



Murdoch
UNIVERSITY

MURDOCH RESEARCH REPOSITORY

This is the author's final version of the work, as accepted for publication following peer review but without the publisher's layout or pagination.

The definitive version is available at

<http://dx.doi.org/10.1080/13218719.2015.1032951>

Kenny, M.A. and Procter, N. (2015) The fast track refugee assessment process and the mental health of vulnerable asylum seekers. *Psychiatry, Psychology and Law*, 23 (1). pp. 62-68.

<http://researchrepository.murdoch.edu.au/26949/>

Copyright: © The Australian and New Zealand Association of Psychiatry,
Psychology and Law.

It is posted here for your personal use. No further distribution is permitted.

The Fast Track Refugee Assessment Process and the Mental Health of Vulnerable Asylum Seekers

Mary Anne Kenny^a and Nicholas Procter^{b*}

^a*School of Law, Murdoch University Western Australia;* ^b*Chair, Mental Health Nursing, School of Nursing and Midwifery, University of South Australia, Adelaide, Australia*

On 5 December 2014, the Australian Senate passed the Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth). This article discusses the intersections between an aspect of the new law – the ‘fast track assessment’ Refugee Status Determination (RSD) procedure, mental ill health and vulnerability of asylum seekers. Insecure visa status, post-arrival stressors and living in constant uncertainty and fear of rejection and repatriation are known to compound existing pre-migration trauma for asylum seekers. The ‘fast track assessment’ procedure, in which a large number of asylum seekers’ claims for protection will be processed under the new law, suggests a likely worsening of mental distress, despair and deterioration. The combined nature of mental health and legal support are an increasing feature of a co-ordinated and much needed integrated response to assist vulnerable asylum seekers living in the community. It is suggested that asylum seekers with an existing mental health condition who receive negative outcomes during the RSD process are particularly vulnerable. All asylum seekers should have mental health support made available to them when visa decisions are handed down or shortly afterwards.

Key words: asylum seekers; mental health; refugee status determination; refugees; temporary protection visas.

Introduction

On 5 December 2014, the Australian Senate passed the Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth). One aspect of the new law, the ‘fast track assessment’ (FTA) procedure constitutes a radical shift in the manner in which a large number of asylum seekers’ claims for protection will be processed.

This procedure will apply to approximately 30,000 asylum seekers who arrived in Australia as ‘unauthorised maritime arrivals’¹ between August 2012 and December 2013. As at the end of December 2014 over 28,000

of this group were living in the community on bridging visas or in community detention, and approximately 3000 were held in immigration detention facilities.²

Asylum seekers have been exposed to threats, violence and separation and tend to be more vulnerable to mental ill health than others who had similar experiences.³ Asylum seekers experience post-arrival stressors that refugees settled in the community do not. They have insecure visa status and live in constant uncertainty and fear of refugee status determination rejection and repatriation.⁴ Asylum seekers in the current backlog have been waiting in limbo for almost two years to

*Correspondence: Nicholas Procter, Chair, Mental Health Nursing, School of Nursing and Midwifery, University of South Australia, Adelaide, Australia. Email: Nicholas.Procter@unisa.edu.au

have their protection claims assessed. The refugee determination process and social factors such as the inability to work are closely associated with symptoms of post-traumatic stress disorder and major depressive disorder.⁵ The ongoing uncertainty of their future is associated with deepening mental deterioration.⁶ The opportunity to present their claims will be a welcome one for many; however, there are real concerns that the new FTA procedures carry real risks of privileging efficiency at the expense of fairness. This article outlines and explains the new procedures and explores what the potential impact may be on the already fragile mental health of asylum seekers in the community.

What is the FTA Procedure?

Australia is a state party to the Convention relating to the Status of Refugees 1951,⁷ the Protocol relating to the Status of Refugees 1967⁸ (the Refugees Convention), the International Covenant on Civil and Political Rights⁹ (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁰ (CAT). As part of these international treaty obligations Australia has to make sure that there is a fair and effective refugee status determination (RSD) process in order to properly identify those individuals in need of protection.

The FTA procedure will allow asylum seekers to make an application for protection to the Department of Immigration and Border Protection (the Department).¹¹ Time frames for the provision and assessment of claims will be short. Applications that are refused will be referred to a newly created Independent Assessment Authority (IAA).¹² Reviews by the IAA will be conducted 'on the papers'.¹³ Only in 'exceptional circumstances' will the IAA accept or request new information or interview the applicant.¹⁴ Exceptional circumstances are not defined in the legislation. The Explanatory Memorandum states that this could be where 'there is a significant change of conditions in the

applicant's country of origin that means the applicant may now engage Australia's protection obligations'.¹⁵

Some cases will be excluded from accessing independent merits reviews altogether. This will include cases where the Department assess the claims to be 'manifestly unfounded' where the visa applicant relied upon a 'bogus document' or had access to effective protection in another country.¹⁶

Prior to this change, those who had their protection applications refused by the Department were entitled to seek a full independent merits review of the decision by the Refugee Review Tribunal (RRT). The RRT is obliged to invite review applicants to a hearing and conduct a fresh examination of the case, and is able to accept and review new evidence.¹⁷

After an assessment of claims, those that are found to be owed protection will be allowed to remain in Australia for up to three years on a 'Temporary Protection Visa' (TPV) or for up to five years on a 'Safe Haven Enterprise Visa' (SHEV). Claims will need to be assessed again before the visa expires to determine whether the person is still owed protection. If the person is found to engage Australia's protection obligations they will be granted another temporary visa.¹⁸

Holders of a TPV or a SHEV will have permission to work and study, and will be eligible to obtain welfare benefits. However, holders of temporary visas will not be able to sponsor family members to Australia.

Why was the FTA Introduced?

During Senate committee hearings in relation to the Bill, the Department stated that without the new FTA it would take up to seven years to process the backlog. The Department stated that changes were needed to 'deter abuse of the review system through the late presentation of claims that could reasonably have been presented earlier' and to 'deliver the consistent message that it is extremely important to provide sufficient evidence and

100

105

110

115

120

125

130

135

140

information to establish protection claims upfront'.¹⁹

The proposed FTA appears to be directed primarily at ensuring that the assessment and review processes are as brief as possible. Administratively efficient processes would be desirable for those that have been waiting for some years to have their cases assessed; however, it is unclear whether the FTA process will ensure that genuine claims for protection are identified and whether it is possible to arrive at a fair and true decision.

Refugee Status Determination, Credibility Assessments and Mental Health

The process of RSD is extremely difficult, complex and challenging. Decision makers are required to be aware of the legal framework and evidentiary issues and have to have sound knowledge and skill to be across complex law and evidentiary issues. As evaluation of credibility is central to the decision-making process, decision makers must also be aware of and assess the impact of trauma, gender, age and culture upon the ability of an asylum seeker to relay their story.

The current process stresses that the onus of proof lies with the asylum seeker, who must provide a complete statement of their claims for protection during their first interview with an officer of the Department. Asylum seekers are often not able to provide documentary evidence to support their claims, such as evidence of membership of political party, arrest warrants or prison certificates. The United Nations High Commissioner for Refugees (UNHCR) Handbook on Procedures and Criteria for Determining Refugee Status highlights this point:

Often ... an applicant may not be able to support his (sic) statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest

necessities and very frequently without personal documents.²⁰

The literature on RSD points to the fact that the credibility of an individual's claim is crucial to the success of their claim for protection.²¹ Decision makers are often looking for consistency and clarity in the asylum seekers' claims, and many refusals are on the basis that the asylum seeker's credibility has been undermined by inconsistencies within their claims.

Research demonstrates that post-traumatic stress disorder (PTSD) and other related mental health disorders may seriously affect the ability of an applicant to construct and convey a consistent narrative. Of particular concern are asylum seekers in the sequelae of trauma. Survivors of trauma often have high levels of hyper-arousal and cognitive intrusions, and, in some instances, avoidance.²² Traumatic experiences coupled with memory difficulties can affect credibility judgements in asylum decisions.²³ Other reasons may include a lack of knowledge about the legal process, lack of education or sufficient literacy in their own language or in English, lack of legal advice or mental illness:

[A]n applicant's reticence, hesitancy, comportment and attitude are not objective indicators of credibility. They can be equally indicative of post traumatic stress. Behaviour is a poor determinant of truthfulness and accuracy, particularly if decision makers interpret it with inadequate regard for gendered or culturally specific assumptions, or where the disparity in educational grounding creates a mismatch of expectations and understandings. Refugee determinations raise heightened concerns regarding misunderstandings arising from linguistic, cultural or mental health issues.²⁴

A recent study of RSD by the Department found that many decisions were overturned at the merits review level on the basis of different credibility findings. There may be a number of reasons for this, including inexperienced primary decision makers, reviewers more skilled

145

150

155

160

165

170

175

180

185

190

195

200

205

210

215

220

225

230

at creating a dialogue with visa applicants, or late disclosure of information if a person has suffered torture or trauma (such as rape).²⁵

The Federal Court has stated that before a decision maker can find that an applicant suffers from PTSD they must have proper medical evidence; once they have that evidence, a decision maker cannot make an adverse credibility finding without considering the impact of PTSD on the individual's credibility and their capacity to participate in the hearing.²⁶ Truncated timeframes involved in the FTA will present difficulties for applicants or their representatives to obtain relevant expert testimony.

Adverse findings in relation to credibility at the primary level will be harder to review at the IAA level in the absence of a hearing. The IAA may consider new evidence only if there are 'extraordinary circumstances'. During debate in the Senate an amendment was made to the section which states that new information can be provided to the IAA if the new information either could not have been provided to the DIBP before a decision was made, or was credible personal information which 'was not previously known and, had it been known, may have affected the consideration of the [applicant's] claims'. The explanatory memorandum accompanying this change noted that this amendment may allow an applicant to present evidence of 'significant torture and trauma'.²⁷ However, the memorandum stressed that the applicant will still have to demonstrate that there were some extraordinary circumstances as to why the information was not presented in the first instance,

to reinforce the policy position that fast track applicants must be forthcoming with all of their claims and provide all available information to the Minister before a fast track decision is made.²⁸

The amendment allows for some flexibility for the IAA to consider new evidence of torture and trauma, however the hurdle remains that there still must be some 'extraordinary circumstances' as to why it was not presented at first instance. Medical

and legal practitioners will need to take care to frame their submissions and expert reports in a manner that clearly addresses this issue.

International Comparisons

Several countries use accelerated or expedited asylum procedures to deal with asylum claims which are considered to be 'manifestly unfounded' or where the asylum seeker is from one of a list of countries which are generally considered to be safe.

However, Australia has decided to use an FTA for a group which, historically, have statistically been found to be refugees. Departmental statistics indicate that over the 4 years prior to 2013, an average of about 70% of asylum seekers arriving by boat were determined (at first instance) to be refugees and, on average, 93% of those who had their applications reconsidered following independent review, were accepted as refugees.²⁹

Research on the use of the expedited procedures in the United States found that it led to an increase in the number of appeals to superior courts, which consequently increased costs and decreased efficiency.³⁰ Similar findings have emerged in relation to the United Kingdom Detained Fast Track Procedure.³¹ Lack of appropriate time to seek and obtain legal assistance recently led the United Kingdom High Court to find the DFT system unlawful as there was an 'unacceptable risk of unfairness'.³² After an investigation into the DFT the United Kingdom Parliament's Joint Committee on Human Rights raised particular concerns:

It is self-evident that some asylum seekers – most obviously torture victims and those who have been sexually abused – are unlikely to reveal the full extent of experiences to the authorities in such a short-time period, and that this problem will be exacerbated where they are not able to access legal advice and representation, and the support of organisations able to help them come to terms with their experiences.³³

The Fast Track Refugee Assessment Process and the Mental Health of Vulnerable Asylum Seekers 5

330 Australia is obligated to take positive
 steps towards adopting a fair and effective
 system for determining who is in need of pro-
 335 tection.³⁴ The problem is whether or not it is
 possible for accelerated procedures to be both
 fair *and* efficient. Current government policy
 in Australia is that there will be no govern-
 340 ment-funded legal advice to the majority of
 the legacy caseload. Funding for legal assis-
 tance in preparing their claims for protection
 will only be available to those considered the
 345 ‘most vulnerable’.³⁵ The nature, scope and
 consequences of asylum seeker vulnerability
 will require careful definition, monitoring
 and oversight. Current legal practice of RSD
 involves personal testimony by asylum
 350 seekers as a marker of credibility. Decision
 makers frequently synthesise various data
 sources and rely upon their own assumptions
 about human behaviour when making such
 judgements.³⁶

The Need for an Integrated Mental Health and Legal Response

355 In addition to evidence of traumatic experien-
 ces and asylum seeker processes being inter-
 linked, suicide is known to be the leading
 cause of premature death for asylum seekers
 360 in Australia.³⁷ People who have had first-
 hand experiences of self-harm and suicidal
 behaviour – either personally or as a witness
 – may find it difficult to engage with authori-
 ties for fear of further traumatic experiences.
 The forthcoming process will predictably be
 365 stressful, specifically in terms of mental dis-
 tress, despair and deterioration, and is likely
 to exacerbate psychological distress. People
 working closely with asylum seekers will
 encounter stories of personal sadness and
 370 uncertainty. Self-harm and suicidal behaviour
 amongst asylum seekers is likely to be associ-
 ated with previous trauma, having an uncer-
 tain future, fear of return, and a feeling of
 being ‘under intense pressure and scrutiny’
 and ‘boxed in’.

C4

Mental health needs and legal support are increasing features of a co-ordinated and

much needed integrated response to assist
 asylum seekers in the community. Now more
 375 than ever there is a need to *decrease uncer-*
tainty and *increase certainty* for asylum
 seekers. Denial of legal assistance will not
 meet the desired objective for asylum seekers
 380 to articulate their claims fully at the earliest
 stage of the process. It is important that there
 are safeguards such as legal advice, access,
 sufficient opportunities to prepare cases and a
 meaningful opportunity to appeal negative
 385 decisions.

For this reason, it is critical for the gov-
 ernment to allow for adequate legal and men-
 tal health support during the processes
 attendant upon applications for refugee sta-
 390 tus. Systemic direct service provision can
 help increase mental health protective factors
 linked to personal coping, family support and
 practical day-to-day circumstances (health
 care, accommodation, meal preparation) and
 prevent further injury associated with the
 395 inevitable disruptiveness of ongoing trau-
 matic experiences and uncertainty. Individual
 mental health assistance in some instances
 can be provided in conjunction with, during
 and after legal consultation. Culturally com-
 400 petent engagement during periods of excruciat-
 ing vulnerability and uncertainty can
 provide an important backdrop for feelings to
 be received, lives revealed and cultural
 405 injunctions to advance mental health protec-
 tive factors that asylum seekers perceive to
 be relevant and helpful. Asylum seekers with
 an existing mental health condition who
 410 receive negative outcomes during the applica-
 tion process are particularly vulnerable. All
 asylum seekers should have mental health
 support made available to them when deci-
 415 sions are handed down or shortly afterwards.

C5

C6

Notes

1. ‘Unauthorised maritime arrivals’ are defined as people who arrived in Australia by sea as an unlawful non-citizen; that is, without proper documentation (a valid passport and/or visa): Migration Act 1958 (Cth) s 5AA.

375

380

385

390

395

400

405

410

415

- 420 2. Commonwealth of Australia, Department of Immigration and Border Protection, 'Immigration Detention and Community Statistics Summary' (31 December 2014) <<http://www.immi.gov.au/About/Documents/detention/immigration-detention-statistics-dec2014.pdf>>.
- 425 **Q7**
- 430 3. J Lindgren and others, 'Mental Ill Health Among Asylum Seekers and Other Immigrants in Sweden' (2012) 8 (4) *International Journal of Migration, Health and Social Care* 167–79.
- 435 4. N Crumlish and P Bracken, 'Mental Health and the Asylum Process' (June 2011) 28 (2) *Irish Journal of Psychological Medicine* 57–60.
- 440 5. D Hocking, G Kennedy and S Sundram, 'Mental Disorders in Asylum Seekers: The Role of the Refugee Determination Process and Employment' (January 2015) 203 (1) *Journal of Nervous and Mental Disease* 28–32.
- 445 6. NG Procter, "'They First Killed His Heart (Then) He Took his Own Life". Part 1: A Review of the Context and Literature on Mental Health Issues for Refugees and Asylum Seekers' (2005) 11 (6) *International Journal of Nursing Practice* 286–91.
- 450 7. Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.
- 455 8. Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.
- 460 9. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
- 465 10. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
- 470 11. Applications are made by completing an Application for a Protection Visa Form 866: Commonwealth of Australia, Department of Immigration and Border Protection, 'Application for a Protection Visa' (form), <<https://www.immi.gov.au/allforms/pdf/866.pdf>> accessed 2 February 2015.
- 475 12. Migration Act 1958 (Cth), s 473CA.
13. Migration Act 1958 (Cth), s 473DB.
14. Migration Act 1958 (Cth), s 473DD.
15. Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill (2014) [722].
16. Migration Act 1958 (Cth) s 5 (1) definition of 'excluded fast track review applicant'.
17. Migration Act 1958 (Cth) s 425.
18. There are some limited circumstances where a person who is the holder of a SHEV can apply for a range of both temporary and permanent visas. The person must live and work or study in a designated regional area and not have received specified social security benefits for a period of 42 months. 480
19. Legal and Constitutional Affairs Legislation Committee, 'Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 Australia [Provisions]' Senate (2014) 25 ISBN 978-1-76010-123-7. 485
20. UNHCR, 'Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status' (1979, reedited January 1992) UN Doc HCR/IP/4/Eng/REV.1 [196] <<http://www.unhcr.org/3d58e13b4.html>> accessed 3 February 2015. 490
21. J Hunter and others, 'Asylum Adjudication, Mental Health and Credibility Evaluation' (2013) 41 *Federal Law Review* 471; M Kagen, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2002) *Georgetown Immigration Law Journal*; JA Sweeney 'Credibility, Proof and Refugee Law' (2009) 21 (4) *International Journal of Refugee Law* 700–726. 495
22. B Graham, J Herlihy and C Brewin, 'Overgeneral Memory in Asylum Seekers and Refugees' (2014) 45 *Journal of Behaviour Therapy and Experimental Psychiatry* 375. 500
23. H Rogers, S Fox and J Herlihy, 'The Importance of Looking Credible: The Impact of the Behavioural Sequelae of Post-traumatic Stress Disorder on the Credibility of Asylum Seekers' (2015) 21 *Psychology, Crime and Law* 139. 505
24. J Hunter and others, 'Asylum Adjudication, Mental Health and Credibility Evaluation' (2013) 41 *Federal Law Review* 471, 495.
25. S Tongue, 'Review of Refugee Decision Making Within the Current POD Process' (Department of Immigration and Border Protection Report 12 June 2012) <http://www.immi.gov.au/media/publications/research/_pdf/review-refugee-decision-making.pdf> accessed 3 February 2015, 16. 510
26. *SZACW v Minister for Immigration* [2003] FMCA 307 (21 July 2003). 515
27. Supplementary Explanatory Memorandum, Amendments to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [GH118] (Cth) [27]–[31]. 520
28. Supplementary Explanatory Memorandum, Amendments to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [GH118] (Cth) [27]–[31]. 530
- Q8**

The Fast Track Refugee Assessment Process and the Mental Health of Vulnerable Asylum Seekers 7

- 540 Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [GH118] (Cth) [31].
- 545 29. Department of Immigration and Border Protection, 'Asylum Trends Australia 2012-13 – Annual Publication' (2013) <<https://www.immi.gov.au/media/publications/statistics/immigration-update/asylum-trends-aus-2012-13.pdf>> accessed 3 February 2015.
- 550 30. S Legomsky, 'Restructuring Immigration Adjudication' (2010) 59 Duke Law Journal 1635, 1646.
- 555 31. UK Visas and Immigration, 'Detained Fast Track Processes – Timetable Flexibility: Asylum Instruction' (11 November 2012) <<https://www.gov.uk/government/publications/detained-fast-track-processes-timetable-flexibility-instruction>> accessed 3 February 2015.
- 560 32. *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245, [220]–[221].
33. Joint Committee on Human Rights, 'The Treatment of Asylum Seekers – Tenth Report' HL 81/HC 60 (2006–2007) <<http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/8102.htm>> accessed 3 February 2015 [266].
34. UNHCR, 'Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)' (31 May 2001) UN Doc EC/GC/01/12 <<http://www.refworld.org/docid/3b36f2fca.html>> accessed 3 February 2015. 565
35. Minister for Immigration and Border Protection, 'End of Taxpayer Funded Immigration Advice to Illegal Boat Arrivals Saves \$100 Million' (Media release 31 March 2014) <<http://www.minister.immi.gov.au/media/sm/2014/sm213047.htm>> accessed 22 December 2015. 570
36. J Herily, K Gleeson and S Turner, 'What Assumptions About Human Behaviour Underlie Asylum Judgements?' (2010) 22 International Journal of Refuge Law 351. 575
37. NG Procter, D De Leo and L Newman, 'Suicide and Self-harm Prevention for Detainees in Immigration Detention' (2013) 199 Medical Journal of Australia 730. 580

Proof