réfugiés — le « DORS Committee », la demande du statut de réfugié et sa détermination, ainsi que les programmes spéciaux — l'auteure discute le pouvoir de révision relativement aux demandes à travers une étude de la jurisprudence australienne. Elle conclut que le droit australien de l'immigration est non seulement très discrétionnaire et sensible aux pressions politiques, mais qu'il est aussi relativement exempt de révision judiciaire. L'auteure suggère donc que la définition internationale de « réfugié » soit adoptée par le droit australien, et que la *Migration Act 1958* et les autres politiques et procédures en vigueur soient modifiées, clarifiées et soumises à la révision judiciaire. Un tel changement démontrerait un engagement réel du gouvernement australien en faveur du principe de refuge temporaire.

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Synopsis

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I. General Historical Background

Australia, like Canada, is a country populated mainly by immigration. From the outset of British settlement two hundred years ago, the aim of the Imperial government was to populate the continent with British subjects. As is well known, originally most immigrants to Australia arrived involun-

tarily, being sent by ship from England, Ireland, Scotland and Wales under the penal transportation scheme. However, it was not long before organized migration and settlement programmes began, and over the years until the 1970s firstly Imperial[1] and colonial legislation, and later bilateral treaties and Australian legislation,[2] contained the terms governing the provision of assisted passage for migrants.

Originally, Australian immigration policy was restrictive. In the 1850s, a rush to the gold fields attracted, among others, immigrants from China, and shortly afterward the Victorian state parliament and later the other five Australian state parliaments enacted laws restricting Asian immigration. The desire to control immigration was one of the most significant reasons for the Australian states joining together in a federation in 1901. Indeed one of the first statutes to be enacted by the newly established federal parliament was the *Immigration Restriction Act 1901* (Cth.).[3] This legislation, passed with the almost complete agreement of all parties, provided *inter alia* for the administration, at the discretion of a customs officer, of a dictation test of not less than fifty words "in any European language". The immigration of any person who failed this test was prohibited. Although the words of the statute were general in application, the dictation test was used to exclude non-white immigrants. The implementation of this test came to be known as the White Australia Policy.[4] Proponents of this policy shared not only the wish to restrict immigration to members of the white race, but within that restriction the desire to encourage British and Irish immigration in preference to immigration from some of the continental European coun-

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[1]See, *e.g.*: *Empire Settlement Act, 1922* (U.K.), 12 & 13 Geo. 5, c. 13; *Empire Settlement Act, 1937* (U.K.), 1 Ed. 8 & 1 Geo. 6, c. 18; *Commonwealth Settlement Act, 1957* (U.K.), 5 & 6 Eliz. 2, c. 8; *Commonwealth Settlement Act, 1967* (U.K.), 15 & 16 Eliz. 2, c. 31. Together these provisions are cited as the *Commonwealth Settlement Acts 1922 to 1967.*

[2]M.J. Salter, *Studies in the Immigration of the Highly Skilled* (Canberra: Australian National University Press, 1978), contains at 15-61 a useful historical outline of assisted passage policies throughout Australian history; cited in R.B. Lillich & S.C. Neff, "The Promotion of Human Rights through Bilateral Treaties: The Australian Experience with Migration and Settlement Agreements" in D.W. Greig, ed., *The Australian Year Book of International Law*, vol. 8 (Canberra: Australian National University Press, 1983) 142 at 146 n. 26.

[3]Act No. 17, 1901 Commonwealth Acts.

[4]For a comprehensive discussion of the White Australia Policy, see M. Willard, *History of the White Australia Policy to 1920*, 2d ed. (Melbourne: Melbourne University Press, 1967). The assumption underlying the White Australia policy was articulated by one Member of Parliament as follows: "We are here upon a continent set apart by the Creator exclusively for a Southern Empire — for a Southern nation — and it is our duty to preserve this island continent for all eternity to the white race . . . ." K. O'Malley, Commonwealth of Australia, Senate and House of Reps., *Parliamentary Debates*, Session 1901-02, vol. 4 at 4639 (6 September 1901). Although this rationale ignored totally the fact that the original inhabitants of Australia are non-white aboriginal people, it was nevertheless a widely accepted view.

tries.[5] However, after the fall of Singapore during World War II and the threat of Japanese invasion that followed, Australian immigration policies changed. No longer limited to attracting migrants of British and Irish origin, immigration from the whole of the European continent was sought, and in the late 1940s and early 1950s some of the tight restrictions on non-European settlement were relaxed slightly.[6] Between 1947 and the present day, approximately 4,000,000 people have arrived to settle in Australia from some 140 different countries and localities around the world.

Under this new migration programme, resettlement of refugees within Australia commenced. In 1947, an assisted passage and settlement agreement was negotiated with the International Refugee Organization.[7] Pursuant to this arrangement, Australia accepted approximately 200,000 persons who had been displaced in Europe as an aftermath of the war. Until well into the 1970s, the refugees accepted by the Australian government were, for the most part, of European extraction.[8] Today this is no longer the case. By far the greatest proportion of the numbers of refugees currently admitted to Australia are refugees from Indo-China.

Between January 1947 and June 1986, the numbers of displaced persons, refugees and people admitted under the Special Humanitarian Programme (SHP) totalled 446,259.[9] The categories and number of persons who have been admitted over the years are listed by the Department of

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[5]See the Parliamentary debates at the time on the proposed *Immigration Restriction Bill*: Commonwealth of Australia, Senate and House of Reps., *Parliamentary Debates*, Session 1901-02, vol. 4 at 4265-4666 (6 September 1901) (2d Reading) and Session 1901-02, vol. 5 at 5801-5828 (9 October 1901) (3d Reading). The Bill became the *Immigration Restriction Act 1901*, *supra*, note 3.

[6]For example, in 1952 it was decided to admit Japanese wives of Australian service-men under permits valid initially for 5 years.

[7]For a description of this arrangement, see Commonwealth of Australia, Senate and House of Reps., *Parliamentary Debates*, Session 1946-47, vol. 195 at 2922-23 (28 November 1947).

[8]During World War II several thousand non-Europeans were allowed to enter Australia on compassionate grounds. See A. Calwell, then Minister for Immigration, 2d Reading Speech, *War-Time Refugees Removal Bill*, Commonwealth of Australia, Senate and House of Reps., *Parliamentary Debates*, Session 1948-49 at 810-14 (9 June 1949). After the War, the Australian government attempted to deport those who wished to remain in the country. The deportations were challenged in court successfully, *O'Keefe* v. *Calwell* (1948-49), 77 C.L.R. 261. The *War-Time Refugees Removal Act 1949*, Act No. 32, 1949 Commonwealth Acts, was then passed to permit the deportations. However, the government changed and the non-Europeans were allowed to remain in Australia, though with certain restrictions imposed on them — preventing naturalisation, bringing in wives, children, etc. These restrictions were removed gradually. For further information on this period, see: C. Price, "Immigration Policies and Refugees in Australia" 15 International Migration Rev. 99.

[9]Letter from DIEA Benjamin Offices to the author; ref. 87/75863, ADP/982/ADM:SK. The Special Humanitarian Programme, which commenced in late 1981, is explained in Section V of this paper.

Immigration and Ethnic Affairs (DIEA) as follows: Displaced Persons 170,700; East Europeans 113,500; Soviet Jews 4,800; Latin Americans 5,630; Displaced Persons from Cyprus and Lebanon 17,000; White Russians from China 14,700; East Timorese 6,600; Indochinese 101,003; Other 12,271.

II. The International Conventions Concerning Refugees and Australian Domestic Law

Australia has ratified both of the major international instruments relating to refugees: the *1951 Convention Relating to the Status of Refugees*[10] and its *1967 Protocol.*[11] In fact, besides participating in the 1951 Conference of Plenipotentiaries, Australia played a symbolically significant role in relation to the *1951 Convention.* In accordance with the provisions of Article 43, the Convention was to enter into force on the ninetieth day following the deposit of the sixth instrument of ratification or accession. On 21 January 1954, Australia became the sixth state to accede to the convention and thus brought the instrument into force. Australia originally ratified the *1951 Convention* with reservations to Articles 17, 18, 19, 26, 28 and 32.[12] In December 1967, the reservations to Articles 17, 18, 19, 26 and 32 were withdrawn, and the reservation to Article 28 in March 1971.

Of the other international instruments relating to refugees and stateless persons, Australia has ratified the *1957 Agreement Relating to Refugee Seamen*[13] and *1973 Protocol* thereto,[14] the *1954 Convention Relating to the Status of Stateless Persons,*[15] the *1961 Convention on the Reduction of Statelessness*[16] and the *1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War.*[17]

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[10]28 July 1951, Aust. T.S. 1954 No. 5, 189 U.N.T.S. No. 2545 at 137 [hereinafter *1951 Convention*].

[11]31 January 1967, Aust. T.S. 1973 No. 37, 606 U.N.T.S. No. 8791 at 267 [hereinafter *1967 Protocol*].

[12]For the text of the reservations see 189 U.N.T.S. No. 2545 at 202. Australia has extended application of the *1951 Convention* to Norfolk Island. Australia also extended application of the *1951 Convention,* but not the *1967 Protocol,* to Papua New Guinea and Nauru for the conduct of whose international relations she was then responsible. After independence, these states did not express their intention to adhere, by way of accession or succession, to the *1951 Convention*: Dept. of Foreign Affairs, *Australian Treaty List as at 31 December 1970,* Aust. T.S. 1971 No. 1 at 225. Papua New Guinea ratified the *1951 Convention* on 17 July 1986 by accession: U.N., *Multilateral Treaties Deposited with the Secretary General: Status as at 31 December 1986* (New York: U.N., 1986) at 179.

[13]23 November 1957, Aust. T.S. 1973 No. 17, 506 U.N.T.S. No. 7384 at 125.

[14]12 June 1973, Aust. T.S. 1975 No. 15, 965 U.N.T.S. No. 13928 at 445.

[15]28 September 1954, Aust. T.S. 1974 No. 20, 360 U.N.T.S. No. 5158 at 117.

[16]30 August 1961, UN DOC. A/CONF. 9/15, (1961).

[17]12 August 1949, Aust. T.S. 1958 No. 21, 75 U.N.T.S. No. 973 at 287.

Ratification by Australia, or signature alone where appropriate, binds the Australian government in international law to observe the convention in question. However, for the terms of a convention to bind in municipal law, that convention must be enacted by Parliament in the form of an ordinary statute. Although the federal Parliament has the power, under various of its legislative powers in the constitution, to enact the terms of international conventions into domestic law, this step has not been taken in relation to the refugee instruments. Therefore, the entry of refugees into Australia remains governed by the country's general immigration legislation, principally the *Migration Act 1958* (Cth.).[18]

In 1982, an argument was put to the High Court of Australia to the effect that the *1951 Convention* and its *1967 Protocol*, although not enacted in municipal law, did afford to applicants for refugee status certain rights and did impose on Australia corresponding obligations, enforceable by suit in the High Court. This argument elicited the response that treaties have no legal effect upon the rights and duties of the subjects of the Crown and that aliens are in no different position.[19] Regarding the further argument that the position is different when what is in question is not an obligation imposed upon an individual by a treaty, but rather a right conferred upon the individual by a treaty, Stephen J. said:

> In my view [the] authorities are not confined to the case of treaties which seek to impose obligations upon individuals; they rest upon a broader proposition. The reason of the matter is to be found in the fact that in our constitutional system treaties are matters for the Executive, involving the exercise of prerogative power, whereas it is for Parliament, and not for the Executive, to make or alter municipal law ... .[20]

More recently it was argued before the Full Court of the High Court that provisions of two international instruments annexed to the *Human Rights Commission Act 1981* (Cth.),[21] had to be considered before a deportation order (which had an effect on an Australian citizen) could be

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[18]Act No. 62, 1958 Commonwealth Acts [hereinafter *Migration Act*].

[19]*Simsek* v. *Minister for Immigration and Ethnic Affairs* (1982), 40 A.L.R. 61, 148 C.L.R. 636, 56 A.L.J.R. 277 (*sub nom. Simsek* v. *MacPhee*), Stephen J. [hereinafter *Simsek* cited to C.L.R.].

[20]*Ibid.* at 641-42.

[21]Act No. 24, 1981 Commonwealth Acts, vol. I.

made.[22] The argument was based on the fact that the preamble to the *Human Rights Commission Act* recites that "it is desirable that the laws of the Commonwealth and the conduct of persons administering those laws should conform with" the provisions of the *International Covenant on Civil and Political Rights*, the *Declaration of the Rights of the Child* and certain other international instruments relating to human rights and freedoms.[23] Dealing with this argument the then Chief Justice, Gibbs C.J., stated:

> It is trite to say that treaties do not have the force of law unless they are given that effect by statute ... . The words of the preamble to the *Human Rights Commission Act* did not have the effect of making the Covenant and the Declaration part of Australian municipal law. There was no legal obligation on the Minister's delegate to ensure that his decision conformed with the Covenant or the Declaration.[24]

The other judges did not advert in any detail to this specific point. Wilson J., however, stated that the international instruments in question were not part of the law of Australia, and Brennan J., that there was no legal basis for this part of the claim. Nonetheless, Australian courts sometimes do look to international conventions, including those not incorporated into domestic legislation, when interpreting Australian statutes in order to achieve consistency between international and domestic law, and in some instances Australian tribunals and courts have considered provisions of the *1951 Convention* and the *1967 Protocol*. For example, in *Ceskovic* v. *Minister for Immigration and Ethnic Affairs*[25] the Administrative Appeals Tribunal and the Federal Court considered Articles 32 and 33 of the *1951 Convention*,

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[22]*Kioa* v. *Minister for Immigration and Ethnic Affairs* (1985), 62 A.L.R. 321, 159 C.L.R. 550, (*sub nom. Kioa* v. *West*) 60 A.L.J.R. 133 [hereinafter *Kioa* cited to A.L.R.]. The Australian citizen in this case was a child born to parents while they were in Australia as prohibited non-citizens. Both parents had arrived in the country legally, on temporary entry permits, but had overstayed after the expiration of their permits. Under Australian citizenship laws at the time such children acquired Australian citizenship at birth. In *Kaufusi* v. *Minister for Immigration and Ethnic Affairs* (1987), 70 A.L.R. 476 at 482, the Federal Court followed *Kioa* holding that when the Minister exercises his discretion to deport the parents of Australian born children he must have regard to the interests of those children. In 1986, the *Australian Citizenship Amendment Act 1986*, Act No. 70, 1986 Commonwealth Acts, vol. I, was passed with the result that children born to temporary residents and prohibited non-citizens do not acquire Australian citizenship. Section 4 of the 1986 Act provides that a person born in Australia after the commencement of the legislation

> shall be an Australian citizen by virtue of that birth if and only if a) a parent of the person was, at the time of the person's birth, an Australian citizen or permanent resident; or b) the person has, throughout the period of 10 years commencing on the day on which the person was born, been ordinarily resident in Australia.

[23]*Kioa*, *supra*, note 22 at 336.

[24]*Ibid.*

[25](1979), 27 A.L.R. 423.

and in *Simsek* v. *MacPhee*[26] the High Court examined Articles 31 and 32. In *Minister for Immigration and Ethnic Affairs* v. *Mayer*,[27] all five judges in the Full Court of the High Court adverted to Australia's obligations under the *1951 Convention* and *1967 Protocol* and to the Convention definition of refugee. The reason for the discussion of the *1951 Convention*, however, was not because it embodies applicable international legal principles, but because reference is made to it in the Australian legislation which was in question.[28] More recent cases, looking both at the policies relating to the admission of refugees to Australia, and at the *1951 Convention-1967 Protocol* definition, are discussed later (in Section VI: Rights of Review).

III. The *Migration Act 1958* and Cnrrent Policy Regarding Admission of Non-Citizens to Australia

As noted earlier, although Australia is a state party to both the *1951 Convention* and its *1967 Protocol*, neither instrument has been enacted into municipal law, and the admission of refugees to the country remains governed by the general immigration legislation. Hence the relevant provisions of this legislation, and the practices and policies related to it, are examined here in some detail.

The main statute (currently under review)[29] is the *Migration Act*. It controls the entry into, and the removal from, Australia of all "non-citizens". It is machinery legislation, being concerned mainly with procedural provisions which may be used to implement any immmigration policy.

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[26]*Simsek, supra*, note 19 at 644-45. In this case Stephen J. reached a narrow interpretation of Australia's obligations, holding that the operation of Article 32 was limited to persons both regarded as refugees and lawfully within the country.

[27](1985), 61 A.L.R. 609, 57 C.L.R. 290, 59 A.L.J.R. 824 [hereinafter *Mayer* cited to A.L.R.].

[28]*Ibid.* at 611, 612, 614, 615, 618, 619-22. A similar approach was taken also in the later case of *Banu* v. *Minister for Immigration and Ethnic Affairs* (30 January 1987), Sydney No. G3 of 1987 (Federal Court) [unreported]; and in *Azemoudah* v. *Minister for Immigration and Ethnic Affairs* (1985), 8 A.L.D. 281 at 290.

[29]In recent years immigration law, policy and procedures have been subject to review several times in Australia. The first Australian Human Rights Commission produced five reports on particular aspects of the migration process (all published by Australian Government Publishing Service, Canberra): *Human Rights and the Deportation of Convicted Aliens and Immigrants*, Report No. 4 (June 1983), *The Observance of Human Rights at the Villawood Immigration Detention Centre*, Report No. 6 (August 1983); *Deportation and the Family: Report on the Complaints of Mrs M. Roth and Mr C.J. Booker*, Report No. 8 (September 1984), *The Human Rights of Australian Born Children: A Report on the Complaint of Mr and Mrs R.C. Au Yeung*, Report No. 10 (January 1985) and *Human Rights and the Migration Act 1958*, Report No. 13 (April 1985); in 1986 the Administrative Review Council published its Report to the Attorney-General entitled *Review of Migration Decisions*, Report No. 25 (Canberra: Australian Government Publishing Service, 1986), and at the present time, the Committee to Advise on Australia's Immigration Policies is conducting an enquiry and circulating a draft migration bill for comment.

A fundamental principle underlying the statute is that any person who is not an Australian citizen, must obtain a visa authorizing travel to Australia before setting out for the country. Carriers transporting to the country people who do not hold the requisite visas commit an offence,[30] and may be liable for the carriage of these persons out of Australia.[31]

Visas, once obtained, indicate the type of entry permit to be issued on the holder's arrival at a port of entry. Generally, these permits will be issued to visa holders on arrival. Possession of a visa, however, does not guarantee entry or issue of a permit. Entry permits are of two types: temporary entry permits, which may be granted subject to conditions;[32] and permanent entry permits which are not issued subject to conditions — they are granted to migrants or refugees who are admitted to Australia for permanent residence.

Without an entry permit, or on the expiry of a temporary permit, all non-citizens are "prohibited non-citizens" liable to deportation[33] and subject to the wide powers of arrest and detention conferred by the Act both on the federal police and on DIEA officers.[34] There are no statutory guidelines to define the mode of the exercise of the border official's discretion to grant entry permits, and decisions to refuse entry are not subject to review.[35]

The *Migration Act* confers wide discretionary powers on the Minister of Immigration and Ethnic Affairs and on his or her delegates, while governmental and departmental policies fill the vacuum left by the lack of comprehensive legislation. The policies underlying the immigration system were declared to the federal parliament in a statement made in May 1983

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[30]*Migration Act, supra*, note 18, s. 11C.

[31]*Ibid.*, s. 21. They may be liable also for the carriage of persons out of Australia who, although in possession of visas, on arrival are not granted entry permits. See *ibid.*, s. 36A.

[32]*Ibid.*, s. 6(6).

[33]*Ibid.*, ss 7(1), 18.

[34]*Ibid.*, ss 37, 38. There are some exceptions to this general rule, contained in s. 8(1): diplomats, for instance, are exempt from the visa and permit requirements.

[35]Australian Human Rights Commission, Report No. 13, *supra*, note 29, para. 152. In *Kioa, supra*, note 22 at 348 Mason J. said:

> The grant of an entry permit is a matter of discretion. Indeed, the cancellation of a temporary entry permit is expressed to be a matter of absolute discretion (s. 7(1)). In the ordinary course of the granting or refusing of entry permits there is no occasion for the principles of natural justice to be called into play.

In its 1986 Report to the Attoruey-General, the Administrative Review Council called for a structuring of the discretions which exist under the *Migration Act*, Report No. 25, *supra*, note 29, paras 138-57. Recommendation I states:

> In order to lay down identifiable criteria applicable to the exercise of discretionary powers conferred by the Migration Act and Regulations, those powers should be structured, wherever appropriate, by embodiment of such principles and criteria in legislative form, preferably in the Act or Regulations.

by the then Minister.[36] In the statement different categories of migrant entry are identified: family migration; refugee and special humanitarian migration; labour shortage and business migration; independent migration; and special eligibility.[37] From time to time, the emphasis put upon any of these areas may change, and the guidelines fluctuate with government policy and with economic considerations. Decisions are made annually on the general levels of immigration for the year, on the numbers of refugees to be admitted, and on the priorities to be given to different categories of immigrants within the ceiling or target number of the year's intake.[38]

In the 1984-85 programme, the government changed the balance in the intake of migrants, increasing the proportion of places allocated to business and skilled labour migrants at a cost to family sponsored migrants and refugees. Since that time this approach has been continued.[39] Another change has been a division within the refugee and special humanitarian category into funded and unfunded places — the government meeting the costs of bringing to Australia only those selected for funded places. Of the 12,000 places allocated to the refugee/special humanitarian category in 1987-88, 7,000 of the places are funded, 5,000 are not.[40] The proportion of unfunded places is increasing and the effect may be to disadvantage the economically weak.

Immigration decisions such as these are made, not on the basis of the legal provisions of the *Migration Act*, its amendments and regulations, but on the basis of government policies, and on the policies, procedures and guidelines set out in departmental manuals and circulars, which themselves are amended frequently. Changes in administrative law, and in particular the enactment of the *Administrative Decisions (Judicial Review) Act 1977* (Cth.)[41] and the *Freedom of Information Act 1982* (Cth.),[42] have resulted in a considerable expansion of the information provided in the manuals. This information is now available (with the exception of restricted sections) for

[36]Commonwealth of Australia, House of Reps., *Parliamentary Debates*, Session 1983, vol. H. of R.131 (New Series), (18 May 1983).

[37]The criteria for family reunion are as follows: Categories A and B — close family, *i.e.* spouses, dependent children, aged parents; Category C — extended family, *i.e.* brothers and sisters, non-dependent children.

[38]For a general comment on the changes in immigration policy over the last few years, see B. Hounslow & P. Waters, "Immigration: Arbitrary controls without redress" Legal Service Bulletin, December 1985 at 275.

[39]*Ibid.* at 275.

[40]*Infra*, note 60 at 7. The government has stated that refugees will not be disadvantaged by this new policy, so that unfunded places will generally go to those admitted under the special humanitarian category.

[41]Act No. 59, 1977 Commonwealth Acts [hereinafter *ADJR Act*].

[42]Act No. 3, 1982 Commonwealth Acts.

public inspection at DIEA offices, and may be purchased from government bookshops.[43]

In addition, there are over four hundred departmental instructions in force. These also are subject to frequent amendment. They cover a variety of matters such as the financial charges made for services and information concerning welfare grants.[44] The complexity of the system is increased yet further by variations in the administrative practices employed by different immigration offices. When, in addition, account is taken of the fact that many clients of the system are not proficient in the English language, and have only a limited knowledge and understanding of the Australian legal system, it can be seen that under the current procedures there is potential for considerable difficulties and misunderstandings.[45]

IV. Australian Law and Procedures for the Determination of Refugee Status

There is no obligation under either the *1951 Convention* or the *1967 Protocol* to set up procedures for the determination of refugee status. Many countries have not done this, and where procedures have been established they vary widely. The procedures which have been established in Australia for the determination of refugee status applications made from within, or at the borders of the country are outlined below, but first the composition and functions of the Determination of Refugee Status Committee (DORS Committee) will be briefly described.

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[43]The following are the manuals published and used by the DIEA: (i) *Determination of Refugee Status: Notes for the Guidance of Interviewing Officers*; (ii) *Examination of Passengers and Crew at Airports*; (iii) *Examination of Passengers and Crew at Seaports*; (iv) *International Movement Control Inspection Manual*; (v) *Medical Standards for Selection of Migrants* (prepared by Department of Health); (vi) *Migrant Entry Handbook*; (vii) *Notes for the Guidance of Doctors and Radiologists Examining Applicants for Entry to or Stay in Australia*; (viii) *Temporary Entry Handbook, Part 2: Private Overseas Students and Trainees*; (iv) *Residence Control Manual*; (x) *Resident Return Handbook*; (xi) *Temporary Entry Handbook, Part 1: Visitors and Temporary Residents*; (xii) *Grant of Resident Status Handbook;* and (xiii) *Health Standards for Permanent or Long-term Entry or Stay in Australia: Guidelines for Australian Government Medical Officers.*

[44]The instructions, (apart from the small percentage which are restricted), may be inspected by members of the public under the *Freedom of Information Act, supra,* note 42.

[45]The conclusion reached in one report was that there exists "a consistent pattern of disadvantage, discrimination and deprivation, inherent, it appears, in the very condition of being a migrant", A. Jakubowicz & B. Buckley, *Migrants And The Legal System,* Research Report for the Commission of Inquiry Into Poverty, (Canberra: Australian Government Publishing Service, 1975) 65.

A. The DORS Committee

The DORS Committee was created in 1977 and meets regularly in Canberra, Australia's capital city. The Committee has four members, one each from the Department of Foreign Affairs and Trade, the Attorney-General's Department, the Department of Prime Minister and Cabinet, and the DIEA. The DIEA official chairs the meetings. A representative of the Office of the United Nations High Commissioner for Refugees (UNHCR) is entitled to attend all meetings and to make known the views of the UNHCR Office. The composition of the Committee, and the location of its Secretariat in the DIEA office in Canberra, have led to concern that its recommendations on refugee status claims may be influenced by political considerations.

Following inter-departmental discussions in 1977, in which the UNHCR representative participated, guidelines were established to govern the Committee's proceedings. The Committee functions on a case by case system and is required to apply the *1951 Convention-1967 Protocol* definition of refugee. Applications are considered on the basis of a detailed application form filled out by the claimant and any other material before the Committee. All decisions, which then are passed on as recommendations to the Minister, are made by majority vote. Where the votes are equal, the chair casts the deciding vote. The UNHCR representative is there to advise and observe only and does not have a vote.

The High Court of Australia held in *Simsek* v. *MacPhee*[46] that a claimant for refugee status has no right or legitimate expectation upon which he or she can base an entitlement to be accorded the degree of natural justice which would permit direct representation to and appearance before the DORS Committee.[47] Applicants are not generally granted an appearance before the Committee.[48] A practical reason for this is that the DORS Committee sits only in Canberra, whereas people make applications for refugee

[46]*Simsek, supra,* note 19. In another case, *Benipal* v. *Minister of Foreign Affairs and Immigration* (26 November 1985), Auckland, New Zealand, No. 878/83, 993/83, 1016/83 (High Court) [unreported], the High Court of New Zealand preferred to follow its own reasoning to the restrictive approach to "legitimate expectation" adopted in Australia and exemplified in *Simsek*, finding the refugee status applicant in the case before it to have a legitimate expectation *inter alia* that his application would be dealt with fairly. Chilwell J. stated also that a prerogative power used at a domestic level may be capable of review, and that Ministers or an interdepartmental committee dealing with refugee status applications are not immune from review simply for the reason that they are exercising non-statutory powers. Transcript at 271-73.

[47]It should be noted here that in *Kioa, supra,* note 22, it was held that the requirements of natural justice or procedural fairness must be observed before a deportation order may be made under s. 18.

[48]In a few very urgent cases applicants have in fact been called before the committee: G.S. Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1983) at 169.

status at DIEA offices throughout the continent. The settled location of the Committee does have advantages, for it has allowed the development both of consistency of decision-making and of expertise. However, it also has disadvantages: the most serious is that the absence of the applicant can make the all-important task of the assessment of his or her credibility extremely difficult. There is no opportunity under the present system for the DORS Committee to assess the manner or demeanour of the applicant, nor to ask pertinent and sometimes decisive questions.

Until recently this problem had been exacerbated by the fact that some departmental officers operated in areas where very few claims were made, and hence did not have the opportunity to develop real expertise in interviewing refugee applicants. To overcome these difficulties a new scheme was developed: the establishment of a body of expert interviewers, based in Canberra, who would travel to different DIEA regional offices to conduct the interviews and prepare the transcripts. If applicants could not appear in person before the DORS Committee, it was felt that transcripts prepared by people who were expert in the hearing of refugee claims should have made easier the essential assessment of credibility. Recently a much more detailed form of application for refugee status has been prepared, and all applicants are required to fill in this form. The assessment made by the DORS Committee is now a detailcd documentary assessment. Any interview is now a supplementary or clarifying device.[49] In the case of frontier claims, interviews are held.

Those assessing claims to refugee status must familiarize themselves with conditions in the applicants' country of origin. The DORS Committee refers to a variety of sources. It receives, for instance, information from overseas posts of the Australian Department of Foreign Affairs and Trade, reports by various human rights organizations and the U.S. State Department *Country Reports on Human Rights Practices.*

There will always be some people who abuse refugee status procedures, and experience in different countries shows that large numbers of groundless claims can reduce the effectiveness of the procedures and cause delays. Such applications are not only burdensome to the affected country, but are also detrimental to the interests of those applicants with well-founded claims to refugee status. In 1981, the DORS Committee discussed these problems, but considered that the Committee itself should not summarily reject applications for inadmissability, since the Minister retains in all cases the ultimate responsibility for the determination of refugee status. The Committee further agreed that it was essential that all applicants be assured effective procedural guarantees. However, in order to expedite proceedings,

[49]Letter from DIEA New South Wales Region to the author (11 April 1988); ref. N87/101854.

specific ground-rules for rejection were recognized, and agreement was reached as to the circumstances in which an application might be considered either incompatible with the Convention and Protocol or manifestly unfounded.

An applicant will be held to come within the incompatible category where he or she has dual or multiple nationality and makes no claim of persecution or lack of protection with respect to those other countries of nationality; where he or she has found protection in another state; where the person falls within Article 1D, 1E or 1F of the Convention; where the person has been convicted of a particularly serious crime in Australia and is a danger to the community; or if he or she is a danger to the security of Australia.[50] An application may be considered to be manifestly unfounded if the information it contains does not provide any indication of a claim to a well-founded fear of persecution, or if the allegations made would not even, if proved, satisfy the requirements of the Convention definition.[51] Where the DORS Committee members and the UNHCR representative are unanimously of the view that the claim is manifestly unfounded, the claim will not be considered further, but if any one on the Committee so requests, normal processing will take place.

After considering an application, the DORS Committee has the power to accept or reject it or defer it pending additional enquiries. Once reached, the Committee's decision is communicated to the Minister as a recommendation. The Committee's role is to advise the Minister on the claims for refugee status which come before it. Although in practice it is rare for the Minister to reject a favourable recommendation from the Committee, the Committee advises and recommends only, and the ultimate decision on refugee status is the sole responsibility of the Minister.[52]

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[50]See generally, Goodwin-Gill, *supra*, note 48 at 170.

[51]*Ibid.* These problems have been discussed in some detail by the Sub-Committee of the Whole on International Protection, and the conclusions of this body can be found in UNHCR (26 August 1983) UN DOC EC/SCP/29.

[52]In 1985, the DORS Committee made a recommendation that Melanesian applicants from Irian Jaya be granted refugee status. Relations between Australia and Indonesia were delicate. This recommendation was sent back to the Committee by the Minister with a request for further clarification. In June 1986, 2 of the 11 applicants were granted refugee status, the Minister stating that none of them would receive a permanent entry permit. See D. Rickard, "Australia's refugee policy: The rhetoric and the reality" Legal Service Bulletin, October 1986, 214 at 214-15.

B. Refugees admitted for settlement in Australia after selection at posts outside the country

In any given year almost all the refugees admitted to Australia for resettlement as permanent residents enter after being assessed at overseas posts. The Australian approach to the resettlement of refugees is based on the premise that the government has the sovereign responsibility to administer refugee policies in accordance with its own priorities and criteria. The DIEA has stated that it is necessary

> to make judgments about the basis on which some applicants within mass flow situations should be selected for refugee resettlement in this country and others rejected .... Successive Australian governments have reaffirmed the need for Australia to make its own selection of applicants both on the basis of humanitarian needs (i.e. claims to refugee status as assessed by Australia within its own procedures and against its own experience) as well as on other criteria such as links with Australia. Only in this way has it been judged that Australia is selecting from amongst refugee groups those whose situation is most desperate and irreversible.[53]

Applications from persons in other countries who wish to be admitted into Australia under the refugee intake programme are considered on a case by case basis by DIEA officers to overseas posts. Guidelines and instructions are issued by the Department to assist the officers who conduct the interviews. These guidelines are available to the public under the *Freedom of Information Act*. The guidelines and instructions refer in some detail to the Convention and the criteria contained within its definition, to the onus of proof, to Australia's main regional priorities in the matter of refugee resettlement and to the broad principles by which refugees are to be selected. The guidelines also refer to the special humanitarian programme, to counselling for those accepted about the conditions they may expect to find in Australia, to travel costs and other such matters.

The first step required to be taken before the process is set in motion is that the applicant declares himself or herself as a claimant to refugee status, and applies for admission to Australia on this ground.[54] This requirement, even where officers are sensitive to the problems of potential applicants, can require some knowledge of the system which is not always possessed by those in real need. For those who are aware of this step and make such an application, the next stage is an interview. Clearly the outcome of the interview will be crucial. Equally clear is the fact that the assessment

[53]DIEA Submission to the Australian Human Rights Commission, paras 8.2.4-8.2.5., cited in Australian Human Rights Commission, Report No. 13, *supra*, note 29, para. 120.

[54]Applications are usually accepted only if the person has been referred by the local UNHCR Office, where there is one.

of the claims is to some degree subjective and may vary with the different field officers concerned.[55]

If the applicant establishes that he or she is a refugee within the terms of the *1951 Convention-1967 Protocol* definition, this will not of itself confer a right to migrate to Australia. The instructions state that those who are not within any of the priority categories, or who have been accepted elsewhere, should not be considered further. The priority categories are people who have family in Australia, people with close links to Australia and people with resettlement potential or humanitarian claims.

If both refugee status and a priority category are established, the applicant is then processed for settlement suitability for Australia. Criticisms have been made in relation to the process of assessment of Indo-Chinese refugees. It has been claimed, for instance, that the profiles of national groups supplied to the officers in the field, the numbers of staff at different posts in the region and the frequency or otherwise of visits by staff to some of the camps, have combined to disadvantage Laotian and Kampuchean refugee groups as against the Vietnamese, with the result that the former groups remain in camps for disproportionately long periods.[56] Submissions of this nature were made to the Australian Human Rights Commission in 1984 during the conduct of its enquiry into the operation of the *Migration Act.* In reply to the Commission's queries, the DIEA stated that applicants with immediate relatives in Australia generally will not be refused refugee entry on settlement grounds unless it is considered to be not in the interests either of the refugees themselves, or of the Australian community.[57]

As noted above, since 1984 the total numbers in the refugee/special humanitarian intake and the proportion of places allocated to this category in the total migration programme has decreased from 14,850 (19%) in 1984

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[55]The first Australian Human Rights Commission examined the present system and stated in Report No. 13, *supra,* note 29, paras 123, 124 that

> [w]hile interviewers are counselled that questions *may* be couched in the language appropriate to the applicant's background, education etc., the reality is that fear, limited formal education or cultural differences will lead to questions not always eliciting the most appropriate response or the most compelling reasons.
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> . . .
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> [A]s well as ensuring that DIEA officers are fully briefed about the current political situation, instructions should require that interviewers recognise any linguistic, cultural or educational factors which may prejudice the presentation of an applicant's claim.

[56]See, for example, Submission No. 114 from Mr R. Plant made to the Australian Human Rights Commission in Canberra, 27 February 1984. Cited in Report No. 13, *supra,* note 29, para. 128.

[57]Letter of 15 June 1984, as cited in Australian Human Rights Commission, Report No. 13, *supra,* note 29, para. 127.

to 12,000 (12%) in 1987. In 1983-84, 16,000 refugees arrived in Australia to take up permanent residence. The 1984-85 programme also had a target number of 16,000. In that period, 9,860 persons were admitted under the refugee programme and 5,170 under the SHP. For 1985-86, the calling number was lowered to 14,000. This included 10,000 places for funded refugees and persons admitted under the SHP, 2,000 unfunded places under the SHP and 2,000 places allocated as a contingency reserve to be used as and when necessary.[58] During this time, 7,837 were admitted under the refugee programme, and 4,003 under the SHP, making a total of 11,840. For 1986-87, the ceiling number for the refugee and SHP was again lowered by 2,000 to 12,000 and the number admitted was 11,300.[59] The 1987-88 programme number is again 12,000: 7,000 places are for refugees, and 5,000 for the SHP.[60] The DIEA has stated that the programme retains flexibility to adjust to developments throughout the year. As in previous years, a contingency reserve of 2,000 is available should an unforeseen emergency situation arise requiring an Australian resettlement response.

As mentioned already, some of the allocated places are unfunded: passage assistance will be allocated on the basis of demonstrated humanitarian need.[61] The Australian government meets the transportation costs of the refugees admitted to the country under the funded intake programme, and provides a number of reception and integration facilities and programmes, including accommodation for a period of six months.

Within the overall ceiling of the refugee intake programme, available places are presently allocated to refugees in countries of first asylum in South East Asia, to Eastern European and Latin American countries and the Middle East. For 1984-85, the three last-mentioned regions received 1,000, 750 and 750 places respectively. By far the greatest number of places (over 100,000 in the last ten years) are allocated to refugees from South East Asian

[58]DIEA News Release entitled "Statement to the Parliament by the Minister for Immigration and Ethnic Affairs, the Hon. Chris Hurford, M.P., on the 1986/87 Migration Program" at Appendix B.

[59]Government funding has been reduced: Ministerial Statement by the Hon. C. Hurford, M.P., Minister for Immigration and Ethnic Affairs on the Migration Program 1986-87, Commonwealth of Australia, House of Reps., *Parliamentary Debates*, Weekly Hansard, No. 5, 1986 at 1969-72 (10 April 1986). The Minister indicated that Australian funding of refugee travel has been greater than that made by other comparable intake countries, and that this funding would be reduced in the 1986-87 year.

[60]DIEA statistics contained in News Release from the Hon. Mick Young, M.P., Minister for Immigration and Ethnic Affairs, Canberra (11 June 1987). The anticipated numbers for 1988-89 are 12,000 places in the refugee and humanitarian category and 2000 contingency reserve places: DIEA statistics contained in News Release from the Hon. Clyde Holding, M.P., Minister for Immigration, Local Government and Ethnic Affairs, Canberra (1 June 1988) at 1.

[61]*Ibid.* at 7.

nations: 8,000 in 1984-85, 6,000 in 1985-86, and 4,000 in 1986-87. In 1987-88, the breakdown per region is anticipated to be: Indochina 5,880; Eastern Europe 2,000; Latin America 1,700; Middle East 1,600; Africa 200; and Other 700. The places available are assigned by reference to factors such as the recommendations of UNHCR, the size of camp populations, requests from the countries in question, the number of places in refugee camps, the prevailing economic conditions in Australia and persons known to be of concern and interest to sponsors in Australia. Although Australia's main regional priorities for the refugee intake programme are those mentioned above, the present government is committed to a greater diversification, and is now aiming to respond to the problems of refugees worldwide.

C. *Application for refugee status by persons already at or within the borders of Australia*

Since Australia is geographically distant from most other countries, and since visas are required for all non-citizens who intend to visit, very few people apply for refugee status at the borders of the country or after entry. Over the recent past, fewer than 300 persons per year have applied for refugee status locally.[62] During the last two years this number has increased. In 1986-87, there were 488 applications for refugee status by persons physically present in Australia.

Applicants who do apply locally may arrive legally, for example with a visitor's visa, and then make an application for refugee status either at the port of entry, or later when they are in the country having been admitted on temporary entry permits. Others arrive with no appropriate documentation such as those without visas in transit at international airports or as stowaways or seamen who jump ship. Stowaways have made claims from vessels in Australian ports several times in recent years: in 1979 from M.V. Dimitris, a Greek vessel under contract to a Soviet company; in 1980 from the M.V. Simonetta, an Italian vessel; and in 1982 from the M.V. Pacific Skou, a Danish vessel.[63] In these cases the Australian authorities requested resettlement guarantees as a precondition to disembarkation, but these were not forthcoming. The asylum-seekers were eventually allowed to disembark on humanitarian grounds and to submit claims for refugee status to the DORS Committee. There have been other cases in which the DIEA has relied on the "flag carrier principle" where the flag state of the ship in question is a signatory to the *1951 Convention* or *1967 Protocol*, or on the

[62]Applications for refugee status by persons physically present in Australia: 1980-214; 1981-139; 1982-147; 1983-137; 1984-201; 1985-281; 1986 (Jan-June) - 276; 1986/87-488; 1987/88 (to end of Jan) - 239. Statistics in correspondence from DIEA Sydney Office, *supra*, note 49.

[63]See further, Goodwin-Gill, *supra*, note 48 at 85, 86.

fact that the applicant has a possible claim against a third country. The government has in these circumstances sometimes refused to entertain the claim at all.[64]

Very occasionally Indo-Chinese boat people, and more recently people from Irian Jaya, have landed directly on Australia's northern shores and have applied for refugee status after disembarkation. In such circumstances Australia, much to local surprise, has become a country of first asylum.[65]

Applications for refugee status are made also after the expiration of an entry permit, after people have been arrested and detained as suspected "prohibited non-citizens" and even after the commencement of deportation proceedings.[66]

As noted earlier, a non-citizen present in Australia without the appropriate documentation is a "prohibited non-citizen", and as such is liable to arrest, detention and deportation. The status of "prohibited non-citizen" ceases only on the grant of an entry permit. Although entry permits generally must be acquired prior to entry into Australia, section 6A of the *Migration Act* lists a limited set of circumstances in which such permits may be granted to non-citizens after entry. The relevant circumstances for present purposes are those where a person:

> (A) ... has been granted, by instrument under the hand of a Minister, territorial asylum in Australia (s. 6A(1)(a)), or, where
>
> (B) ... there are strong compassionate or humanitarian grounds for the grant of an entry permit to him (s. 6A(1)(e)), or, where
>
> (C) ... the Minister has determined, by instrument in writing, that he has the status of refugee within the meaning of the *1951 Convention* and *1967 Protocol* (s. 6A(1)(c)).

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[64]For example, there is the very recent case of an Ethiopian stowaway on a vessel flying the Dutch flag. The stowaway endeavoured to apply for refugee status from the vessel while berthed in the port of Sydney on 16 December 1987.

[65]On these occasions the government has tended to over-react, apparently regarding these arrivals as the opening of the floodgates to an invasion of migrants from the countries to Australia's north. Though this position has never been stated officially, it is the *unofficial* position taken by government departments and is generally accepted by those dealing with refugee applicants.

[66]Persons detained because they are suspected to be prohibited non-citizens are commonly held at one of three immigrant detention centres in the country, located in Sydney, Melbourne and Perth. Conditions at the Sydney Villawood detention centre have been the subject of some stringent criticism from the Australian Human Rights Commission: see Report No. 6 and Report No. 13, Appendix, *supra*, note 29. Charges are made for each day spent at a detention centre. This amount is recoverable as a debt due to the government: *Migration Act*, *supra*, note 18, s. 21(7).

1. Territorial asylum

Any decision as to whether to grant territorial asylum is made by the Minister for Foreign Affairs and Trade. It is a discretion which is exercised extremely rarely, and has been used on only two occasions since the early 1950s. In 1954, Mr and Mrs V. Petrov, a diplomat and his wife from the U.S.S.R. applied for and were granted territorial asylum. In 1980, Miss H. Giersch, a ballerina from the German Democratic Republic was granted territorial asylum. The Minister does not make public his reasons for any decision on asylum applications. The approach of the Department of Foreign Affairs and Trade is that a decision to grant territorial asylum carries with it a strong political statement, and is likely to have much greater implications for bilateral relations than is a grant of refugee status.

2. Compassionate and humanitarian grounds

Whether a person will be allowed to remain in Australia for compassionate or humanitarian reasons is a decision within the competence of the Minister for Immigration and Ethnic Affairs. Section 6A(1)(e) enables the government to respond compassionately to persons who, for example, are from minority groups of special concern to Australia, or to persons who have close ties with Australia, and who, while not in fear of persecution should they return to their country of origin, may nevertheless be subjected to substantial discrimination or serious violations of their human rights.

Applicants for refugee status who fail to establish that they fall within the criteria of the *1951 Convention-1967 Protocol* may, in some circumstances, be allowed to remain in Australia on compassionate and humanitarian grounds. Those so allowed to remain may be granted either a temporary entry permit or permanent residence.

3. Refugees

The third category is that of persons who are determined by the Minister to have the status of refugees.

a. Procedures for people arriving without documentation and applying for refugee status before "entry" into Australia

Of those very few people who do arrive without visas, some will apply for refugee status either while on a foreign vessel in an Australian port or on arrival at a proclaimed airport, possibly in transit. The numbers in this last category, although still very small in comparison with those arriving in Europe and in Canada, have increased quite markedly recently giving rise to repeated reference by government authorities to the floodgates argument.

If people are not granted entry permits, they are deemed not to have "entered" Australia, even if they are for custody purposes transported outside the proclaimed airport or ashore from the vessel.[67] This includes those who do possess visitor's visas on arrival but who are refused entry permits. When application for refugee status is made by a person arriving at the frontier who has not yet "entered" the country, this application is referred to the immigration officer responsible for refugee processing. The frontier officer does not make an assessment of the claim but is required to forward the details to a senior DIEA official in the DORS Secretariat in Canberra who will assess its admissibility. If the senior officer decides that the claim could instead be made against the flag carrier of the vessel bringing the claimant to Australia or against a third country, he or she may take the decision to "turn around" the applicant without notifying the other DORS Committee members.[68] Under the *Migration Act*, a carrier bringing a person to Australia who is refused an entry permit at the border can be required, by notice given within 48 hours, to remove that person at no cost to the Australian government.[69]

In the recent case of *Gunaleela* v. *Minister for Immigration and Ethnic Affairs*[70] the joint judgment of Sweeney, Lockhart and Gummow JJ. outlined the approach of the Federal Court to the obligation of decision-makers when exercising the discretion as to whether to grant entry permits to persons making refugee status claims at the border:

> An examination of the subject matter scope and purposes of the Migration Act discloses, in our view, that, in the case of persons who have not yet entered Australia within the meaning of the legislation, a decision-maker dealing with a request for a temporary entry permit or for temporary and permanent entry permits is not necessarily *bound* to take into account, as a relevant matter (within the meaning of s. 5(2)(b) of the Judicial Review Act), the circumstances that the applicant for the temporary entry permit wishes, if that permit is granted, to enter Australia and then to achieve permanent resident status, having then fulfilled the condition in s. 6A(1)(c) in the Migration Act, viz. determination of refugee status.

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[67]*Migration Act, supra*, note 18, ss 36, 36A(8).

[68]In a DIEA publication, *Refugee Policies and Refugee Status Determination Procedures* (Canberra: DIEA Background Paper, 1987) it is stated: "Australia is not obliged to entertain a claim where the claim might more appropriately and with equal moral force, be the responsibility of another signatory to the 1951 Convention". The author has been informed that the statement does not reflect the DIEA's current official policy.

[69]*Migration Act, supra*, note 18, s. 36A(4) and (5). The airline has an obligation to comply within 72 hours, although this period may be extended in certain circumstances, for example when a case is before the court. See *e.g. Akyaa* v. *Minister for Immigration and Ethnic Affairs*, Sydney, No. G 173 of 1987 (Federal Court) [unreported], transcript at 17.

[70](1987), 74 A.L.R. 263.

> On the other hand, the subject matter, scope and purposes of the Migration Act indicate that one of the factors which may properly be taken into account in the exercise of the discretion to grant a temporary entry permit, or temporary and permanent entry permits, to a person who has not entered Australia in the statutory sense is that the applicant claims "refugee status" and wishes to obtain permanent resident status. By "refugee status" we refer to the meaning of the term "refugee" in the Convention identified in s. 6A(1)(c) of the Migration Act. Australia is a party to that Convention and no doubt the decision-maker might properly take into account in a general way the existence of Australia's international obligations thereunder.
>
> If the decision-maker wishes to take such matters into account, the manner in which he does so is very much for the judgment of the decision-maker in the circumstances of the particular case. These circumstances may include considerations of urgency of the nature we have earlier described and of whether the application is made prior to departure for Australia or only upon disembarkation at a port of entry here. We have earlier set out the statement of Mason J. in *Kioa* v. *West* ... [at 348], which indicates that in the ordinary course there will not be occasion for the principles of natural justice to be called into play. (original emphasis)[71]

In one instance later brought before the Federal Court, an intending applicant for refugee status, Mr Azemoudah, a practising Christian and an Iranian citizen, was turned around and sent back to Hong Kong on the flight on which he had arrived.[72] From Hong Kong he was sent back to India, and ultimately was returned to Iran from India. Prior to his arrival in Sydney, a solicitor had been engaged on Mr Azemoudah's behalf. The solicitor was at the airport to await his client's arrival, and there had informed a DIEA official of his client's flight number and of the fact that the client had no travel documents and wished to claim refugee status. The solicitor was not allowed access to his client, and later that day, after Mr Azemoudah had been put on the return flight to Hong Kong, the solicitor applied to the Federal Court for and later was granted an order that he be returned to Australia pending the determination of his refugee status claim.[73] Clearly it is possible that these immediate rejections or turn arounds occur in cases such as this when there is no lawyer present and no likelihood of subsequent legal action. Since the turn arounds occur prior to passage through immigration control, it is extremely difficult to obtain evidence about how often this might be happening. Amnesty International provided evidence to a 1985 enquiry by the Australian Human Rights Commission to the effect that such turn arounds occur not infrequently, and the Sydney

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[71] *Ibid.* at 280.

[72] *Azemoudah, supra,* note 28 at 283-86.

[73] In the joint judgment in the later case of *Gunaleela, supra,* note 70 at 279-80 heard by the Full Court of the Federal Court it was said of *Azemoudah*: "[T]hat decision [is] one to be understood in the particular factual setting which gave rise to it .... In our view, this case should not be treated as establishing any general principle".

Amnesty office continues to believe this is so. If this is the case, such a practice must be a cause of serious concern as the ultimate fate of the refugee status applicant may be his or her final return to the country of origin, even though the initial destination, generally the port at which the last flight was boarded, may well be apparently a safe one. This in fact is what appears to have happened in Mr Azemoudah's case.[74]

A different procedure will follow if, at the time of initial assessment, it is decided that the claim is admissible. In such a case, the notes of the preliminary interview with the border official are circulated to the DORS Committee and UNHCR. Sometimes the notes are accompanied by advice from the DORS Secretariat that in its view the claim is "manifestly unfounded", and if all members of the Committee and UNHCR are in unanimous agreement with this assessment, the claim may be rejected by the Minister's delegate. Such decisions may be taken without a meeting as a result of telephone consultations. However, if there is not unanimous agreement on this point, or where on the basis of the information received from the preliminary interview the DORS Secretariat assesses the claim as one of substance, a full interview is arranged with a DIEA officer, and the applicant is requested to fill in the comprehensive refugee application form introduced in 1987.[75] The application form and transcript of interview are circulated to the Committee members and UNHCR. The Committee then meets to consider the claim. The nature of the application to be made and the proceedings of the Committee in these cases are broadly the same as those followed when claims deemed to have substance are made from within the country. These are described in more detail in the next section. The main distinguishing feature is that border claims are processed with some

[74]On an application for judicial review of the DIEA decision to deport Mr Azemoudah without allowing him access to his legal adviser and without a proposed interview by Sydney DIEA officials, the Federal Court held there was a case sufficient to justify interlocutory relief in that there was a "serious question to be tried". The decision to reject the claim for refugee status apparently had been made without the benefit of information on the situation in Iran, especially in relation to persons of the same religion as the applicant. The Court held that it had jurisdiction to make a mandatory order upon an interlocutory application, and that in this case, since it was likely that the Hong Kong authorities would deport the applicant to India, and that he might thence be returned to Iran, it was appropriate to order the Department to arrange for Mr Azemoudah's return to Sydney pending a final decision on his refugee status claim. Before this order could be carried out the applicant had been returned by the Hong Kong authorities to Bombay and from there the Indian authorities returned him to Iran. At the time of writing, Mr Azemoudah's Sydney solicitor believed his client to have been imprisoned on arrival in Iran and to be still in prison. It is alleged by other reliable sources that he has been executed.

[75]Information given to the author by the DIEA Sydney Office. The application form itself is forty-eight pages long. All information is given in confidence. In addition to asking detailed questions of the candidate for admission, the form also directly and indirectly outlines the services and help available to the refugee claimant.

haste. Generally the applicants are not granted temporary entry permits while their claims are decided, but instead are held in detention centres where they are deemed not to have "entered" Australia.[76] By so holding the applicants, the federal government preserves its right to require the carrier to remove them — sometimes in circumstances where deportations of an applicant who had entered the country might be very difficult. Section 36A of the *Migration Act* confers very wide powers on DIEA officials, its provisions permitting detention in custody for extended periods of time, without charges being made and without those detained ever being brought before a court.[77]

Several points need to be made about the nature of the preliminary interview with the border official. During the 1985 Australian Human Rights Commission enquiry into the *Migration Act* and its operation,[78] evidence received by the Commission indicated that people who may have valid claims to refugee status but arrive without visas very often experience difficulties during their first contact with either the police or immigration officials:

> It was claimed that, during the initial dealings, such persons are neither informed of the procedures in Australia nor put in touch with such community organisations as Amnesty International which could possibly assist them. It was suggested that many of the DIEA officers perceived their role to be the prevention of abuse of the Act rather than the establishment of whether or not there is a genuine case for hearing by the DORS Committee. Cases were given of deportees who were not given interviews with a DORS ... Committee rep-

[76]See, for example, *Osman Lloyd* v. *Minister for Immigration and Ethnic Affairs* (5 June 1987), Perth, No. WAG 35 of 1987 (Federal Court) [unreported]; *Akyaa, supra*, note 69. This procedure seeks to a) deter frivolous applicants b) deter those seeking to enter for reasons other than refugee or humanitarian — for example, economic — considerations c) make available to the Department those people who may seek to hide themselves in the community if and when their claims are rejected. In some circumstances persons have been granted temporary entry permits pending resolution of their claims: a) when during processing it becomes apparent that their claims are highly likely to succeed; b) where compassionate factors exist — children in custody; c) where no adequate or appropriate facilities for their detention exist; and where the likelihood of absconding into the community is low. The 1986 Exconi meeting stressed that refugees and asylum seekers should wherever possible, not be detained as common criminals and should not be located in areas where their physical safety is endangered. This information was given to the author by the DIEA Sydney Office.

[77]In *Akyaa, supra*, note 69, transcript at 20-21, Gummow J. said:

> [T]he procedure [of detention] only operates in respect of those who have been denied entry permits at the airport (s. 36A(3)) and who if they entered Australia (cf s. 36A(8)) would, as prohibited non-citizens (s.6(1)), be liable to arrest (s. 38).

[78]See also Submission No. 46 from the Department of Foreign Affairs and Submission No. 111 from Amnesty International to the Enquiry Into Human Rights and the Migration Act (1985), as cited in Australian Human Rights Commission, Report No. 13, *supra*, note 29, para. 162.

> resentative, and who were returned to countries where it was likely they would face, at the very least, detention.[79]

One provision in the DIEA *International Movement Control Inspection Manual*[80] requests inspectors not to ask a person if he or she wishes to make a claim to be a refugee, and requires the applicant for refugee status to take the initiative. Although a formal request is not made essential and although officers may be sensitive to the situation of potential applicants,[81] this approach can and undoubtedly does disadvantage those without some knowledge of the Australian system and of the criteria of the Convention definition. Those in the most desperate need may well not possess such knowledge.[82] Other evidence submitted to the Australian Human Rights Commission suggested that at times during these interviews appropriate interpreting services are not available, and that the use and selection of interpreters appears to vary according to the DIEA official concerned. The *International Movement Control Inspection Manual* does not require a translator, legal representative or social worker to be present.[83] On occasions, applicants are fearful that the official interpreter could be a government agent of the country they have fled. Although official interpeters sign a statement of confidentiality, such fears are very real and disadvantage those applicants affected by them.

b. Procedures for people applying for refugee status after "entry" into Australia

Very occasionally non-citizens reach Australia by landing illegally somewhere on unpatrolled shores or by arriving without documentation at an airport which is not a proclaimed airport under section 5 of the *Migration Act*. They are deemed to enter Australia, albeit illegally, at disembarkation.[84] Hence, once they have disembarked, they will follow the procedures set down for all persons applying for refugee status from within the country. These procedures are outlined immediately below. Most of the people who do apply for refugee status from within Australia have arrived legally, for example on visitor's visas. At some stage after this legal arrival they seek to extend their stay or to remain in the country on a permanent basis. Often they apply during the currency of their temporary entry permits and hence while they are still legally within Australia. Sometimes, however, application

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[79]See Submission No. 111 from Amnesty International, *ibid.*

[80]*Supra*, note 43, para. 4.15.5: cited in Australian Human Rights Commission, Report No. 13, *ibid.* See also *Osman Lloyd, supra*, note 76, transcript at 32-33, where this approach by the Department is noted.

[81]Australian Human Rights Commission, Report No. 13, *supra*, note 29, para. 162.

[82]*Ibid.*

[83]*Ibid.*

[84]*Migration Act, supra*, note 18, s. 5(2)(a) and (b).

is made after the expiration of the temporary entry permit, when the applicants will have become "prohibited non-citizens".

When application is made from within the country, again the first necessary step is that the applicant should indicate a wish to apply for refugee status. The DIEA *Notes for the Guidance of Interviewing Officers* states:

> If a person indicates to immigration authorities his wish to apply for refugee status he should be invited to complete an application ... .[85]

In October 1985, the Minister for Immigration and Ethnic Affairs tabled in Parliament a policy statement in which it is made clear that stricter policies would thenceforth be pursued in relation to applications to remain in Australia made by prohibited non-citizens. The Minister stated that where the *Migration Act* requires the possession of valid temporary entry permits at the time of application for a change in status, this requirement would now be enforced strictly. He noted that it was "an accepted principle of justice and fairness that people should not derive benefit from an illegal act they have committed. Illegal immigration is no exception".[86] Under the *Migration Act* sections 6A(1)(c) (refugee status) and 6A(1)(e) (strong compassionate or humanitarian grounds) entry permits will not be granted to non-citizens after entry unless at the time of application the applicants are the holders of valid temporary entry permits. Nonetheless, although the new policy generally is being enforced strictly, at the time of writing applicants for refugee status are being treated as an exception. Although the majority of refugee applicants are not holders of valid temporary entry permits at the time of making a refugee claim, they are not refused permanent residence solely on this ground.

Once an intention to apply for refugee status has been indicated, application must be made to a regional office of the DIEA. Applications must clearly set out the basis for the claim, and may include any documents supporting the application. Sometimes application is not made until after the applicant has been arrested as a prohibited non-citizen and placed in detention. Under these circumstances, once an application has been made and accepted as having some merit by DIEA, any deportation order which is in force will not be executed until the application has been determined. In the meantime, the applicant may be released from detention. Release will not follow, however, if the applicant is believed to be a danger to the community or likely to abscond.

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[85]*Notes for the Guidance of Interviewing Officers, supra*, note 43, para. 7.1.

[86]Statement tabled in the House of Representatives in October 1985 by C. Hurford, M.P., Minister for Immigration and Ethnic Affairs, *Policy on Illegal Immigrants* (Canberra: DIEA, November 1985) at 2. *Sinnathamby* v. *Minister for Immigration and Ethnic Affairs*, (1986) 66 Aust. L.R. 502 takes the policy into consideration.

Once application has been made, even claims considered to be without merit are referred to Canberra where the DORS Committee must make a recommendation on them. DIEA officers do not make the final decision (although some cases may not receive a full interview if they are considered manifestly unfounded). All claims judged to have merit proceed to the next stage, formerly an interview with a DIEA departmental officer, now the filling out of a comprehensive refugee status application form.[87] Finally the DORS Committee considers the application. Its decision is communicated to the Minister as a recommendation, and as noted earlier, it is the Minister who is responsible for the final decision.

Although there is no formal nexus in Australia between the grant of refugee status and immigration status or continued residence, practice shows that a favourable recommendation on refugee status creates a strong presumption that a grant of asylum will follow. However, in mid-1986 when two out of eleven Melanesian Irian Jayan applicants were successful in obtaining refugee status, the government granted them temporary entry permits only. The then Minister stated that he was looking for a third country to resettle them. This decision was clearly motivated by political considerations, *i.e.* the desire not to offend Indonesia,[88] and does not sit easily with Australia's espousal at the international level of the need for regional solutions to the problems of refugees.

When an applicant fails to establish, to the satisfaction of the DORS Committee, the criteria for refugee status, the Committee or its Secretariat may recommend nonetheless that the applicant be granted permission to remain in Australia under section 6A(1)(e), that is, on compassionate or humanitarian grounds. Should the application for refugee status be unsuccessful, and should the applicant not be granted permission to remain in the country on compassionate or humanitarian grounds, then he or she will be required to leave Australia. Deportation in accordance with the provisions of the *Migration Act* would follow as a final resort in the absence of voluntary departure.

The whole procedure, from the initial application to receipt of a decision as to refugee status, may take twelve months or even longer. Until October 1987, during this decision-making period applicants generally were not al-

[87]It should be noted here that the government has provided a telephone interpreter service. Information on this is given in the DIEA refugee status application form (*supra*, note 75). Phone calls can be made from almost everywhere in the country to central interpreter pools for the cost of a local call. The interpreter service is then free: Letter from DIEA, *supra*, note 49 at 3.

[88]*Supra*, note 52. See *e.g.* Prime Minister R. Hawke's statement in P. Kelly, "Hawke puts Jakarta first in refugee row" *The Australian* (17 September 1985) 1.

lowed to work.[89] However, special benefits of approximately A$100 per week could be obtained from the Department of Social Security.[90] Since October 1987, social security benefits have been payable only to Australian citizens, permanent residents or holders of unconditional temporary entry permits.[91]

Not until a person has been accepted for refugee status can an application for permanent resident status be made. It is then generally granted. However, the process may take some time, as all members of the refugee's family, whether in Australia or not, are required to undergo medical and character checks. Until permanent resident status is acquired, the refugee remains on a temporary entry permit. Therefore, also since October 1987, pending determination of their claims, refugee status applicants who are in the country legally may be granted unconditional temporary entry permits and hence will be entitled to receive social security benefits. Applicants who are not legally present in the country will receive permission to work if they are judged to have a *prima facie* case.[92] However, these people are not issued with unconditional temporary entry permits, and so under the new regulations they are not entitled to social security benefits.

Once permanent resident status is granted, the person concerned is placed in exactly the same position as that of Australian citizens for all matters, except for voting and for government employment where there may be a requirement that the employee has Australian citizenship. Generally, application for Australian citizenship may be made two years after the acquisition of permanent resident status.

V. Other Special Programmes

The Special Humanitarian Programme was developed to enable a compassionate response to be made to people who are not eligible for normal migrant entry nor for admission as refugees, but who nevertheless are fleeing substantial discrimination or serious violation of their human rights. Recently it has been used for the benefit of people still in their own countries who face severe human rights problems such as in some Latin American

[89]However, even prior to 1 October 1987 there were some cases where refugee status applicants were allowed to enter the workforce prior to the granting of permanent resident status: information given to the author by the UNHCR Office, Canberra. Where applicants were not allowed to work they had no entitlement to unemployment benefits: *Social Services Consolidation Act 1947-1950*, No. 26, 1947 Commonwealth Acts, s. 107.

[90]In January 1987, the special benefits were: 1) for an adult over 21 years A$95.40 per week; 2) for a person aged 18-20 years A$91.20 per week; and 3) for a person under 18 years of age A$50 per week: *Services Consolidation Act*, *ibid.*, ss 112, 125.

[91]*Ibid.*, ss 3(1), 129(3).

[92]News Release by the Hon. Mick Young, M.P., Minister for Immigration, Local Government and Ethnic Affairs, Canberra (16 September 1987).

states. Further, it provides a means of admitting people to Australia without causing offence to the country of origin.

In addition to the 16,000 places allocated in 1984-85 for refugee resettlement, 3,000 places were made available under this programme. In 1985-86, 10,000 funded places were allocated for refugees and those admitted under the SHP, and a further 2,000 places were set aside for unfunded admissions under the programme.[93] In 1986-87, the places allocated to refugees and to persons admitted under the SHP were not separated and have been recorded above. Eligibility for the programme is decided on a case by case basis. Applicants must show close ties with Australia, for example, by former residence for educational purposes, by the presence of close relatives settled in the country or for a small number by support from a strong, well-established, well-organized community group within Australia. Applicants must be sponsored and assisted either by an individual or a group in Australia.[94] Sponsors must have legal permanent resident status, but there is no qualifying period of residence and it is not necessary to provide full sponsorship.

People from Vietnam have a further opportunity to be admitted for permanent residence in Australia under the auspices of a scheme originally called the Orderly Departure Programme and now called the Family Reunion Programme for Vietnam. In March 1982, the Australian and Vietnamese governments signed a Memorandum of Understanding. Under this scheme, people are being brought from Vietnam to Australia through a flexible application of the Australian family reunion migration policy. In Australia this is regarded strictly as a migration programme, but it has the underlying purpose of providing an alternative to departure by boat, at least for those people who have relatives who qualify to sponsor them. The first migrant under this programme arrived in November 1982.

Sponsors in Australia who wish to bring in relatives from Vietnam apply to their local regional DIEA office. That office examines the level of support which will be provided towards the settlement of the potential migrant. There are delays and backlogs with the applications, and priorities have been developed. Within these priorities, sponsorship applications are processed in the order in which they are received. The priorities are: Category A — spouses and dependent children; Category B — parents and fiancé(e)s; and Category C — adult brothers, sisters and adult children.

[93]An unfunded place is one where the person in question, or his or her sponsor, pays the travel costs.

[94]Sponsorship may be made by a family member. For this purpose "family" includes relatives to the degree of grandparents, grandchild, uncle, aunt, niece, nephew and first cousin: Policy Circular PC61 issued by the DIEA (23 November 1983), File Ref. 83/95052 at 15.

Once checked by the regional office, the application is sent to the central office in Canberra which prepares lists of names to be presented to the Vietnamese government for it to approve departure. The initial list of 6,000 names was handed over in June 1982.[95] Recently the number of applications has increased tremendously as a consequence of the large number of refugees from Vietnam now resettled in Australia who wish to sponsor their relatives.[96] In 1984-85, 2,699 Vietnamese people received visas under the arrangements. Approximately 3,500 were expected in 1985-86, but due to difficulties within Vietnam only 2,456 migrant visas were issued in Hanoi. The Australian government has acted to improve the operation of the programme by relocating the processing office in Bangkok, by clearing the backlog of Australian interest cases and by improving the medical processing system.[97]

The sponsors are required to pay in advance the costs of medical examination in Vietnam and of travel to Australia. The travel arrangements are organized by the Intergovernmental Committee for Migration. Once agreement has been received from the government of Vietnam, interviews and medical examinations are arranged, and the sponsor is required to provide proof of an offer of employment within Australia. Should the applicant be rejected, owing to change of circumstances or on grounds of physical or psychological unsuitability, for example, the sponsor will be informed and any money paid in advance will be refunded.

VI. Rights of Review Relevant to Refngee Status Applications

For the past decade the general trend in Australian administrative law has been to define ministerial discretion more closely, and to provide the right to an independent review for those affected by administrative decisions. However, this trend has not been followed in relation to the wide discretionary powers conferred by the *Migration Act.* Here the rights of review which do exist have grown in an *ad hoc* manner without regard to the basic question of whether there is a need for a general right of external review on the merits of decisions. In its recent report made to the Attorney-General, the Administrative Review Council (a federal body which in 1986

[95]DIEA, *Review of Activities to 30 June 1982* (Canberra: Australian Government Publishing Service, 1982) at 56-57, cited in R. Plant, "Australia's Refugee Intake Policy" (paper delivered to Conference, "Destiny in Asia, Australia and ASEAN", 2 November 1984) at 9.

[96]More than 99,000 as of 31 December 1985: information given to the author by the UNHCR Office, Canberra.

[97]Statement by C. Hurford, M.P., Minister for Immigration and Ethnic Affairs (5 March 1986) on the Family Migration Program from Vietnam, in Department of Foreign Affairs, Backgrounder. No. 515 (12 March 1986) at III-IV. The number of persons issued visas for migrant entry in Hanoi for 1985-86 were 2,456, and from July to December 1986 were 1,447.

looked into the review of immigration decisions) concluded that the existing means of review of migration decisions were inadequate and were failing to provide for an effective review on the merits from a wide range of decisions deserving of such review.[98] If an application for refugee status made within Australia is rejected by the Minister, no appeal lies to the courts. The possibility of an informal review does exist, however, and where an adverse decision has been given, the applicant often will make representations to the DORS Committee, to the DIEA, to a member of parliament or to the Minister. In any case in which reconsideration is sought or where new information is received, either the Minister or the DIEA may refer the case back to the Committee. Again, the function of the Committee is to make recommendations only.[99]

Regarding applications for migrant entry visas made from overseas, the Administrative Review Council has recommended that where a decision is made to refuse such a visa and where this affects the interests of an Australian citizen or permanent resident, the decision should be reviewable on the merits at the instance of the citizen or permanent resident, but not at the instance of the person refused the visa.[100] If implemented, this recommendation could be of value to some refugees, for instance, those with relatives who are Australian citizens or permanent residents.

Where maladministration by a federal government department is concerned, any one, including refugee applicants both within and outside Australia, may lodge complaints with the Office of the Commonwealth Ombudsman. The Ombudsman, who may not review action taken by the Minister, cannot substitute his or her decision for that of the department, but may recommend corrective action where it seems that there has been some failing in departmental administration. Should the Ombudsman be of the opinion that, after investigation and recommendation, a department has failed to take adequate remedial action, he or she may bring that situation to the attention of Parliament either in a special report or by including this information in the Ombudsman's annual report to Parliament.[101]

In addition, there is always the possibility of judicial review of the legality of decisions, although not of their merits, under the *ADJR Act*.[102] The passage of this Act in 1977 facilitated considerably the review of the

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[98]Administrative Review Council, Report No. 25, *supra*, note 29.

[99]The former Human Rights Commission found these informal means of review to have several serious deficiencies. Only people with knowledge, contacts and influences have effective access to them, the system is inconsistent and it absorbs considerable resources: Australian Human Rights Commission, Report No. 13, *supra*, note 29, para. 316.

[100]Administrative Review Council, Report No 25, *supra*, note 29, paras 291, 292.

[101]*Ombudsman Act 1976*, Act No. 181, 1976 Commonwealth Acts, s. 19.

[102]*Supra*, note 41. And, apart from that Act, judicial review is available at common law.

decisions made by administrators, and it has been used with respect to a number of decisions made under the immigration legislation. Two leading High Court decisions rendered in 1977 had held the Minister for Immigration and Ethnic Affairs to be under no obligation to afford natural justice when making a deportation order against a "prohibited non-citizen". However, in 1985 in *Kioa* v. *Minister for Immigration and Ethnic Affairs*,[103] the majority of the High Court (Mason, Wilson, Brennan, Dean JJ., with Gibbs C.J. dissenting on this point), held that legislative amendments since 1977 had had the result that observance of natural justice or "procedural fairness" is now required before a deportation order may be made under section 18. In 1987, in *Akyaa* v. *Minister for Immigration and Ethnic Affairs*,[104] the Federal Court applying *Kioa* extended the requirements of natural justice to the case of a refugee status applicant held in detention under section 36A of the *Migration Act*.[105] In this case, procedural fairness was held to require that the applicant be given the opportunity to respond in writing, after consultation with her legal advisers, to the substance of allegations of fraud made in regard to her previous unsuccessful application for refugee status. This earlier decision and its review had been followed by her deportation in 1986.[106]

In another case concerning refugee status applicants detained under section 36A of the *Migration Act*, the extension of natural justice requirements to cases of deportation under section 18 was discussed. Fox J. in *Sinnathamby* v. *Minister for Immigration and Ethnic Affairs* said:

> The guideline is fairness; in general the party should have an opportunity of dealing in an appropriate way with matters with which he can reasonably be expected to be able to deal, and which might assist his or her case.
>
> [Here] the material which was prejudicial to the appellant had been provided by the appellant herself. In the circumstances, I consider that the decision-maker was not required to give the appellant a chance to comment on the view that he had taken of it; to do so would amount to a general requirement that a decision-maker make known to each case his view or evaluation of the material that an applicant puts forward ... .[107]

Until recently, the *ADJR Act* had been considered inapplicable to decisions relating to refugee status. This view was based on the provision that only decisions "made under an enactment" fall within the purview of the Act, and the decision whether to grant or withhold refugee status was said to be

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[103]*Kioa, supra*, note 22.
[104]*Akyaa, supra*, note 69.
[105]*Ibid.*, transcript at 25-26.
[106]*Ibid.*, transcript at 2, 28-29.
[107]*Sinnathamby, supra*, note 86 at 506.

made according to the *1951 Convention-1967 Protocol* and not according to an Australian statute.

The Full Court of the High Court of Australia in *Minister for Immigration and Ethnic Affairs* v. *Mayer* examined the legal basis for the ministerial determination of refugee status.[108] Mr Mayer, the respondent in the case, originally from Irian Jaya, had arrived in Australia from Papua New Guinea in June 1984 and had applied for refugee status. His case was considered by the DORS Committee, and then together with the recommendations of the Committee was considered by the Minister. The Minister decided that Mr Mayer was not eligible for refugee status and so informed him. Mr Mayer requested a statement of the reasons for this decision. Under section 13(1) of the *ADJR Act*, Mr Mayer would be entitled to such a statement as long as the Minister's decision was "made under an enactment", and as such within the ambit of the Act. Hence the question was one of administrative law: was the decision to refuse refugee status "a decision made under an enactment" such as to entitle the respondent to request reasons? The court did not at any stage advert to the substance of the claim for refugee status. In the opinion of the majority (Mason, Deane and Dawson JJ.), the Minister's decision was one within section 3(1) of the *ADJR Act*, a decision made "under an enactment".[109] In accordance with this ruling the Minister provided Mr Mayer with the reasons for the rejection of the application for refugee status.

The effect of this case is potentially far-reaching, and the issue has since been raised as to whether DORS Committee recommendations are subject to judicial review. The Full Court of the Federal Court in *Gunaleela*,[110] while finding that decisions regarding refugee status claims made by applicants who under the *Migration Act* are deemed not to have "entered" Australia are not made under section 6A(1)(c) of the Act and hence are not reviewable under section 5 of the *ADJR Act*, found it unnecessary to decide whether the decision itself was reviewable under section 6 of the same Act,[111] or whether the DORS Committee recommendations were reviewable.[112]

At first it seemed that one likely consequence of the *Mayer* case would be an amendment to the *ADJR Act* to ensure that refugee status decisions

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[108]*Mayer, supra*, note 27.

[109]*Ibid.* at 619.

[110]*Gunaleela, supra*, note 70.

[111]*Ibid.* Morling J., at the initial hearing in the Federal Court had said at 260-61:

> I have already stated my conclusion that the applicants do not fall within the provisions of s 6A(1)(c) of the Act because they are deemed not to have entered Australia. Nevertheless, it is plain that decisions were made refusing to grant them entry permits, and those decisions are reviewable under the Judicial Review Act.

[112]*Ibid.* at 277-78.

would be exempt from its provisions. In March 1986, the proposals of this nature were under discussion. The government sees asylum and protection issues as matters for the sovereign prerogative of the state and not as appropriate areas for review. Nonetheless, at the time of writing no such legislative changes had been made and they now seem unlikely. Today applicants frequently request a statement of the reasons for the decision as to refugee status. When refugee status determinations are reviewed by the courts the minutes of the DORS Committee meetings can be and generally are made available to the court,[113] although it may be stipulated that parts of the minutes not be made public.

Until recently very few cases concerning refugees reached the courts. Today, however, an increasing number of applicants seek review under the *ADJR Act*. As noted earlier, much of the immigration practice in Australia reflects policy rather than law, and when exercising this jurisdiction courts have taken into account government policy. For instance in *Osman Lloyd* v. *Minister for Immigration and Ethnic Affairs*,[114] a case decided in June 1987, the Federal Court of Australia considered ministerial policy affecting Sri Lankan nationals residing temporarily in Australia and wishing to extend their stay in the country. Under the policy guidelines the Minister had directed *inter alia* that all applications for resident status from Sri Lankans were to be treated sympathetically on a case by case basis.[115] Since the advent of the guidelines, all Sri Lankans who have "entered" Australia and whose temporary entry permits have expired are being allowed to remain without detention or deportation until further notice. Another policy of the DIEA, that which permits appeals to the Minister personally against accepted DORS Committee recommendations, was taken into account in *Banu* v. *The Minister for Immigration and Ethnic Affairs*.[116]

In *Gunaleela*[117] (which to repeat concerned applications for refugee status from Sri Lankan Tamils), the court specifically left open the question

[113]See *e.g. Akyaa, supra*, note 69, transcript at 11-15. Disclosure to the court of DORS Committee minutes and recommendations is normally accompanied by an application for an order to prevent public disclosure, in some instances even to the other side. This order is not always granted: information given to the author by the DIEA Sydney Office.

[114]*Osman Lloyd, supra*, note 76, transcript at 29-31. See also *Sinnathamby, supra*, note 86, a case also concerning Sri Lankan Tamils, but prior to these policy guidelines, where the court took into account a different government policy: that people in Australia illegally will not readily be given permanent residence and their breaches of immigration requirements will weigh heavily against them.

[115]The Court reluctantly held that the policy was not intended to apply to persons who are deemed not to have "entered" Australia. *Osman Lloyd, supra*, note 76, transcript at 31, 41-42.

[116]*Banu, supra*, note 28, transcript at 5, 9, 20, 21, 22.

[117]*Gunaleela, supra*, note 70.

of whether or not there would be an error of law for the purposes of the *ADJR Act*[118] if the Convention definition of refugee had been misconstrued as argued by the applicants. Sweeney, Lockhart and Gummow JJ. said:

> The Migration Act does not in terms incorporate the Convention definition into that particular decision-making process, as part of municipal law. A serious question thus arises as to whether, even if the definition was misconstrued, the result was an "error of law" within the meaning of s 5(1)(f) of the Judicial Review Act. The error may rather have been in construing a policy that regard be had in such cases to the terms of Art 1A of the Convention, which lacked any legally binding force upon the decision-making.[119]

Commenting on British, Canadian and United States cases referred to them in argument and in which the terms of the definition had been construed, the judges observed that in all of those cases the courts were dealing with domestic legislation which drew the terms of the definition to the attention of the makers of the decisions under review.[120] Nonetheless, in *Gunaleela* the court did go on to consider the terms of the Convention definition. It was argued for the applicants that there had been read into the definition a requirement that the relevant acts of persecution be directed specifically at the persons claiming refugee status.[121] Singling out is not required in the Convention. The judges noted:

> Clearly enough, a particular applicant ... might, in the circumstances of the case in hand, fall within the terms of the definition and have a valid basis for his or her fear of persecution even if not previously "sought out" or "persecuted as an individual".[122]

However, they held that the use by the Minister's delegate in the materials to which they were referred of terms such as "individual" and "individualised", when considered in the whole context of the deliberations, did not read to them as proceeding on the footing that without a singling out a claim for refugee status could never succeed. They held there was no error of law disclosed in the proceedings.[123]

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[118]*Supra*, note 41. Review under this Act is discussed in Section VI: Rights of review.

[119]*Gunaleela*, *supra*, note 70 at 281.

[120]*Ibid.*

[121]The summary of the statements of each applicant made by the trial judge and adopted by the Full Court was to the effect that in each case either the applicant, or an immediate family member, had been assaulted (beaten or raped), or arrested by Sri Lankan security forces, and in all cases that the applicants' houses had been destroyed (and sometimes possessions looted earlier) by army personnel or by more generalised military action such as bombardment. One applicant had a forged passport and doubts as to her credibility were expressed. The DORS Committee had unanimously recommended that the applicants not be recognised as refugees. The UNHCR view expressed to the Committee, and referred to in the judgment, was that one of the applicants was a refugee: *ibid.* at 266-69.

[122]*Ibid.* at 284.

[123]*Ibid.*

There have been other cases in which the Convention definition requirements have received consideration. In *Akyaa*[124] Gummow J. observed:

> Falsely imputed political opinion may lead to well-founded fear of persecution "for reasons of political opinion", even though that opinion is in truth not held.[125]

In *Murugasu* v. *Minister for Immigration and Ethnic Affairs*[126] Wilcox J. stated:

> [I]t is not essential to the notion of persecution that the persecution be directed against the applicant as an individual. In a case where a community is being systematically harrassed to such a degree that the word persecution is apt, then I see no reason why an individual member of that community may not have a well-founded fear of being persecuted.[127]

A decision denying refugee status to a Sri Lankan Tamil applicant was under review here. The application for review was dismissed. In *Sinnathamby*[128] the Minister's delegate, acting on a recommendation from the DORS Committee, refused both refugee status and resident status to a Sri Lankan Tamil applicant. The letter conveying the latter decision stated as the ground for refusal:

> I am not satisfied that you would suffer gross and discriminatory denial of fundamental freedom and basic human rights on your return to Sri Lanka, greater than the hardship and adversity experienced by the generality of Tamils in Sri Lanka.[129]

The majority of the Full Court of the Federal Court upheld the decision saying *inter alia* it showed no error of law. Burchett J. dissented saying this did show an error of law in relation to the decision to reject refugee status.[130]

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[124]*Akyaa, supra,* note 69.

[125]*Ibid.*, transcript at 32.

[126](28 July 1987), Sydney, No. G254 of 1987, (Federal Court) [unreported].

[127]*Ibid.*, transcript at 13.

[128]*Sinnathamby, supra,* note 86.

[129]*Ibid.* at 505.

[130]*Ibid.* at 516. In this case, Fox J., speaking of one appellant who had greater fears for her safety than the other appellants because her brother had escaped to West Germany while conditionally released from detention, said at 504:

> If the applicant's worst fears are justified, her position must evoke considerable sympathy. The role of this court is not, however, one of testing the reality of her fears or of providing assistance. It is one of seeing that the relevant law and legal procedures in this country have been observed.

Fox and Neaves JJ. held that the deportation order had been properly made because in the circumstances, natural justice had not been denied in that the Minister's delegate had neither failed to consider relevant matters nor applied policy without regard to the merits of the case, nor ordered the deportation merely because the appellants were prohibited non-citizens. Burchett J. dissented.

It is interesting to note here that the New Zealand High Court, in a 1985 decision[131] dealing with a very similar refugee status determination system to that currently operating in Australia, went beyond any decision so far made by the Australian courts.[132] In an application for judicial review by an unsuccessful refugee status claimant, Chilwell J., holding that the wrong question had been asked by the decision-maker and that the Convention definition of refugee had been misconstrued, made a declaration that the applicant was a refugee.[133]

In summary, the present Australian procedure provides that applicants for refugee status will receive a comprehensive application form to complete, but does not provide for interview of the applicant by the DORS Committee. The DORS Committee considers each case on the basis of documentary evidence and makes a recommendation to the Minister. The Minister makes all final decisions as to refugee status and no reasons are given. However, since the case of *Mayer* in December 1985, the Minister, if requested, must provide reasons for refugee status determinations. Today such requests are made regularly. Once the determination as to refugee status has been made, there is no provision for either review on the merits by or appeal to a body other than the original decision-maker, although there may be recourse to the Ombudsman where departmental maladministration has occurred, to various forms of informal review or to judicial review by the courts under the *ADJR Act*.

VII. Conclusion

Due to the nature of the terms of the *1951 Convention-1967 Protocol* definition of "refugee", the granting of refugee status can be a delicate political matter. It involves a comment on the internal affairs of the refugee's country of origin and amounts in effect to a statement that some people within that country fear persecution on the grounds of race, religion, nationality, membership of a particular social group or political opinion. As a consequence, the grant of refugee status carries a negative imputation and can have a detrimental effect on the relationship existing between the country of refuge and that of origin. Hence, on occasion, states hesitate to accord refugee status for considerations of a purely political kind.

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[131] *Benipal, supra*, note 46.

[132] *Ibid.* at 47-52. In New Zealand, as in Australia, an interdepartmental committee considers the cases (the applicant there being interviewed by the committee, something which does not happen in Australia) and makes its recommendations to the relevant Ministers, the Minister of Foreign Affairs and the Minister for Immigration. The Ministers then make the final decision. *Ibid.* at 271-73.

[133] *Ibid.*, transcript at 380.

The Australian government, like other governments, is not immune from these pressures, and clearly at times is motivated by a fear of compromising bilateral relations with other countries such as those with Indonesia. Current Australian domestic procedures for the determination of refugee status do nothing to reduce the potential impact of political considerations. The DORS Committee is an inter-departmental body situated within the Department of Immigration and Ethnic Affairs in Canberra. There is no appeal on the merits to an independent tribunal, such as the courts, from a decision rejecting refugee status. Moreover, there are only limited opportunities for judicial review. Collectively these factors mean there is no effective shield against possible political pressures.

Traditionally very protective of its own sovereignty, particularly where matters of immigration are at issue, the Australian government seems to fear that the "floodgates" are ready to break: that large numbers of refugees currently arriving at the borders of some western countries are likely to arrive in Australia — a fear as yet not appearing to have support from any incontrovertible evidence. This anxiety is reflected by the government's increasing readiness to invoke the "flag-carrier" and "other-port" principles. In adopting this approach, Australia already may be failing to abide by the requirements of the *1951 Convention-1967 Protocol* and of international law in the treatment of potential refugee applicants. Writing in 1983, Goodwin-Gill concluded that "the principle of flag-state responsibility can hardly be said to have established itself as 'international custom, as evidence of a general practice accepted as law'."[134] He stated that it may be appropriate to emphasize the responsibility of the first port of call, and commented that it is not "consonant with considerations of good faith for a state to seek to avoid the principle of non-refoulement by declining to make a determination of status."[135] Others have concluded that a refugee should not be subjected to measures such as rejection at the frontier, and that asylum should not be refused on the ground that it could be sought from another state.

The main Australian statute in the area of immigration control, the *Migration Act*, provides a legislative framework within which refugee policies are developed and decisions taken. It confers extensive discretionary powers on executive officers with respect to the taking of decisions which can have profound effects on the lives of refugees and refugee status applicants. Under the Act and its accompanying procedures, there may have been and still be inconsistencies in the treatment of those who apply for refugee status from within Australia. Policies formulated to govern the treatment of specific groups, for instance the policy currently protecting Sri Lan-

[134]Goodwin-Gill, *supra*, note 48 at 91.
[135]*Ibid.* at 73.

kan nationals from involuntary return to their country, may (as this particular policy has been) be applied differently according to whether, under the terms of domestic legislation, the people in question are deemed to have "entered" Australia or not. Further, those who under the provisions of the *Migration Act* are deemed not to have "entered" may be turned around at the airport with no chance to make an application. Although this does not happen frequently, often applicants are refused entry permits pending determination of their refugee status claims and are held in detention under section 36A of the *Migration Act.* There is evidence that these people encounter restrictions and difficulties in making their claims as a result of the very fact of this detention. Amnesty International Australia has recently drawn to the attention of the government some of the difficulties alleged to be experienced by these detainees: difficulties firstly in obtaining access to the refugee determination process generally and to statements of reasons for the rejection of claims; and secondly in obtaining representation, appeal and review. In any case powers such as those conferred by section 36A are undesirable. Its provisions authorise detention that may be prolonged and contain no requirement that the detainees be brought before a magistrate.

Ideally the *Migration Act* should be amended to ensure in all cases that temporary entry permits are issued to cover the period necessary for consideration of the applications of those persons who do reasonably apply for refugee status at the border. Further, the courts would be greatly assisted in their task of review if the *1951 Convention-1967 Protocol* definition of refugee were enacted into Australian legislation. At the present time, this suggestion is receiving consideration by the Committee to Advise on Australia's Immigration Policies, and the definition has been incorporated into a draft migration bill currently being circulated for discussion. In addition, it is desirable that the instructions, training and guidelines given to the border officers, and the border procedures themselves be amended to ensure sensitivity to cases where people are afraid and do not themselves mention refugee status. By amendments such as these, Australia could demonstrate a real commitment to the principle of temporary refuge, a principle whose progressive development the government has for several years now been advocating at the international level.

Since overseas selection accounts for the vast majority of the refugees admitted to Australia, it is also essential to address both policies and performance in this area. Australia generally has taken pride in an open policy to refugees. The present reality, however, is that refugees and people in refugee-like situations are finding it increasingly difficult to achieve entry. Although the overall immigration intake has risen over the past few years, the numbers of refugees admitted within that intake have declined. Further, despite the immense proportions of the world-wide refugee problem, Aus-

tralia has continued to be highly selective both about the types of people accepted in the refugee intake programmes and in regard to the countries from which refugees are accepted.

For several years most of the refugees admitted to Australia have come from Indo-China, in particular from Vietnam. The policy followed here reflects Australia's particular commitment to its own region, and in comparative international terms, Australia's response to the plight of Indo-Chinese refugees has been very good. In fact, when the small population is taken into account, Australia can be seen to have accepted a greater proportion of Indo-Chinese refugees than any other Western nation. However, it must be acknowledged also that this regional resettlement policy is not always followed when delicate political considerations arise, and that there is an unwillingness to accept refugees from "new" source countries, such as Sri Lanka, or to increase the overall numbers to be admitted within either the refugee category or the SHP.

It is important to look at the performance of Australia in the overall context of the current refugee situation. Although achieving refugee status can appear to be a mere technicality, to a refugee it may be the only form of security possible. It is imperative that the procedures established for the determination of refugee status be fair and accessible to those who may desperately need access to them. In the field of international refugee law and practice, the example set by relatively wealthy countries with the capacity to accept newcomers is extremely important. The adoption of equitable procedures for the determination of refugee status and the establishment of fair and humane resettlement quotas in keeping with the relative material prosperity of the country in question not only assist those refugees who benefit directly but can serve also to influence positively the practices, procedures and quotas adopted by other countries. Looked at from this angle, Australia along with other states owes stringent obligations to the international community. It is vital that these obligations be scrupulously observed.