



Professor Ben Saul

Professor of International Law

Sydney Centre for International Law, Faculty of Law

Joint Select Committee on Australia's Immigration Detention Network

By email: immigration.detention@aph.gov.au

31 August 2011

Dear Committee,

Please accept this late submission into your inquiry. I am a Professor of International Law and barrister specialising in human rights law, refugee law, and security law.

I also act for 40 refugees currently in immigration detention who have received adverse security assessments from the Australian Security Intelligence Organisation ('ASIO'), and who are lodging complaints with the United Nations Human Rights Committee (under the First Optional Protocol to the *International Covenant on Civil and Political Rights* ('ICCPR')). These refugees have been in administrative detention for between one year and two and a half years. They cannot be safely returned to their countries of origin; no other country has agreed to take them; and Australia will not release them. I **annex**, as a supporting document, a copy of the draft consolidated UN complaint, which forms the basis of their individual complaints to the UN Committee.

The legal views expressed in that complaint, to which I refer the Committee for details, are the basis of this submission. In sum, I draw the following conclusions about the legal situation of refugees in detention who have received adverse security assessments:

1. Their protracted or indefinite detention is arbitrary and unlawful under article 9(1) of the ICCPR. Specifically:

- (a) Australia has not demonstrated the substantive necessity of their initial detention, by conducting any personal, individual assessment of any risks posed by each of them upon arrival;
- (b) Australia has not demonstrated the substantive necessity of their initial detention, by providing sufficient reasons or evidence to substantiate any bare assertion by ASIO that they are security risks;
- (c) Australia has not shown that less invasive alternatives (of which there are many available under Australian law) to their detention are unavailable or would be ineffective;

- (d) Their continuing detention is potentially indefinite and unreasonable, since it is neither time limited nor subject to periodic review;
 - (e) There are no current, pending and realistic prospects of their removal to another country, rendering their continuing detention arbitrary;
 - (f) The real purpose of their ongoing detention – preventive security detention where removal is not realistic – is not specifically authorised by law;
 - (g) Their detention constitutes a prohibited penalty (on account of their ‘unlawful’ mode of entry to Australia) under article 31(1) of the 1951 Refugee Convention, which is the relevant *lex specialis* qualifying the determination of whether detention is arbitrary under the ICCPR;
 - (h) Their detention pending removal is not supported by international refugee law as the relevant *lex specialis* governing their detention, specifically because neither the exclusion grounds of Article 1F nor Article 33(2) of the 1951 Refugee Convention are met.
- 2. Their detention is not subject to effective judicial review and is inconsistent with Australia’s obligations under article 9(4) of the ICCPR. Specifically:**
- (a) They are unable to effectively challenge the necessity of their detention in the Australian courts. Judicial review is limited to a purely formal determination of whether they meet certain narrow statutory criteria (such as being an ‘offshore entry person’ or ‘unlawful non-citizen’), and cannot test the merits of any substantive grounds justifying detention;
 - (b) They are unable to effectively challenge the adverse security assessments issued by ASIO, upon which the decisions to refuse them refugee protection visas and to detain them are based. In particular:
 - (i) The reasons and evidence for their adverse security assessments have not been disclosed to them, because ASIO has decided to refuse any disclosure to them (including even a redacted summary);
 - (ii) They enjoy no statutory rights to judicially challenge their assessments under the *Australian Security Intelligence Organisation Act 1979* (Cth) (‘ASIO Act’), or to review the merits of the assessments before any administrative tribunal;
 - (iii) Australian courts are not empowered to review the substantive ‘merits’ of adverse security assessments, but are confined to limited judicial review of them for errors of law (‘jurisdictional error’);

- (iv) Such judicial review at common law is *practically* unavailable, because Australia has not disclosed to them any reasons for, or evidence substantiating, their adverse security assessments, and they are therefore unable to identify any *prima facie* errors of law which would permit them to legitimately commence proceedings, without risking abuse of the courts' process and incurring costs orders;
- (v) They are unable to compel disclosure of the reasons for, or evidence substantiating, their adverse security assessments, both because the courts have accepted that procedural fairness at common law is reduced to 'nothingness' in their circumstances (as long as the ASIO Director-General has given genuine consideration to whether disclosure would not prejudice national security), and/or public interest immunity would preclude disclosure to them anyway; and
- (vi) There is no other special judicial procedure enabling their adverse security assessments, and thus their detention, to be tested to the standard demanded by article 9(4).

3. The circumstances of their detention inflict, or risk inflicting, serious psychological harm on detainees, contrary to articles 7 and 10(1) of the ICCPR. Specifically, such harm cumulatively arises because of:

- (a) The protracted, indefinite and arbitrary character of their detention; and
- (b) The inadequate conditions of their detention, which include:
 - (i) Inadequate physical and mental health services;
 - (ii) Exposure to unrest and violence in detention, and related risks of punitive legal treatment;
 - (iii) The risk of excessive use of force by the authorities; and
 - (iv) Grave risks of experiencing or witnessing suicide or self-harm.

4. The detrimental impacts of arbitrary detention on families and children is contrary to articles 17(1), 23(1) and 24(1) of the ICCPR, by unjustifiably interfering in family life and failing to protect families and children.

Each of these arguments is developed in turn in this submission. Please be in touch if you require any further information.

Yours sincerely