

# Factsheet

## Refugees with an adverse security assessment by ASIO



Between January 2010 and November 2011, the Australian Security and Intelligence Organisation (ASIO) issued adverse security assessments to over 50 refugees, the majority of them Tamils. All had come to Australia by boat, and all were found to be refugees by the Australian authorities – in other words, it was accepted that they had a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group. Importantly, none was excluded pursuant to article 1F of that treaty, which permits the denial of refugee protection if there are serious reasons for considering that an individual has committed a crime against peace, a war crime, or a crime against humanity; a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; or has been guilty of acts contrary to the purposes and principles of the United Nations. Almost all of those refugees remain in indefinite immigration detention. Neither the adverse security assessment, nor their detention, can be reviewed effectively or overturned by a court or tribunal.

In practice, recognition by the Australian authorities that a person is a refugee does not automatically lead to the grant of a protection visa. Australian law requires that a person first be assessed by ASIO not to pose a risk to national security.<sup>1</sup> Such risks include domestic or international espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on defence systems, foreign interference, or a serious threat to Australia's territorial and border integrity. In making its assessments, ASIO is not bound by conventional standards of proof (such as 'balance of probabilities' or 'beyond reasonable doubt').

We do not really know why the 50+ refugees are considered by ASIO to pose a security risk because insufficient reasons have been given. Presumably, ASIO thinks that the Tamils are linked with the LTTE – even though the civil war in Sri Lanka has ended, the LTTE no longer exists, the LTTE was never listed by Australia as a terrorist organization, and there is scant evidence that the LTTE ever posed a risk to Australia.<sup>2</sup> Further, UNHCR has cautioned governments not to make rash judgements about Tamils with a demonstrated LTTE connection: many civilians undertook mundane and innocent roles as cooks, lawyers and doctors for the LTTE; others were coerced into military action.<sup>3</sup> It is also important to note that international humanitarian law does not criminalize the actions of non-State armed groups fighting against government military personnel where civilians and civilian objects are not unlawfully targeted.<sup>4</sup>

In the absence of any probative evidence justifying the adverse security clearance, some have argued that the approach may mask other (unlawful) objectives:

a group-based classification that all 'boat people' from Sri Lanka may be potential 'terrorists'; a generalised fear of absconding which is not personal to each refugee; a broader policy or political aim of punishing unlawful arrivals (contrary to art 31 of the *Refugee Convention*) or deterring future unlawful arrivals; or the bureaucratic convenience of having persons readily available for processing.<sup>5</sup>

The result is that the refugees have been denied protection visas and subjected to prolonged and indefinite detention in closed immigration detention centres in Australia.<sup>6</sup> Most have been detained now for over four years,<sup>7</sup> and at least one child has been born and

raised in detention.<sup>8</sup> Although the government posits that they are merely being held pending their removal, the reality is that removal is highly unlikely. Because they are refugees and face persecution if returned to Sri Lanka, the principle of *non-refoulement* (under both international refugee law and human rights law) precludes their return.<sup>9</sup> Having unsuccessfully explored alternative resettlement options for over four years, the Australian Immigration Department has conceded that the likelihood of any other country agreeing to resettle them is remote:

it is recognised that we should not have high expectations that countries would be willing to accept refugees who have been determined by Australian authorities to have adverse security assessments.<sup>10</sup>

In late 2012, retired Federal Court judge Margaret Stone was appointed to provide periodic independent 'advisory' review of ASIO's adverse security assessments of refugees. However, her powers were limited. While she could access all the evidence considered by ASIO, her findings as to whether or not the decision was 'appropriate' were not binding on the government. Further, there was no minimum disclosure requirement in terms of the reasons she could provide to the individual concerned. Finally, the refugees had no opportunity to be informed of, or respond to, the allegations against them.

On 14 May 2014, Parliament passed the Migration Amendment Bill 2013, entrenching ASIO's unfettered and non-reviewable powers in legislation.<sup>11</sup> The legislation makes it a condition of a protection visa that the applicant does not have an adverse security assessment from ASIO. Decisions to refuse or cancel a protection visa on these grounds are not reviewable by a tribunal. The Government also indicated that it rejected the recommendation of the Senate Legal and Constitutional Affairs Committee that the role of the Independent Reviewer be put into legislation. It has previously indicated that it plans to abolish the role – a small concession that was made by the Labor government in 2012, following the High Court's decision in M47.<sup>12</sup>

## Areas of legal concern

### 1 No procedural fairness

Most of the refugees had no advance notice of the allegations against them before the adverse security assessment was made. At most, they may have had certain contentions put to them in the course of their ASIO interview. None received reasons or evidence for the adverse assessment,<sup>13</sup> and attempts by their lawyers to gain confidential access through existing legal mechanisms were denied.<sup>14</sup> The substance of the decisions could not be reviewed,<sup>15</sup> 'contrary to basic principles of due process and natural justice'.<sup>16</sup>

A failure to provide reasons to an affected person must be regarded as a failure to substantiate the necessity of immigration detention. Thus, it is not merely an incidental or procedural defect. 'If a person is not told why they are considered to be a security risk, they cannot contest that assertion, and there can be no confidence that the assertion is substantiated in light of all the relevant evidence.'<sup>17</sup>

While in theory judicial review was available, in reality it was rendered nugatory given the dilution of procedural fairness in legislation and the common law, which can amount to 'nothingness'.<sup>18</sup> Without reasons for the decision, it was exceptionally difficult to isolate grounds for review. Further, public interest immunity could be invoked to preclude the disclosure of relevant materials in court and effectively exempt the assessment from review. And finally, if the Attorney General certified that disclosing such information would prejudice Australia's security, then a court would have to give primary weight to this view.<sup>19</sup>

## 2 Arbitrary detention

In August 2013, the UN Human Rights Committee found that Australia's indefinite detention of these refugees was unlawful under international law.<sup>20</sup> This followed similar conclusions by Australian expert bodies.<sup>21</sup>

Detention is only lawful if it is reasonable, necessary and proportionate in all the circumstances, and can be periodically reviewed. The only basis on which the Australian government could justify detaining the refugees would be if it could show that there was a particular individual risk of a person absconding, or committing a crime against others, or engaging in acts contrary to national security. This would have to be demonstrated on a case-by-case basis, and the government would also have to show that there were no other, less intrusive, measures that could achieve the same objectives (such as through mandatory reporting requirements). Further, if Australia did have sufficiently strong evidence that any of the detained refugees had committed a crime in the context of the armed conflict in Sri Lanka, for instance, or by association with an organization such as the LTTE, it could prosecute them under Australian law.

The Australian government has not been able to demonstrate any of these things.

The refugees are unable to challenge their detention in an Australian court, which is also a breach of international law. As the UN Human Rights Committee noted, even if judicial review is technically available, it must enable the court to order release if the detention is contrary to international law. Australian courts do not have this power.

## 3 Cruel, inhuman or degrading treatment

The UN Human Rights Committee found that the cumulative conditions of the refugees' immigration detention constituted cruel, inhuman or degrading treatment. This was because of its arbitrary character, protracted and/or indefinite duration and difficult conditions – including inadequate physical and mental health services and the refugees' exposure to unrest and violence (such as attempted suicides). Between May and November 2012, four of the refugees attempted suicide. The Committee said that these factors, along with the government's refusal to provide them with information and procedural rights, together inflicted 'serious psychological harm' upon the refugees in violation of international human rights law. The government's provision of health care and mental support services did not remedy these negative impacts.

The threshold for cruel, inhuman or degrading treatment is very high, which makes this finding particularly potent.

## 4 Australia is out-of-step with other countries

Australia's blunt approach to security assessments is wholly out of step with comparable democratic countries, and arguably is facilitated by the absence of a domestic bill of rights. Throughout the EU, as well as in the US, Canada and New Zealand, human rights protections are balanced on a case-by-case basis against competing public interests such as national security, rather than automatically overridden. The appointment of a 'special advocate' to examine confidential, security-sensitive evidence on behalf of the affected person is a procedure that is used in the UK, Canada and New Zealand, for example. As Saul has observed: 'Those places are no less safe than Australia because of it. Fairness ultimately enhances security rather than diminishes it. ... [A]llowing people to test the allegations sharpens security decisions and focuses scarce resources only on those who are

truly dangerous.<sup>22</sup> In other cases, it may be able to prosecute the person and determine through a legal process whether or not they have committed a crime.

Indefinite detention is also unlawful in comparable democratic countries.<sup>23</sup> Such countries have pioneered alternatives to detention, some of which have been adopted in the Australian context with respect to counter-terrorism offences (eg control orders). In the migration context, it is already possible for the Minister to enable people to reside in 'community detention', subject to specific conditions, instead of closed immigration detention.<sup>24</sup> However, as successive reports by the Australian Human Rights Commission have shown, even though there is a separate security assessment process for community detention, the government takes a blunt approach. It assumes that once a person has an adverse ASIO security assessment, he or she will not pass the security assessment for community detention and thus it is pointless to go through the process. Yet, as the Law Council of Australia has observed, such a blanket approach is inappropriate, 'particularly in circumstances where no consideration has been given to whether the perceived security threat posed to the community in the specific case might be addressed through the imposition of conditions.'<sup>25</sup> Conditions might include requirements to reside at a specified location, curfews, travel restrictions, regular reporting or even electronic monitoring.<sup>26</sup>

Yet, despite this, Parliament has refused to reform the process.<sup>27</sup> As noted above, on 14 May 2014 Parliament chose instead to entrench ASIO's unfettered and non-reviewable powers in legislation.<sup>28</sup>

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<sup>1</sup> In *Plaintiff M47/2012 v Director General of Security* [2012] HCA 46, the High Court held that prescribing public interest criterion 4002 as a criterion for the grant of a protection visa was beyond the power conferred by s 31(3) of the *Migration Act 1958* (Cth) and thus invalid. A bill before Parliament seeks to amend the *Migration Act* to require that a condition for a protection visa is that the applicant does not have an adverse security assessment by ASIO, and to clarify that neither the RRT nor the AAT can review a visa refusal or cancellation because of an adverse security assessment: see Migration Amendment Bill 2013. This passed the House of Representatives on 12 February 2014.

<sup>2</sup> Ben Saul, 'ASIO is Judge, Jury and Executioner', *New Matilda* (4 October 2012), available at <https://newmatilda.com/2012/10/04/asio-judge-jury-and-executioner>.

<sup>3</sup> UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka* (April 2009) 37–8; see also UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka* (21 December 2012) 40–1.

<sup>4</sup> Ben Saul, 'Dark Justice: Australia's Indefinite Detention of Refugees on Security Grounds under International Human Rights Law' (2012) 13 *Melbourne Journal of International Law* 685.

<sup>5</sup> Saul, above n 4, fn 102 (omitted here). These are unlawful justifications for detention pursuant to ICCPR, art 9(1).

<sup>6</sup> While some were released into community detention for a time, they were subsequently returned to closed facilities. See AHRC report in relation to Ms E (2013).

<sup>7</sup> Saul, above n 4, fn 13.

<sup>8</sup> *Ibid*, fn 15.

<sup>9</sup> Even if the government had invoked the exception to *non-refoulement* under article 33(2) of the Refugee Convention, the broader scope of the principle under international human rights law (which has no exceptions) would prevent their removal. This has been recognized in Australia.

<sup>10</sup> Australian Human Rights Commission, 'Immigration detainees with adverse security assessments v Commonwealth of Australia (Department of Immigration and Citizenship)' [2013] AusHRC 64 (Report into arbitrary detention and the best interests of the child) at [84] citing the Department of Immigration and Citizenship; see also related paragraphs.

<sup>11</sup> Migration Amendment Bill 2013 (Cth),

[http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r5161](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5161)

<sup>12</sup> Senator Michaela Cash, Second Reading, Migration Amendment Bill, Senate Hansard, 14 May 2014, p. 23; Oliver Laughland, Coalition would scrap independent refugee review, *The Guardian*, 30 August 2013,

<http://www.theguardian.com/world/2013/aug/30/coalition-rules-out-review-of-asio-findings>. See also, n

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<sup>13</sup> Communication to the United Nations Human Rights Committee (28 August 2011) 14 as cited in Saul, above n 4, fn 7. All the Independent Reviewer was able to reveal was a very brief summary which shed no light on the reasoning or material relied upon to support it.

<sup>14</sup> See, eg, materials cited in Saul, above n 4, fn 73-75: *Administrative Appeals Tribunal Act 1975* (Cth) ss 39A, 39B (in the exercise of inherent judicial power); *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth); *Leghaei v Director-General of Security* [2005] FCA 1576; *SBEG v Secretary, Department of Immigration and Citizenship* [2012] FCA 277.

<sup>15</sup> By contrast, Australian citizens and permanent residents have a right of review of an adverse security clearance by the Administrative Appeals Tribunal. An adverse security clearance might be issued if someone sought to work as a government official, for example.

<sup>16</sup> Australian Human Rights Commission, Submission to *Independent Review of the Intelligence Community*, April 2011, 6 available at <https://www.humanrights.gov.au/independent-review-intelligence-community-submission-2011>.

<sup>17</sup> Australian Human Rights Commission, Submission to *Independent Review of the Intelligence Community*, April 2011 as cited in Saul, above n 4, 19.

<sup>18</sup> *Leghaei v Director-General of Security* [2007] FCAFC 37, [51] referring to *Leghaei v Director-General of Security* [2005] FCA 1576 (10 November 2005) at [88].

<sup>19</sup> See *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

<sup>20</sup> UN Human Rights Committee, *FKAG and others v Australia*, Communication No 2094/2011 (30 August 2013), UN Doc CCPR/C/108/D/2094/2011

[http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/AUS/CCPR\\_C\\_108\\_D\\_2094\\_2011](http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/AUS/CCPR_C_108_D_2094_2011)

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<sup>21</sup> See, eg, materials cited in Saul, above n 4, fns 16-23: *SBEG v Secretary, Department of Immigration and Citizenship* [2012] FCA 277; *Sagar v O'Sullivan* (2011) 193 FCR 311; *Soh v Commonwealth* (2008) 101 ALD 310; *Parkin v O'Sullivan* (2009) 260 ALR 503; *Leghaei v Director-General of Security* (2007) 97 ALD 516; *Kaddari v Minister for Immigration and Multicultural Affairs* (2000) 98 FCR 597; *Director General Security v Sultan* (1998) 90 FCR 334; Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98 (2004) 408; Australian Human Rights Commission, Submission to *Independent Review of the Intelligence Community*, April 2011; Senate Joint Select Committee on Australia's Immigration Detention Network, Parliament of Australia, *Final Report* (2012) 161; UNHCR, 'Expert Roundtable on National Security Assessments for Refugees, Asylum Seekers and Stateless Persons in Australia' (Chair's Summary, 3 May 2012); Australian Labor Party, *National Platform* (Australian Labor, 2011) 173-4 [161]; Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012 (Cth).

<sup>22</sup> Saul, above n 2.

<sup>23</sup> The International Law Commission ('ILC') also supports this approach in its current draft articles on protection of the human rights of persons who have been or are being expelled, by suggesting that '[t]he duration of detention may not be unrestricted. It must be limited to such period of time as is reasonably necessary for the expulsion decision to be carried out. All detention of excessive duration is prohibited'. See International Law Commission, Report of the International Law Commission: Sixty-Second Session, UN GAOR, 65th sess, Supp No 10, UN Doc A/65/10 (2010) 279 n 1259 as cited in Saul, above n 4, fn 143.

<sup>24</sup> *Migration Act*, s 198AB.

<sup>25</sup> Submission No 2 by the Law Council of Australia to the Senate Legal and Constitutional Affairs Inquiry into the Migration Amendment Bill 2013 (19 December 2012) [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2680%20-%20Migration%20and%20Security%20Legislation%20Amendment%20\(Review%20of%20Security%20Assessments\)%20Bill%202012.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2680%20-%20Migration%20and%20Security%20Legislation%20Amendment%20(Review%20of%20Security%20Assessments)%20Bill%202012.pdf).

<sup>26</sup> Australian Human Rights Commission, above n 10, [65].

<sup>27</sup> See, eg, Saul, above n 4, 4 citing the Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012 (Cth).

<sup>28</sup> Migration Amendment Bill 2013 (Cth). See also the report of the Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment Bill 2013 [Provisions]* (February 2014).