RACS REFUGEE ADVICE & CASEWORK SERVICE

August 2019

RACS Briefing Note – Qantas and the deportation or forced movement of people seeking asylum and refugees

1. Overview

There are a number of human rights issues and risks with commercial airlines agreeing to transport people seeking asylum on behalf of the Department of Home Affairs ('the Department').

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

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

2. Legal Framework

Australia has international human rights obligations under treaties such as the Refugee Convention, the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC) and the Universal Declaration of Human Rights.

An airline's involvement in the involuntary deportation or forced movement of people seeking asylum also contravenes the United Nation's Guiding Principals on Business and Human Rights, which note that business enterprises have an obligation, independent of States, to fulfil human rights obligations 'over and above compliance with national laws'.[3]

We call on Qantas and other commercial airlines to meet their human rights obligations, and we emphasise significant human rights risks that arise from the participation in deportation and forced movement of people below.

3. Human Rights Risks

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

In May 2017, the Minister for Home Affairs Hon Peter Dutton announced a deadline of 1 October 2017 by which a large cohort of people seeking asylum who arrived by boat in 2012 and 2013 were supposed to apply for temporary protection visas.[4] The deadline was implemented despite the fact that many people

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

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

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

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

within the cohort had been statutorily barred from making an application until 2016. This window of time, coupled with resource constraints on pro bono legal services, meant that 71 people missed the 1 October 2017 deadline across Australia. This means that those 71 people now cannot lodge a valid protection visa application, even though they may hold a credible fear of persecution in their home country. In some cases, people have attempted unsuccessfully to lodge a protection visa application after 1 October 2017.

RACS is assisting these people, and it is our experience at RACS that since 1 October 2017 the Minister for Home Affairs is refusing to "lift the bar" which would allow people seeking asylum to make a valid application and undergo a proper assessment of their protection claims.

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

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

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

From mid 2018 and over the following years, temporary protection visas that have durations of 3 or 5 years will expire. Prior to the expiry of their temporary protection visa, visa holders must re-apply for protection. Any person who does not re-apply for protection prior to their temporary protection visa expiring will also be barred from making a valid re-application. We have already seen some refugees miss their deadline to re-apply for various reasons, and expect this number to grow. This may result in the indefinite detention or forced deportation of people that have previously been declared refugees by the Department of Home Affairs and still fear persecution.

b) Separation of families seeking asylum

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

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

The Minister has the power to intervene in such cases; however this personal power is non-compellable and is rarely exercised. Just last year, a Tamil man who was both a husband and father was removed

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

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

involuntarily to Sri Lanka, as his application was made and assessed separately to his wife and child.[7] We understand the wife and child were granted 5 year temporary protection visas (known as Safe Haven Enterprise Visas), but they arrived on a later boat to the husband and father and so applied separately to him under a different legal framework.

The UN has also called on the Government to end the practice of separating family members through offshore processing. There were a number of families separated between Manus Island, Nauru and Australia.[8] There was a case of one refugee that was faced with the impossible choice of choosing between their family unity and expressing interest in resettlement in the USA.[9]

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

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

By carrying out involuntary deportations which separate family members from their loved ones, the Department of Home Affairs and participating contractors breach international human rights, including the rights of children.

c) Deteriorating country conditions

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

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

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

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

[8] UNHCR, 24 July 2017, 'UNHCR chief Filippo Grandi calls on Australia to end harmful practice of offshore processing' available at: < http://www.unhcr.org/en-au/news/press/2017/7/597217484/unhcr-chief-filippo-grandi-calls-australia-end-harmful-practice-offshore.html>.
The Guardian, 10 November 2018, 'Many families remain separated amid ongoing Nauru medical transfers' https://www.theguardian.com/australia-news/2018/nov/10/many-families-remain-separated-amid-ongoing-nauru-medical-transfers.

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

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

[11] See, as an example of a case in which the Minister refused to interview, The Guardian, 27 July 2018, 'Australia deports Tamil asylum seeker despite father's murder' available at:

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

d) Transport of people to detention centres

Transporting people from one detention centre to another also risks breaching human rights. RACS is concerned by the often prolonged detention of refugees and those seeking asylum in onshore detention centres, and has witnessed the deterioration of detainees' physical and mental health as a consequence. The Australian Human Rights Commission has reported consistently over the last decade[12] on cases where a person's continuing detention has constituted a breach of their rights under international conventions such as the ICCPR, and has found in many cases that people are arbitrarily detained in breach of the very fundamental right to liberty.

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

The manner in which transfers and deportations are carried out also causes distress to detainees. The Australian Human Rights Commission report on Yongah Hill Immigration Detention Centre notes that transfers are undertaken with little or no warning to detainees in the early hours of the morning. The Commission heard evidence that also suggested that the nature of transfers had created significant concern and anxiety among some people in detention.[13] This has also been RACS' experience, where our clients are often removed without prior warning, preventing them from communicating their transfer to us. RACS is also aware of detainees being transferred from a detention centre close to their community and family in Sydney or Melbourne to remote centres such as Christmas Island or Yongah Hill.

e) Nauru and Papua New Guinea immigration centres

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

The UNHCR has made its position clear that offshore processing undermines the global refugee system and constitutes a failure by Australia to afford protection to refugees irrespective of their mode of arrival. The UNHCR has found that the conditions on both Manus Island (Papua New Guinea) and Nauru have caused harm to those detained there.[14] A senior UNHCR official recently described the mental health situation of offshore detainees as "very, very shocking".[15] The media and other reporting bodies have found the conditions on Manus and Nauru to constitute torture, and medical and other support services

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<https://www.theguardian.com/world/2017/sep/22/an-impossible-choice-the-nauru-refugee-forced-to-choose-between-family-and-freedom>.

[12] See Australian Human Rights Commission Human Rights Reports at <https://www.humanrights.gov.au/our-work/legal/projects/human-rights-reports>.

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

[14] UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees on the Inquiry into the Serious Allegations of Abuse, Self-harm and Neglect of Asylum-seekers in Relation to the Nauru Regional Processing Centre, and any like Allegations in Relation to the Manus Regional Processing Centre Referred to the Senate Legal and Constitutional Affairs Committee*, 12 November 2016, available at: <http://www.refworld.org/docid/591597934.html>.

[15] ABC News, 27 March 2018, 'UN official visiting Nauru detention centre concerned about 'shocking' mental health situation' available at: <http://www.abc.net.au/news/2018-03-27/unhcr-says-nauru-refugees-mental-health-situation-shocking/9591846>.

remain totally inadequate to meet the complex physical and mental health needs of the individuals there. 12 people have died in offshore detention since 2014.[16]

RACS recommends that Qantas does not transfer any detainee to offshore processing countries, currently Nauru and PNG, as the conditions there constitute an egregious breach of human rights.

f) Deportations in circumstances where non-refoulement obligations have not been correctly considered

A number of circumstances arise in Australia's domestic refugee law system whereby the Department contravenes international human rights law. In 2014, the *Migration and Maritime Powers Legislation Amendment (Resolving the Legacy Caseload) Act* made sweeping changes to refugee law and policy in Australia that departed from international law standards. Significantly, the definition of refugee narrowed in domestic Australian law.

Section 197C of the *Migration Act 1958* (Cth), which was also introduced in 2014, explicitly provides that the requirement to remove unlawful non-citizens arises regardless of any non-refoulement obligations that may exist. The existence of this section represents another significant and deliberate step by Australia away from honouring our international obligations, and means that the Department of Home Affairs is obligated to attempt to remove certain people seeking asylum regardless of whether Australia's non-refoulement obligations apply to a person .

Case law has made clear that the executive is prone to misconstrue their statutory task and conflate the concept of 'protection obligations' as they are defined in the *Migration Act 1958* with Australia's broader international obligations, including that of refoulement in the Refugee Convention. This has been significant particularly in cases where a person may be facing deportation due to the cancellation of their visa. The Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, and his delegates have the power to cancel or refuse a person's visa in a variety of circumstances.[17] The Minister also has the extraordinary power to set aside carefully considered Administrative Appeals Tribunal decisions.[18] Case law has illustrated that during the exercise of broad-reaching cancellation and refusal powers, decision makers can fail to correctly consider Australia's refoulement obligations and other international convention obligations.[19] In the Federal Court decision of *Ibrahim v Minister for Home Affairs*[20] the full bench found that the Assistant Minister, who exercised a cancellation power, failed to afford Mr Ibrahim procedural fairness and failed to properly understand how the law applying to protection visa applications is different to Australia's non-refoulement obligations. Similarly, in *Omar v Minister for Home Affairs*[21] Mortimer J found that the Minister failed to engage with Mr Omar's submissions, which raised Australia's non-refoulement obligations as an argument to support the revocation of his visa cancellation. Mortimer J found that the Assistant Minister's failure to carefully and seriously consider Australia's non-refoulement obligations and the consequences that flow from such obligations was not a rational or reasonable exercise of power.[22] However, we reiterate that the courts can only intervene in limited circumstances where domestic law has not been properly applied, irrespective of international law.

Another example of Australia stepping further away from its international treaty obligations was illustrated by the outcome of the High Court case *SZTAL v Minister for Immigration and Border Protection*.[23] In that case, the majority of the High Court settled on a narrow reading of the complementary protection obligations contained in section 36 as defined by section 5(1). These provisions were enacted in 2012 to

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[16] The Guardian, 20 June 2018, 'Deaths in offshore detention: the faces of the people who have died in Australia's care' available at: <https://www.theguardian.com/australia-news/ng-interactive/2018/jun/20/deaths-in-offshore-detention-the-faces-of-the-people-who-have-died-in-australias-care>.
[17] For example, under the 'character test' provisions of the Act, or where a person as given incorrect information (see section 116 of the Act).
[18] See section 501A of the *Migration Act 1958* (Cth)
[19] For example under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
[20] [2019] FCAFC 89.
[21] [2019] FCA 279.
[22] At [57]-[63].
[23] *SZTAL v Minister for Immigration and Border Protection*; *SZTGM v Minister for Immigration and Border Protection* [2017] HCA 34.

give effect to Australia's obligations under the CAT and the ICCPR. Despite this, Australia's narrower definition, requiring the *intentional* infliction of torture, degrading or inhumane treatment or punishment, departs significantly from international jurisprudence, where the concept of intention differentiates torture from the separate concept of degrading or inhumane treatment or punishment. As a consequence of confining this definition in interpreting Australian law, the consequence of *SZTAL* is such that there is nothing in Australian law preventing the deportation of those who would be subjected to *unintentional* cruel, inhuman or degrading treatment or punishment in their home countries. Arguably, this constitutes a further step away from honouring our treaty obligations.

4. Conclusion

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

In this context, noting the inadequacy of domestic mechanisms to ensure human rights are preserved, and the continued reticence of the Government to fulfil Australia's international human rights obligations, it is more important than ever that corporations such as Qantas take the lead on human rights and put an end to complicity.

For further comment, please contact me on 02 8317 6500 or sarah.dale@racs.org.au.

Yours sincerely,

Sarah Dale
Principal Solicitor
Refugee Advice and Casework Service (Australia) Inc