

ASIO's Catch 22: Asylum in Limbo

By Sandra Murray

Almost 50 recognised refugees remain in detention in Australia due to 'adverse security assessments' by ASIO. They have no access to the information used to make the assessments, and no right to have them reviewed. They are in a legal limbo that could stretch on indefinitely. To mark Refugee Week 2013, three experts asked why this situation is allowed to exist, what effect it has on the people subject to adverse assessments, and how it can be fixed.

Jane Dixon SC, barrister and President of Liberty Victoria, began by reflecting on her career in criminal law and contrasting the experiences of refugees with Australian citizens facing criminal charges. It is concerning to note, she said, that refugees are not afforded the same procedural protections as criminals due to a lack of transparent and accountable processes.

Also worrying was the independent review procedure undertaken by The Hon Margaret Stone, who last year was appointed Independent Reviewer of ASIO Adverse Security Assessments, Ms Dixon said. While this review procedure is a step in the right direction in providing refugees some procedural relief, the process has obvious flaws: the largely non-transparent review is conducted by a single person and is not subject to appeal. Further, information used in the review is provided by ASIO, and it is unclear the extent to which Stone can look beyond that information. Even if the assessment was found to be incorrect, Ms Dixon noted, the Department of Immigration and Citizenship is not obliged to release the refugee from detention.

Patrick Emerton, Senior Lecturer in the Monash Faculty of Law and Associate of the Castan Centre, then discussed the legal issues surrounding the indefinite detention of refugees with adverse assessments. As he noted, ASIO's functions have evolved over time: while once it was an organisation of spies aiming to combat communism, it has more recently been involved in criminal investigations in terrorism and the regulation of entry into Australia. Its inception as a spy agency rather than a criminal investigation agency is significant, Dr Emerton emphasised, because it is not subject to the judicial oversight which plays a significant role in disciplining and controlling police powers – and this lack of discipline can lead to illegality, as demonstrated in the *UI-Haque* case heard by the Supreme Court of New South Wales.

Even when ASIO acts in accordance with the law, Dr Emerton said, the outcomes remain undesirable because of the way the Migration Act and ASIO Act are framed. Until the relevant regulation in the Migration Act was struck down in the 2012 M47 High Court challenge, for example, protection visas could not be granted until ASIO assessed the applicant against criteria that include the interests of foreign countries. Even today, ASIO advises the Minister for Immigration and Citizenship on the granting of a visas by reference to criteria that go beyond the safety of Australia and Australians.

Matthew Albert, a barrister who has represented a number of refugees and asylum seekers, then explained recent and impending High Court litigation on the subject and outlined how the situation may be changing through the courts.

In a powerful address, Mr Albert argued that the current system is unsatisfactory. Its operation in a legal, process and detail vacuum, he explained, makes it difficult for lawyers to represent their clients. It also means the process is drawn out, and therefore requires lawyers to act for a lengthy period of time, almost always pro bono.

Mr Albert emphasised that the bigger issue is not only that dozens of refugees are detained without charge and denied access to natural justice, but what this situation says about Australia as a country. The system shows that Australia is willing to tolerate the mistreatment of refugees, and that the legal system allows it. As he remarked, it is for this reason that the legal challenges are important and that pursuing the fundamental issue of the rule of law is critical.

The evening concluded with a lively discussion about the role that international human rights law may play in modifying the law in the courts, and about the need for the Australian community to tell politicians that the current process is undemocratic and unfair.

Mr Albert adeptly summarised the evening by borrowing words of US Judge Damon Keith:

"Democracy dies behind closed doors. When government begins closing doors it selectively controls information rightfully belonging to the people. Selective information is misinformation."



Jane Dixon SC addresses the crowd.