Masters in International Migration and Refugee Law

Thesis

No Second Chances:
Procedural Safeguards in the Australian Fast-Track Procedure in Light of International Refugee Law

Shota Hitomi

Date: 16 August 2019
Word Court: 21570 (excluding footnotes)
Table of Contents

1. CHAPTER 1: INTRODUCTION 3

1.1. EXECUTIVE SUMMARY 3

1.2. BACKGROUND 3

1.2.1 AUSTRALIA, THE REFUGEE CONVENTION AND ITS NON-REFOULEMENT OBLIGATIONS 3

1.2.2 AUSTRALIA’S REFUGEE PROGRAM 5

1.2.3 IMPLEMENTATION OF FAST-TRACK ASSESSMENT 6

1.3 METHODOLOGY 8

2. CHAPTER 2: ASSESSING PROCEDURAL SAFEGUARDS IN THE IAA 10

2.1 PRACTICAL ISSUES 10

2.2 AN ILLUSTRATION OF DOMESTIC PROCEEDINGS: M174/2016 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION 12

3. CHAPTER 3: INTERNATIONAL STANDARDS OF PROCEDURAL SAFEGUARDS 14

3.1. INTRODUCTION 14

3.2. EFFECTIVENESS OF NON-REFOULEMENT 14

3.2.1. IMPORTANCE OF NON-REFOULEMENT PRINCIPLE 15

3.2.2. THE UNHCR VIEW 16

3.2.3. COMPARATIVE SEVERITY OF CONSEQUENCE OF BREACH 17

3.2.4. THE ICCPR AND CAT 18

3.3. EFFECTIVE REMEDY GUARANTEES 20

3.3.1. ARTICLE 32 OF THE REFUGEE CONVENTION 20

3.3.2. ARTICLE 2(3) ICCPR – EFFECTIVE REMEDY 23

3.3.3. ARTICLE 13 ICCPR – RIGHT TO SUBMIT REASONS AND RIGHT TO REVIEW BY A COMPETENT AUTHORITY 25

3.4. ARTICLE 31 OF THE REFUGEE CONVENTION 27

3.5. FAIR HEARING GUARANTEES 29

3.5.1. ARTICLE 16 REFUGEE CONVENTION – ACCESS TO COURT OF LAW 29

3.5.2. ARTICLE 14 ICCPR – FAIR HEARING BEFORE A TRIBUNAL 30

3.6. CONCLUSION 34

4. CHAPTER 4: THE JUSTIFICATIONS OF FAST-TRACK PROCEDURES: A COMPARATIVE STUDY 36

4.1. INTRODUCTION 36

4.2. THE CEAS PROCEDURES (EU) 37

4.2.1. ACCELERATED PROCEDURES 37

4.3. EXPEDITED REMOVAL PROCEDURE (US) 38

4.1. JUSTIFICATIONS 39

4.1.1. GUARANTEE OF FIRST INSTANCE PROCEDURAL FAIRNESS 39

4.1.2. EFFICIENCY AND EFFICACY 43

4.2. CONCLUSION 45

5. BIBLIOGRAPHY 47
1. Chapter 1: Introduction

1.1. Executive Summary

The Australian public as a whole have long been indifferent to the consequential fate of asylum seekers fleeing persecution. Somehow, those fleeing persecution by boat, those who are labelled ‘illegal’ and those who are from ‘high-risk’ countries are taken to be unworthy of the minimal guarantees and protections which should be provided to all people. This is in spite of the special vulnerability of asylum seekers and the tentative positions they find themselves in. This adiaphorisation of asylum seekers has devastating consequences on the lives of people seeking asylum in Australia.

These measures which disadvantage and marginalise a vulnerable class of people are justified by politicians in Australia for a plethora of reasons. Asylum seekers are said to be expelled from Australia for ‘national security reasons’, push backs of boats are conducted to ‘protect our borders’, men, women and children are placed in offshore detention as a ‘deterrent’ and asylum procedures are changed for the sake of ‘efficiency’.

This thesis considers the lack of procedural safeguards provided within the Australian Fast-Track Assessment procedure of asylum seekers, in which a specific group of applicants are subjected to an accelerated procedure and precluded from basic procedural rights in their refugee status determination procedure. Applicants who have their initial application rejected by the Department of Home Affairs are automatically referred to the Immigration Assessment Authority, where ‘assessors’ review the matter ‘on the papers’, meaning that the applicant is unable to present new evidence or be afforded an oral hearing or interview to present his or her case.

It is argued that these procedural rules are unlawful under international law instruments, to which Australia are signatories. This thesis will place focus on the Refugee Convention, the ICCPR and the CAT. An analysis of the procedural safeguards which may be derived from these instruments will show that the Australian fast track procedure is in violation of international law instruments. Further, it is this thesis’ will to illustrate that the justifications used by Australian legislators to legitimise these deficient procedures would be unacceptable in many other jurisdictions.

1.2. Background

1.2.1  Australia, the Refugee Convention and its Non-Refoulement Obligations

The United Nations Convention Relating to the Status of Refugees (“the Refugee Convention”) was brought into force in Australia, when it ratified the Convention on 22 January 1954.¹

The Refugee Convention is the key international legal document relating to refugee definition. The Refugee Convention, inter alia, defines the term “Refugee” and outlines the rights of refugee and the obligations states owe to refugees. The Refugee Convention is underpinned by a number of fundamental principles, among them, non-refoulement, which refers to the right of a refugee not to be returned to a country where they risk persecution.

The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth)² (the “Amendment Act”) was introduced in Australia in 2014 in the context of a backlog of unprocessed asylum seekers with temporary bans on making any application for asylum.
international protection. Prior to the Amendment Act the power enabling the removal of non-citizens from Australia was pursuant to the reference to the Refugee Convention in section 36 of Australia’s Migration Act 1958, which provided that relevant provisions of the Migration Act must be understood in the context of these protection obligations under the Refugee Convention and its non-refoulement obligations.

Independent judicial interpretation has played an important role in understanding Australia’s international obligation under the Refugee Convention. The High Court of Australia in the case of Plaintiff M61/2010E v Commonwealth of Australia, previously stated prior to the Amendment Act coming into force that the Migration Act proceeds on the assumption that Australia owes protection to individuals, stemming from international obligations by not returning a person to a country where he or she has a well-founded fear of persecution for a Convention reason.\(^3\) The Refugee Convention was part of Australian domestic law, informing the courts of Australia’s international obligations prior to the enactment of Amendment Act. Australia’s refugee program was, underpinned by its obligation under the Refugee Convention and its non-refoulement obligations.

When the Amendment Act came into force in Australia in 2014, it enacted a multitude of changes to refugee law in Australia. Among these changes, a key amendment was to ‘clarify’\(^4\) Australia’s international human rights obligations by removing all reference to the Refugee Convention and non-refoulement obligations under international law from the Migration Act 1958 (‘Migration Act’).\(^5\) This statute removes judicial scrutiny of whether Australia complies with its non-refoulement obligations under international law when removing people and sets out its own refugee definition which are narrower than the Refugee Convention and in decided cases.\(^6\)

Further, the Amendment Act discards the common law which developed under judicial interpretation of the Migration Act and the Refugee Convention by codifying the Government’s own interpretation of the Refugee definition and non-refoulement obligations.

The Amendment Act creates new obligations in relation to the powers to remove people from Australia. Section 197C of the Amendment Act states when exercising powers to remove an unlawful non-citizen from Australia ‘it is irrelevant whether Australia has non-refoulement obligations in respect of that person’\(^7\), in essence legislatively removing the consideration of Article 33 of the Refugee Convention\(^8\), Article 6(1) of the International Covenant on Civil and Political Rights (‘ICCPR’), Article 7 of the ICCPR\(^9\) and Article 3 of the Convention Against Torture (‘CAT’).\(^10\)

---


\(^4\) Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) Schedule 5

\(^5\) Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) section 10

\(^6\) Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) Schedule 5

\(^7\) Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) s197C

\(^8\) Article 33 Refugee Convention: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

\(^9\) Article 6(1) UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966. United Nations, Treaty Series, vol. 999, p. 171 (‘ICCPR’): Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his or her life.

\(^10\) Article 7 ICCPR: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

\(^11\) Article 3 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85 (“CAT”): (1) No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
Consequently, when the Court interprets the Migration Act’, due to Australia’s dualist system, the Court is not bound to interpret the Migration Act it in a way that is consistent with the Refugee Convention. This clearly has broad and powerful repercussions on the state of Australia’s international protection obligations in general.

1.2.2 Australia’s Refugee Program

Australia’s migration program requires all non-citizens to hold a visa to enter and stay in Australia. The variety of visas are diverse, with permanent non-citizen residents also requiring a permanent visa to enter and stay in Australia.

Australia’s refugee policy is riddled with various human rights issues. These issues are criticised by human rights organisations, academics and the legal professionals both domestically and internationally. Among them, Australia’s turn backs, offshore processing and immigration detention policies are cited as some of the major issues plaguing Australia’s refugee program.

All visa applications are lodged and assessed by the Department of Home Affairs, the government department responsible for all immigration related matters, including refugee visa applications requesting international protection. There are three categories of refugee visas within the Australian refugee program, which are divided by the asylum seeker’s mode of arrival. First, are the refugees who arrive in Australia through the UNHCR’s refugee and humanitarian resettlement program which allocated 18,750 places in 2018-2019. These places are reserved for those who have been determined to be refugees by the UNHCR, those who suffer ‘substantial discrimination’ in their home countries and 1000 ‘community support’ placements for those who have received sponsorship from Australian individuals, community groups or businesses. Second are those individuals who have entered Australia with a valid visa who apply for international protection inside Australia and are eligible to apply for permanent protection in Australia. The final category, are the individuals who enter Australia by sea or plane without a valid visa, otherwise known as “unauthorised maritime arrivals” and “unauthorised air arrivals”. Individuals arriving in this manner since 1 January 2014 are removed to Manus Island or Nauru for immigration detention and offshore processing. There are no avenues for settlement in Australia for these individuals. However, “unauthorised maritime arrivals” arriving in this manner between 13 August 2012 and 1 January 2014 were not subject to removal to Manus Island or Nauru. These individuals are known as the “legacy caseload”. “Unauthorised maritime arrivals” under the “legacy caseload” are subject to a much more limited right to international protection than those who arrive in Australia with a valid visa, making an onshore application for protection.

Australia only offers two types of temporary protection visas to those under the “legacy caseload” seeking international protection. There is no option to seek a permanent form of international protection and applicants are limited to applying for either a 3-year Temporary Protection Visa or a 5-year Safe Haven Enterprise Visa. These applications are assessed under the fast track procedure which will be further elaborated in sub-chapter 1.2.3. There is no visa program for those under the “legacy caseload” to accommodate family reunification for asylum seekers. Family reunification is only available to Australian citizens and permanent residents. The Minister of Home Affairs and his delegates make decision to grant or reject visa applications. For the majority of rejected visa applications (along with cancelled visas) an application for merits review may be made to the

---


Administrative Appeals Tribunal, which hears matters de novo. This is further discussed below in sub-chapter 1.2.3.

1.2.3 Implementation of Fast-Track Assessment

The 2014 amendment to the Migration Act was to introduce a new fast track review process for decisions made by the Department of Home Affairs\textsuperscript{14} to refuse a certain groups of Protection Visa applicants who arrived as “Unauthorised Maritime Arrivals”\textsuperscript{15, 16} These decisions are known as ‘fast track reviewable decisions’.

The Amendment Act creates an extensive statutory framework governing the processing of protection claims in Australia. The main difference between the fast-track review process and ordinary migration procedures is that instead of a first instance appeal procedure at the Administrative Appeals Tribunal (“AAT”) protection visas rejected under the fast-track review process are undertaken by a new administrative review body known as the Immigration Assessment Authority (hereafter “IAA”). Broadly, this fast-track assessment is applicable to decisions to refuse the grant of a protection for applicants who have arrived in Australia by sea and without a visa after 13 August 2012.

At the time of the enactment of the Amendment Act and the implementation of the IAA, there were over 30,000 asylum seekers who had arrived by sea after 13 August 2012, pending decision by the Minister for Home Affairs. The object and purpose of the introduction of the ‘fast-track’ review is to increase the speed in which applications for protection are processed by the Department and to clear the ‘backlog’ of protection applications pending by the Departmental level. Under the new fast track system, the Minister for Home Affairs must refer decisions to refuse international protection in the first instance to the IAA.

True to its name, the fast-track review aims to assess applications as rapidly as possible. The Department, as its first step, identifies cases which are to be referred to the fast-track process that ‘appear less likely to be successful in gaining refugee status and can be determined readily’. A Departmental decision maker would then make a decision within 14 days. If a negative decision was made at this stage, an immediate fast-track review would be initiated by another case officer, to be completed within another 14 days. This immediate review is undertaken automatically, and without notice to the applicant. If the review results in a negative decision for the applicant, removal was to take place within 21 days. Under current policy, if a person was unable to be removed, then he or she would be transferred to Christmas Island pending removal. Voluntary removal options will also be offered at Christmas Island. For IAA decisions, the Federal Court of Australia has jurisdiction to review IAA decisions on points of law but not points of fact. Merits review is not offered at the judicial review stage by the Federal Court. Judicial review only allows the Federal Court to ascertain whether the decision-making process of the IAA was lawful and not whether the decision itself was correct.

\textsuperscript{14} The Department of Home Affairs have undergone several iterations between 2014 and November 2018 when this was written. Please note that references to the Department of Home Affairs, the Department of Immigration and Border Protection and Department of Immigration are all of the same governmental departments which have undergone several name changes.

\textsuperscript{15} Section 5AA of Migration Act 1958 (Cth)

\textsuperscript{16} Section 473BA of Migration Act 1958 (Cth)
The procedural process is distinct from the processes and rules of the Administrative Appeals Tribunal (AAT/ Tribunal) which hears merits review cases for all other migration decisions. The rules of the AAT permit the Tribunal to obtain information that the tribunal considers relevant to the hearing, gives an applicant the right to an oral hearing and requires the AAT to give parties a reasonable opportunity to present his or her case. In essence, Tribunal Members who act as the decision maker at the AAT, stand in the shoes of the original decision maker. The judicial review process before the Federal Court is the same whether the applicants applied from the AAT or the IAA, except that at the first review stage, the AAT offers full merits review, whereas the IAA does not. The IAA decision-maker does not stand in the shoes of the original decision maker at the Departmental level and is under no obligation to consider all relevant facts. Unless there are exceptional circumstances, the IAA is not obliged to obtain new information through documentation or oral interviews and is required to make a decision on the papers which were previously provided to the Department in the first instance.

Since the introduction of the IAA in 2014, the fast-track process has attracted criticism from a multitude of stakeholders, including human rights and refugee advocate bodies.

Some of the major procedural fairness and natural justice concerns raised by these bodies are as follows: applicants have no right to review by the IAA where the Department finds that protection in another country is refused, a bogus document was used or where the applicant has made a ‘manifestly unfounded’ application; there is no provision requirement for a fast track applicant to be notified that the primary decision has been referred by the minister in the IAA; and the IAA is under no obligation to provide an oral hearing or admit further evidence.

As a consequence of the removal of references to Australia’s international obligations from the Migration Act, the Australian domestic courts are unable to consider the procedural guarantees available within the Refugee Convention, ICCPR and CAT in ascertaining whether the fast-track assessment procedures violates international law. The statute in domestic law codifies the procedural rules of the IAA explicitly, which imposes a procedure that lacks the abovementioned safeguards. The procedural rules of the IAA has come under scrutiny under domestic law, with a particular matter rising all the way to the High Court of Australia, on the basis that these rules do not meet basic procedural fairness requirements as developed under Australian administrative common law. These challenges have not been successful to date.

---

17 Migration Act 1958 (Cth) s424
18 Migration Act 1958 (Cth) s425
19 Administrative Appeals Tribunal Act 1975 (Cth) s39(1)
21 M174/2016 v Minister for Immigration and Border Protection [2018] HCA 16
22 M174/2016 v Minister for Immigration and Border Protection [2018] HCA 16
1.3 Methodology

This paper intends to consider whether the lack of a right to an oral hearing and prohibition from being able to produce new evidence at the IAA violates procedural safeguards guaranteed by international instruments, with a particular focus on the Refugee Convention, ICCPR and the CAT. These instruments are considered because these are the prominent human rights and refugee law instruments to which Australia is a signatory.

To the author’s knowledge, the compatibility of the fast track procedure with international standards has not been considered, except where it is touched upon by O’Sullivan and McDonald in their article titled “Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime” in which they briefly mention non-refoulement standards set by Article 33 of the Refugee Convention.23 However, the article does not consider international standards in detail, other than to emphasise their analysis of procedural fairness under domestic standards. While other authors have considered other areas of Australian migration procedures in light of international standards (notably Foster and Pobjoy’s research on RSD procedures on Christmas Island in: “A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia’s 'Excised' Territory”24), the consideration of the fast track procedure’s compatibility with international standards has not previously been addressed.

This thesis will then extrapolate how the procedural rules operate in reality and identify problematic elements of the fast track procedure. The thesis will also look at M174/2016 v Minister for Immigration and Border Protection [2018] HCA 16, the first High Court case challenging the fast-track procedure, as an illustration of how these problematic elements unfold and how the domestic courts struggle to deal with its issues. Then, by applying legal standards derived from international instruments mentioned above, this thesis will consider whether the procedural rules are in line with international standards. Further, the reasons cited by the state to justify the fast-track procedure are examined and then compared to justifications used in the US Expedited Removals Procedure, ECtHR procedures in questions of “rigorous scrutiny” and the UK Detained Fast Track Procedures to consider whether derogation from certain procedural safeguards are justified. The ECtHR was chosen due to depth of case law available, the comparatively strong enforcement mechanisms and binding nature of the ECHR on contracting states, which the ICCPR is modelled upon. The US Expedited Removal Procedure was chosen to illustrate how other jurisdictions can let procedural safeguards to asylum seekers can be deprived, similarly to Australia, but how the US Supreme Court has utilised the US Constitution to guarantee safeguards. The UK Detained Fast Track Procedures was also chosen to illustrate the same concepts but also because the UK and Australia share similar legal systems.

The thesis will utilise a legal doctrinal method in considering whether Australia’s fast track procedure violates these international instruments. The thesis will first consider the legal instruments directly, then move to consider the preparatory works of the legal instrument (which shows the intention of the drafter who drafted the legal instrument) and court decisions related to the specific provisions. Each article of international law will consider the scope, content and derogations to the extent where it is relevant. If these do not produce a clear answer, the thesis will further consider academic literature, placing strong reliance on important commentaries of the international instruments, such as Grahl Madsen, Hathaway, Zimmerman, Dorschner and Machts, Joseph and Castan and Nowak. Further, reliance will be placed upon Australian academics and their analysis of other Australian migration issues in light of international standards, as well as other international authors (especially within the European context) to derive guidance on international instruments.

Cases discussed within this thesis were chosen to not only understand the scope and definition of articles within international instruments, but also to illustrate a court’s decision-making process in balancing justifications. The latter is especially relevant in discussing justifications of procedures in Chapter 4. First, cases were chosen on the basis of whether the case is important within its own jurisdiction. Second, cases were chosen on the basis of whether the factual scenario in the case resembles the issues faced by applicants within the Australian fast track procedure. For example, seminal cases of the ECtHR such as Jabari and Salah Sheekh are considered but also cases which consider issues which relate to the thesis question at hand, such as Hilal, which considers the question of the right to produce further evidence in latter parts of the judicial process. Further, cases involving “accelerated” or “fast track” procedures are utilised in the analysis in considering the subject matter of this thesis.
2. Chapter 2: Assessing procedural safeguards in the IAA

2.1 Practical Issues

A procedural rule (or the lack of procedural rule) under the fast-track process which has garnered a great amount of criticism from the legal community and human rights organisations, is that there is no obligation on the IAA to provide a visa applicant with an oral hearing or to accept new information under the fast track review process. Following the lodgement of a visa application at the Department of Home Affairs, under the fast-track process there is no further opportunity to provide information to the Department or the IAA, even if the evidence points to circumstances which existed before the application for international protection was made.

A comparative look at the AAT will show that the AAT allows for a de novo merits review, allowing applicants to provide new evidence at any stage of the AAT proceedings. Further, if the AAT cannot provide a positive decision (a decision to overturn a rejection or cancellation by the Department) it will conduct an oral hearing, allowing the Applicant to make an oral testimony.

Only under ‘exceptional circumstances’ is the IAA obligated to accept or request new information or interview the referred applicant. The term ‘exceptional circumstances’ is not defined by the Migration Act. The Explanatory Memorandum to the Bill, which is drafted by the Government and circulated with the authority of the Minister of Immigration and Border Protection, provides some guidance in this respect. The Memorandum states that the intention of not defining the term was to give broad discretion to the decision maker to interpret this provision.

However, despite its stated intention, the implementation of this provision is restrictive. The explanatory memorandum outlines examples of circumstances that would not justify the consideration of new evidence includes:

- information available at the Departmental application stage that was ‘not presented for unsatisfactory reasons’;
- a ‘general misunderstanding or lack of awareness of Australia’s processes and procedures’; or
- ‘a change in personal circumstances within the control of the applicant’.

The limited review mechanism under the IAA is justified by the Australian Government to cater for the quick and efficient mechanism in dealing with review. The purpose of the limited review is only to deal with ‘corrections of error’. These are corrections of an error in either law or fact, in relation to issues held to be a key consideration, considered to be determinative by the Department in refusing an applicant’s application for protection.

Further, within the explanatory memorandum, the Australian Government justifies these measures by explaining that the asylum seeker has a responsibility to specify the particulars of their claim, provide sufficient evidence to establish their claim and encourage complete information to be provided up front. In other words the applicant is afforded the opportunity to present his or her

25 Migration Act 1958 (Cth), s 473DB
26 Migration Act 1958 (Cth), s 473DB, 473DC, 473DD
27 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth)
28 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) para 915
29 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) para 916
whole case before the Department in the first instance, and therefore is not expected to present evidence at the review stage. The explanatory memorandum continues by adding that this measure of limited review prevents an avenue for asylum seekers who attempt to “exploit the merits review process” by presenting new claims or evidence to bolster their original unsuccessful claim after they have learnt why their original application was unsuccessful.32

The explanatory memorandum appears to make several assumptions. The first assumption, is that an asylum seeker is not a ‘vulnerable person’ as commonly understood in European jurisprudence, in particular European Court of Human Rights case law.33 The assumption here is that these asylum seekers who are living within Australia without the right to work, without welfare, healthcare or funding for legal assistance has the necessary language abilities, is an adult, have a sound recollection of their asylum account (unaffected by trauma), are physically and mentally healthy, has access to telecommunications and the internet and understands the migration system to the point that they are able to put their claim clearly and sufficiently on their first attempt. This assumption is problematic because in many other jurisdictions, including the procedures of the UNHCR, the vulnerability of an asylum seeker is a well-established principle upon which procedural safeguards are provided. This vulnerability stems from the discrimination and violence they have suffered in their home country and as stated in the ECtHR case of MSS v Belgium and Greece, “accentuated by the vulnerability inherent in his situation as an asylum seeker”.34 This aspect of vulnerability should be relevant in considering procedural safeguards.

The second assumption here is that all or most asylum seekers who have arrived in Australia are not genuinely seeking refuge but are seeking to ‘exploit’ the system in order to enter Australia. Nevertheless, the legitimacy of these procedural processes has been upheld on several occasions in Australian Courts.

The narrow circumstances in which the IAA can accept relevant new information is criticised because it deprives the applicant from the opportunity to have relevant facts considered by the decision-making body. For example, the lack of an opportunity to present new evidence may create a multitude of problems when credibility of the applicant is at issue. Credibility goes to a large aspect of the refugee status determination (“RSD”) process and is widely accepted as a key consideration of assessment.35 The UNHCR has stated that it is essential for a review body to be able to obtain a personal impression of the applicant.36 Credibility assessment is a difficult process even where an oral assessment is involved.37 As Justice Kirby of the Australian High Court stated, “the process is one [of] arriving at the best possible understanding of the facts in an inherently imperfect environment.”38 The process which Justice Kirby was deciding upon included an oral hearing where the applicant is afforded the right to submit an oral testimony. With this in mind, the ability of making an assessment on credibility would appear to have insurmountable difficulties where no oral hearing is conducted.

33 See M.S.S. v. Belgium and Greece, no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011; Tarakhel v. Switzerland, Application no. 29217/12, Council of Europe: European Court of Human Rights, 4 November 2014
34 M.S.S. v. Belgium and Greece, no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011 para 233
36 UNHCR, Submission No 138 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 31 October 2014 at 79.
In *MB16 v Minister for Immigration and Border Protection*, the Australian Full Federal Court considered this very issue in relation to credibility assessments in a limited review process. It dismissed the challenge to the fairness of the fast track procedure on the basis that legislators are free to legislate for an assessment with different and conflicting objectives, such as “efficiency, speed, absence of bias, consistency with the Act and the natural justice hearing rule.”

Further, this view was confirmed in *M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16, with the court stating that exceptional circumstances will only arise where the circumstances “‘would’ as distinct from ‘might’, be the reason or part of the reason for refusing to grant the protection visa”, setting a high standard for where new information may be submitted.

However, had references to the Refugee Convention, ICCPR and the CAT not been removed from the Migration Act, Australian courts may be informed by its standards when ruling on the shortcomings of the IAA in relation to the lack of these procedural safeguards.

### 2.2 An Illustration of Domestic Proceedings: M174/2016 v Minister for Immigration and Border Protection

The 2018 High Court decision of *M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16 is illustrative of the problematic nature of this fast track review process. This is the first time the Australian fast track procedure has come under scrutiny in the High Court of Australia. In *M174/2016* the applicant was an Iranian national who arrived in Australia by boat in 2012. The application for protection was refused by the Department of Immigration and Border Protection and the matter was automatically referred to the IAA.

The applicant’s claim centred around his conversion from Islam to Christianity and the fear of persecution on the basis of his religion if returned to Iran. In his application and at his interview with the Department in 2015, the plaintiff stated that he was regularly attending church services at the Syndal Baptist Church. The plaintiff submitted a letter of support from the Reverend at the church. The Department refused the application on the basis that the Department believed that the applicant only attended the church to falsely strengthen his claim for protection and they did not believe the Applicant genuinely converted to Christianity. The rejection of the application for protection was centred around the applicant’s credibility.

Following the referral to the IAA, the IAA affirmed the decision made by the Department without further communication to the applicant. The applicant provided the IAA with further letters from the Reverend and other members of the church. The IAA refused to consider these documents on the basis that exceptional circumstances did not exist to oblige the IAA to consider this evidence.

The applicant argued that the IAA committed jurisdictional error by failing to exercise its discretion to interview the applicant and failing exercise its discretion to consider new information submitted by the applicant.

In a unanimous decision, the High Court found against the applicant and confirmed the IAA’s power to review a decision notwithstanding jurisdictional error at the application stage.

---

39 *BMB16 v Minister for Immigration and Border Protection* (2017) 253 FCR 448, 456 [29]
40 *BMB16 v Minister for Immigration and Border Protection* (2017) 253 FCR 448, 456 [29], natural justice is the technical terminology in Australian and English common law, referring to the right against bias and the right to a fair hearing. While the term has a long history, it is equally ‘disparate’ with multiple applications. For more see the Federal Court Justice Robertson's publication on Natural Justice and Procedural Fairness: [https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-robertson/robertson-j-20150904](https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-robertson/robertson-j-20150904)
41 *M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16 [72]
A notable characteristic of the judgement (and the arguments put forth by the plaintiff) is the absence of any reference to international legal instruments, such as the Refugee Convention, the ICCPR or the CAT. Minimum guarantees of procedural safeguards under international standards, such as non-refoulement, were not considered in the judgement. The submissions and judgement centred around a definitional argument on whether or not the decision made by the IAA was a ‘fast track decision’, in the circumstances where there was jurisdictional error in the decision of the IAA. It is clear that when decisions are made in relation to the credibility of the applicant, the IAA procedures are especially problematic and lack the necessary safeguards to protect refugees under the Convention and other international instruments.

The decision concluded that the IAA must exercise its review powers within the bounds of ‘legal reasonableness’, expanding this as a ground of appeal in the process. While the precise meaning of ‘legal reasonableness’ was explained further, this reference to legal reasonableness may have implications for judicial review both within the 'fast track review' process and more broadly.

The following chapters will explore how the Refugee Convention, ICCPR and the CAT may inform Australian courts in this respect.
3. Chapter 3: International Standards of Procedural Safeguards

3.1. Introduction

The Australian court’s general reluctance to draw upon international legal instruments to motivate their decision making is a stark contrast from jurisdictions such as Europe, where it is well established that international instruments such as the ECHR are used to derive procedural safeguards within domestic proceedings for refugees. The explanatory memorandum illustrates the limited human rights considerations of legislators in drafting the Amendment Act. The explanatory memorandum makes two interesting statements in relation to the procedural standards of the fast-track process. First, while conceding that merits review “can be an important safeguard”, it goes on to emphatically state that “there is no express requirement under the ICCPR or the CAT for merits review in the assessment of non-refoulement obligations”. Second, it correctly states that the Refugee Convention does not provide for any procedures to be adopted by states in the processing of protection claims.

This chapter considers the obligation owed by states to provide procedural safeguards, which may be derived from various instruments of international law, including the Refugee Convention, the ICCPR and the CAT. It will then consider whether the Australian fast track procedure’s procedural rules are in line with these international standards.

As the Refugee Convention, ICCPR and the CAT do not provide a model procedure which states must follow when conducting refugee status determination (“RSD”), states have created divergent procedures within their own common law and civil law traditions. However, it is argued that certain minimum procedural safeguards can be derived upon a closer look at the Refugee Convention, the ICCPR and the CAT.

First the analysis will explore the principle of effectiveness and the procedural protections which should be afforded in order to maintain the effectiveness of non-refoulement obligation. Subsequently, the thesis will move onto consider the express provisions provided within the Refugee Convention, the ICCPR and the CAT relating to procedural safeguards, the right to an effective remedy and to fair hearing guarantees.

3.2. Effectiveness of Non-Refoulement

The principle of non-refoulement is regarded as a core obligation under the Refugee Convention. It is crucial that adequate legal and procedural safeguards are provided to asylum seekers in order to ensure compliance with the obligation of non-refoulement. There are no procedures expressly listed in the Refugee Convention to be adopted by the contracting states. However, there are several provisions within the Refugee Convention which prescribe a minimum standard of procedural safeguards to be provided within domestic proceedings. The first of these safeguards is derived from the principle of non-refoulement and the fundamental nature of non-refoulement obligations.

The principle of non-refoulement is outlined in a variety of both international and domestic legal instruments. Most notably, within the following international instruments: Article 33 of the Refugee

---

42 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) p21
43 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) p22
Convention, Article 6 and 7 of the ICCPR and Article 3 of the CAT. The analysis will begin with Article 33 of the Refugee Convention as a starting point.

3.2.1. Importance of Non-Refoulement Principle

Both refugee law scholars and the UNHCR have stressed the importance of maintaining an adequate system of status determination to ensure refugees are not returned to harm pursuant to Article 33. The importance of the non-refoulement principle places a large importance on the processes determining whether a person should or should not be provided protection from refoulement. In most jurisdictions, this comes in the form of a refugee status determination ("RSD") procedure. The importance of a robust RSD process in meeting Article 33 obligations is consistently emphasised by refugee law scholars. Pallis states: ‘[s]imply put, the rule prohibits the return of “refugees” and the only way to determine who is a refugee is to conduct status determination, thus RSD becomes a necessary condition in meeting the obligation’. In other words, a decision to return an individual cannot be made without a proper procedure which can sufficiently determine whether or not an individual is a refugee.

The text contained within Article 33 does not itself mandate a formal procedure to comply with this non-refoulement obligation. Due to the wide variance in legal traditions within contracting states the Refugee Convention, the steps each state takes to ensure the protection of refugees within their jurisdiction are left to their discretion. Similarly, each contracting state also has discretion to determine the status of an applicant within the framework of their domestic legal systems.

However, it is argued that the principle of ‘pacta sunt servanda’ requires a contracting state to uphold treaty provisions in good faith by giving effectiveness to the international law they have contracted to uphold. Under this principle, a contracting state must establish an adequate method of ascertaining who is owed international protection as a refugee, having regard to its own domestic constitutional or administrative structure. The outer limits of the discretion afforded to each state must be confined by the principle of effectiveness of obligations. Regardless of the form of the RSD process, it must be fair, and procedural safeguards must exist to ensure that the state concerned will guarantee its Article 33 obligations.

Battjes takes a similar approach, further confirming that ensuring the effectiveness of Article 33 of the Refugee Convention is crucial in order for states to comply with international law. Battjes draws from the International Court of Justice’s decision in LaGrand which requires states to give ‘full effect’ to

---


49 United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Art 26: pacta sunt servanda is an international law principle meaning “every treaty in force is binding upon the parties to it and must be performed by them in good faith”


51 UNHCR Handbook on Procedures para 189


international treaties can have implications for applications on domestic rules. Further, Article 31(1) of the Vienna Convention on the Law of Treaties provides that treaties must be interpreted in good faith in light of its object and purpose and in accordance with its principle of effectiveness. This approach was considered and confirmed within the European context in the ECtHR case of Mamatakulov II, where effectiveness of Article 34 ECHR was undermined as a result of the Turkey’s extradition of the Applicants to Uzbekistan. The Court in its decision confirmed that the suspensive effect that Article 34 ECHR offers is crucial in order to maintain the effectiveness of the provision as stipulated in the Vienna Convention. The next chapter will further consider Article 3 ECHR as a comparative benchmark to Article 33 Refugee Convention. Without proper procedural safeguards such as the right to produce evidence or the right to an oral hearing, it may be argued that the margin for error in these procedures is greatly increased and the proper effectiveness to determine who should be afforded protection under Article 33 is undermined.

The measures adopted by states will be judged by the international standards of legal efficacy and efficient implementation, meaning that procedural safeguards must exist in order to ensure the effectiveness of state protection against refoulement. Whatever the approach adopted by states, the procedure must be fair and procedural safeguards must exist to ensure that the state concerned will honour their obligations under Article 33. In essence, ensuring that the substance and effectiveness of Article 33 is protected would include the right to produce evidence before a court or tribunal.

3.2.2. The UNHCR View

The UNHCR has stated, “fair and efficient procedures are an essential element in the full and inclusive application of the Convention”, meaning a refugee claimant should be afforded ‘the opportunity to present evidence’ among other rights. The right to free access to courts of law as provided in Article 16 of the Refugee Convention confirms these minimum procedural requirements. Further, the humanitarian and human rights character of the Refugee Convention along with the vulnerable position refugee claimants normally find themselves in must be considered when implementing procedural safeguards within a RSD procedure. The Executive Committee in its General Conclusion on International Protection No. 71 reiterates:

“the importance of establishing and ensuring access consistent with the 1951 Convention and the 1967 Protocol for all asylum-seekers to fair and efficient procedures for the determination of refugee status in order to ensure that refugees and other persons eligible for protection under international or national law are identified and granted protection”


55 United Nations, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 12 March 1986
56 Mamatakulov and Askarov v. Turkey, 46827/99 and 46951/99, Council of Europe: European Court of Human Rights, 4 February 2005
59 United Nations High Commissioner for Refugees (UNHCR), Global Consultations on International Protection, 2nd Mt& Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/0/12 (31 May 2001) [5], [12]
60 Michelle Foster; Jason Pobjoy, ‘A Failed Case of Legal Exceptionalism - Refugee Status Determination in Australia's Excised Territory’, 23 Int'l. Refugee L. 583 (2011) at 601
61 UNHCR Handbook on Procedures, para. 190: ‘he finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own’
an RSD procedure. Amongst a wide array of guidelines relating to the gathering of evidence, the handbook clearly acknowledges the difficulties of a lack of documentary evidence for those fleeing persecution, the need for a personal interview and the hesitation for an applicant to speak freely to a person of authority due to past experiences. Importantly, the handbook acknowledges that the examiner’s conclusion of fact is a “personal impression of the applicant” which will inevitably result in a decision that affects a human life. The handbook also confirms that applicants must have a right to appeal for a formal reconsideration of the decision. Considering these guidelines together, this thesis argues that if an applicant is not granted protection on the basis of evidence collected during an interview with the initial decision maker, he or she must be given an opportunity to provide new evidence and be afforded another oral hearing in the appeals process. If these safeguards are not provided, there is little to no utility in a merits review appeals process. It does not take into account that the conclusion drawn by the initial decision maker is a personal impression of the applicant and the applicant must have another independent examiner test the veracity of the initial decision made.

Generally speaking, the Refugee Convention allows for accelerated procedures in cases where claims are ‘manifestly unfounded’ or ‘abusive’. Generally, accelerated procedures are most often applied in procedures where applicants are from a ‘safe country of origin’ or ‘safe third country’. Accelerated procedures allow for simplified procedures, however, they generally prohibit authorities to simply suspend procedural safeguards in the interest of efficiency. Procedural safeguards must apply, including the right to have the first decision reviewed. The Executive Committee and the UNHCR have stipulated that applicants whose claim for refugee status was declared manifestly unfounded or abusive must still be provided with an effective remedy, namely, the opportunity to appeal the decision. Further, the UNHCR finds it crucial for an appeal authority to have the opportunity to get a personal impression of the appellant applicant and to have a full consideration of the law and the facts. Due to the irreversible and fundamental consequence of a state’s refusal to provide protection, the appeal authority must be given the ability to reconsider issues of both fact and law, in order to safeguard against a misinterpretation of facts. The issue is compounded in scenarios where negative conclusions are drawn under credibility assessments by decision making authorities.

3.2.3. Comparative Severity of Consequence of Breach

Another line of argument proposed by Taylor is that proceedings relating to Article 33 should be guaranteed a higher standard of procedural safeguards than the procedural safeguards provided in Article 32 due to the consequential gravity of an incorrect decision in non-refoulement matters. Article 32, as is explored in chapter 3.3, concerns the expulsion of a refugee lawfully present in the territory. Article 32 explicitly provides procedural safeguards such as the right to produce evidence and the right to legal representation before a competent authority.

62 UNHCR Handbook on Procedures, para. 196 and 198
63 UNHCR Handbook on Procedures, para. 202
66 UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), 31 May 2001, EC/GC/01/12, p.9 (para 41) and p. 10 (para. 43) as cited in Wouters (2009) p174
67 UNHCR, Submission by the United Nations High Commissioner for Refugees in the Case Between Mir Isfahani and Netherlands – Application 31252/03, May 2005, Appl. No. 31252/03, para. 38 (p. 8) and para. 40 (p. 9) as cited in Wouters, (2009) p174
As a general principle, the greater the consequences of the loss of a substantive right is at stake within a proceeding, the greater the procedural protection that ought to be provided to the individual affected.\(^69\) It is difficult to imagine proceedings of greater consequence than those concerning Article 33. Getting the decision ‘wrong’ would lead to devastating consequences of death, torture or other severe human rights abuses to the person concerned.

Comparatively, Article 32 provides protection from expulsion for refugees who are lawfully within the territory, without any additional criteria that the refugee is at risk of being killed, tortured or suffer other human rights abuses. While the importance of Article 32 of the Convention should not be downplayed, expulsion under Article 32 by the nature of its criterion, does not always necessarily lead to death or torture. After all, Article 32 was inserted into the Convention to prevent states from expelling refugees from their home countries for minor infractions to neighbouring states, where each state would continue to expel the refugee back and forth, continuing to punish the refugee for illegal entry.\(^70\) A counter-argument is that the additional safeguards under Article 32 only exist for Article 32 and not Article 33 because a refugee ‘lawfully in’ the territory should be provided with stronger procedural safeguards than a refugee who is technically not ‘lawfully in’ the territory. Wouters in essence, agrees with this comparative view, considering that the explicit additional safeguards to Article 32(2) does not add any additional safeguards in practice as the implicit restricted use of exceptions and the stringent consideration of cases concerning Article 33 of the Convention should already provide for these safeguards.\(^71\)

However, considering the importance of Article 33 and non-refoulement as a fundamental principle in international law, it is difficult to argue that Article 33 should have second rate procedural safeguards, especially in comparison to another article within the Convention. The consequences of an expulsion for an applicant who falls under Article 33 will be more severe than a refugee being expelled under Article 32. Therefore, the argument follows that, while Article 33 does not explicitly provide for procedural safeguards, it should provide procedural safeguards which are stronger than Article 32 due to the fundamental and consequential nature of Article 33.

3.2.4. The ICCPR and CAT

Article 6 and 7 of ICCPR provide the right to life and the prohibition against torture and ill-treatment respectively and are widely accepted as a prohibition against non-refoulement. The Human Rights Committee has confirmed that the overarching principle of non-refoulement is an integral feature of the Covenant that goes beyond the scope of Articles 6 and 7 of the ICCPR.\(^72\) Further, procedural safeguards under Articles 6 and 7 are bolstered under Articles 14 and 15 whereby a fair trial must be guaranteed. Fair trial guarantees will be further discussed in Chapter 3.5 below. Along with the prohibition of non-refoulement under Article 3 of the Convention Against Torture, Articles 6 and 7 ICCPR provide protection to individuals who fall outside of the scope of Article 33 as a result of derogations under Articles 33(2), 1D, 1E and 1F of the Refugee Convention. Article 3 CAT and Articles 6 and 7 ICCPR will apply to all those individuals who fall within the scope of Article 33 Refugee Convention, upon the condition that they can show that the individual has been or will be subjected to torture.

---


\(^{71}\) Wouters (2009) p177

It is well accepted that Article 3 of the Convention Against Torture also reiterates the importance of an effective procedural safeguards in a status determination procedure. The Committee Against Torture confirmed the right to an effective remedy in its decision of Agiza, in which it stated:

"the right to an effective remedy for a breach of the Convention underpins the entire Convention, for otherwise the protections afforded by the Convention would be rendered largely illusory ... In the Committee’s view, in order to reinforce the protection of the norm in question and understanding the Convention consistently, the prohibition on refoulment contained in article 3 should be interpreted the same way to encompass a remedy for its breach, even though it may not contain on its face such a right to remedy for a breach thereof ... The nature of refoulment is such, however, that an allegation of breach of that article relates to a future expulsion or removal; accordingly, the right to an effective remedy contained in article 3 requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise”

The Committee does not provide procedural standards to be followed in order to provide effective remedy. However, it states that the remedy must include a form of merits review whereby the applicant is permitted to produce evidence which may not have been able to be produced during the initial assessment.73

The preferred view put forth by this thesis is that proper procedural safeguards, including the right to produce evidence before a Court or Tribunal, must be implemented in order to give due regard to Article 33 obligations, due to the fundamental nature of the state’s obligation of non-refoulment. Further, as Article 33 protection has more devastating consequences than expulsion under Article 32, the application of Article 33 of the Refugee Convention must be subject to at least those procedural safeguards articulated in article 32(2), which include the right to produce evidence.74 A failure to do so would result in the contravention of Article 33 of the Refugee Convention.

73 ComAT, Concluding Observations on Canada, 7 July 2005, UN doc. CAT/C/CR/34/CAN, para. 5 (c).
3.3. Effective Remedy Guarantees

3.3.1. Article 32 of the Refugee Convention

Article 32 of the Refugee Convention is unique in its explicit provision of procedural safeguards within the Refugee Convention. Article 32(2) of the Refugee Convention reads:

“(2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.”

The Safeguards

Article 32 requires states to make decisions in accordance with due process of law and plainly guarantees three procedural safeguards to a lawfully residing refugee before he or she can be expelled: the right to submit evidence, the right to appeal and the right to be represented. Grahl-Madsen takes the view that even where a relevant domestic law or regulation does not provide for these rights, a refugee is entitled to treatment in accordance to these provisions. Grahl-Madsen interprets the phrase “in accordance with due process of law” to mean that a refugee can only be expelled from a territory under the same procedural rules which apply to non-nationals generally in the relevant country.

Conversely, in Hathaway’s analysis of Article 32(2)’s drafting process, he notes that most governments were unwilling to guarantee judicial oversight of refugee expulsion. During this process, states acquiesced to a compromise whereby an ‘administrative authority’ may make expulsion decisions which would be ordered only in pursuance of a decision reached by due process of law. An administrative or judicial body responsible for expulsion decision must “at the very least, be explicitly empowered to take account of all the circumstances of the case, including the special vulnerabilities and rights of refugees. The appellate authority must, of course, have real authority over the expulsion process”.

Hathaway further confirms that the right to submit evidence includes any evidence which may assist the refugee to “clear himself”, not just evidence “against expulsion”, concluding that there can be no question that the administrative or judicial body must consider all evidence relevant to the expulsion order.

Article 13 ICCPR provides similar provisions to Article 32(2) of the Refugee Convention regarding the ability of state parties to expel an alien lawfully in their territory. Provisions within the ICCPR will be revisited in a later chapter.

The fast-track procedure’s rule which does not allow applicants to submit new evidence may initially appear to be contrary to Article 32(2). While the requirement safeguarding an applicant’s right to

75 UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, Art 32: “The expulsion of such a refugee shall be only in pursuance of a decision in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specifically designated by the competent authority.”
76 Grahl Madsen (1963) p133
77 Grahl Madsen (1963) p132
78 Hathaway (2005) p 670-671
79 Hathaway (2005) p 672
80 Hathaway (2005) p 673
81 Article 13 ICCPR
submit evidence is clear within the Convention’s text, Article 32(2) provides two major qualifications to these procedural safeguards. Article 32(1) provides that procedural safeguards can be deprived in circumstances “save on grounds of national security or public order” and that the refugee must be “lawfully in the territory”. The issue of national security will largely concern a question of fact and for that reason is not discussed further. However, the question arises as to whether a refugee who is held in detention and undergoing an RSD process is technically ‘lawfully in’ the territory for the purposes of Article 32 of the Convention.

Scope

Both the Refugee Convention and the ICCPR qualify the procedural safeguard to only protect those refugees who are lawfully in the territory. ‘Lawfully in’ is not defined within the Refugee Convention nor the ICCPR. The question then arises as to whether an asylum seeker, arriving by boat as “unauthorised maritime arrivals”, detained in either an onshore or offshore detention centre are considered to be ‘lawfully in’ Australia.

The interpretation of ‘lawfully in’ has been subject to debate since the enactment of the Refugee Convention. For example, Goodwin-Gill’s interpretation of ‘lawfully in’ is far more restrictive than Grahl-Madsen. Goodwin-Gill contends that an asylum seeker is not lawfully in a territory even if they have been given temporary lawful immigration status and is only lawfully in the territory when they obtain permanent resident status. Conversely, Hathaway provides a more expansive interpretation, arguing that an asylum seeker is ‘lawfully in’ the territory once they begin undergoing their RSD procedures even if their entry into the territory was not authorised. Hathaway also places importance on authorisation by the state to enter the country.

Grahl-Madsen’s interpretation of the term ‘lawfully in’ is that asylum seekers who enter the territory with authorisation (i.e. a valid visa) are ‘lawfully in’ the territory. In contrast, those asylum seekers who have been detained at the border pending status verification and those who enter the territory without authorisation are not considered to be ‘lawfully in’ the territory. This approach appears to be similar to Hathaway but provides further distinctions based on the particular circumstances the applicant is in. Further, even if the applicant does not meet all of the requirements for entry, the applicant will be ‘lawfully in’ the territory if the state authorities at the border authorise the applicant’s entry into the state. Grahl-Madsen appears to emphasise the importance of authorisation by the state to be in the territory, arguing that even if the applicant does not meet every requirement for entry, as long as the authorities have dispensed of the requirements and have allowed the applicant to be on the territory, the applicant is ‘lawfully in’ the territory.

According to Grahl-Madsen, a person who has entered the country without authorisation and made an application for protection, pending an outcome is neither lawful nor unlawful, because the person is lawful in a strict physical sense but is not provided with the full breadth of benefits as if they had entered the territory with authorisation.

---

82 Article 32(1) Refugee Convention
This thesis does not have the intention nor capacity to extensively discuss the correct interpretation of ‘lawfully in’. However, it is the author’s view that Grahl-Madsen’s interpretation is more compelling and is supported by Slingenberg in her comprehensive analysis of the term. The Author agrees with Slingenberg’s reasoning following Grahl-Madsen’s authorisation-based approach, which expands on Hathaway’s authorisation-based approach, by providing further distinction based on the location of the applicant, their mode of entry and whether or not they have entered a RSD process. The importance of authorisation by a positive rule of law is further emphasised by Slingenberg.

Consequently, under this interpretation asylum seekers categorised as ‘unauthorised maritime arrivals’ may not qualify as being ‘lawfully in’ Australia. By its language, the Australian government are unequivocal in their intentions of whether the mode of entry of applicants under this framework are authorised or unauthorised. The mode of entry of Unauthorised Maritime Arrivals are exactly as they are labelled: unauthorised. There is no authorisation by the state to consider them ‘lawfully in’ Australia.

However, following a period of onshore detention immediately served on arrival (where the department refused to make a decision on the protection applications of some 25,000 unauthorised maritime arrivals), the government began to grant bridging visas to allow applicants to wait out their RSD procedure within the Australian territory. As at May 2019 almost all applicants within the fast track assessment process are living their lives within the Australian territory on a Bridging Visa E (“BVE”) while awaiting a Departmental decision.

A BVE is a temporary visa which is usually automatically granted to those non-nationals who have had their visa applications rejected, visas cancelled or have found themselves ‘unlawfully in Australia’ through some other circumstance. The BVE is not a ‘substantive visa’ meaning that it is a transitional measure. The BVE provides no right to work, study or travel in and out of Australia and is the visa the Department of Home Affairs provide in order to temporarily regularise a person’s stay while they arrange their travel out of Australia. In comparison, a person who has made a ‘valid visa application’ is given a Bridging Visa A which gives the right to work, study and travel in and out of Australia. This decision to provide Unauthorised Maritime Arrivals from the Legacy Caseload with BVEs was based on the government’s “no advantage policy” to ensure that these applicants do not have an advantage over other applicants who are awaiting offshore processing.

In the context of the above discussion, these applicants have been released from detention and have admitted onto the territory with authorisation from the Australian government to wait for their decision. Considering the nature of BVEs, it is clear that the intention of the Department of Home Affairs’ decision to grant BVEs is not to give additional rights to applicants but to deprive them of them. This is a clear indication that the Department of Home Affairs have interpreted Article 32 Refugee Convention by relying on a more restrictive reading (such as the one given by Goodwin-Gill). However, under the Grahl-Madsen reading, it would appear that the release of these applicants onto territory, no matter under what circumstances, is indicative of authorisation. While it is a matter of interpretation, under the Grahl-Madsen reading applicants within the fast-track procedure is ‘lawfully in’ the territory and must be provided with the procedural safeguards under Article 32.

It must be further acknowledged that if we are to accept that Article 33 of the Refugee Convention should provide a comparatively greater protection than Article 32 of the Refugee Convention as established in subchapter 3.2.3, then the scope of Article 32 and its applicability to the fast track

---


process should inconsequential, as Article 33 of the Refugee Convention and the minimum safeguards applicable should apply to all applicants, regardless of whether they are ‘lawfully in’ the territory or not.

3.3.2. Article 2(3) ICCPR – Effective Remedy

Article 2(3) of the ICCPR ensures an effective remedy to individuals who have been assessed by the authorities to have no real risk or irreparable harm. Article 2(3) ICCPR is based on Article 13 of the ECHR. Article 2(3) ICCPR states:

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

An effective remedy is taken to mean that there is a right to challenge a decision of forced removal, usually involving access to an appeal procedure.

The Human Right Committee have taken views in relation to Article 2(3) ICCPR on several occasions and have extrapolated on what is meant by an effective remedy. The Human Rights Committee have interpreted Article 2(3) ICCPR’s right to an effective remedy to mean the right to an appeal procedure, which should be an effective, independent review of the decision to expel. The remedy must be effective and available, being ultimately binding on the state party. Further, Article 2(3)(b) ICCPR puts a positive obligation on state parties to ensure there are procedural safeguards to ensure the possibility of a judicial remedy. The HRC decision-making is unequivocal on this issue, confirming that an appellate system to review a decision relating to Articles 6 or 7 ICCPR should be provided for and should be safeguarded. If not, the state party have violated their obligations under Article 2(3).

However, there is still question as to what constitutes an effective remedy in respect to specific procedural safeguards. In the HRC’s Concluding Observation of France, the Human Rights Committee criticised France’s general asylum law procedures, in particular the French “priority procedures”. The HRC condemned the French procedures, observing that individuals were not informed of their rights, deprived of access to legal assistance, deprived of access to interpreters and were subjected to short time limits. It was observed that applicants were required to make an application within 5 days of being detained and in cases where their applications were rejected, applicants had 48 hours to make an application for review proceedings. Further, “priority procedures” did not give suspensive effect to applicants and applicants were deported where they were from safe countries of origin before review proceedings could proceed.

---

91 M Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1993) p57
92 Wouters (2009) p412
The Human Rights Committee, General comment no. 31, further clarifies how Article 2(3) should be interpreted in the Committee’s view. It should first be noted that the views of the Human Rights Committee are not binding on states and are not law. However, these comments by the Human Rights Committee are authoritative interpretations on the ICCPR. First, General Comment No 31 states that remedies should be appropriately adapted to take into account the “special vulnerabilities of certain applicants”. In the context of asylum claims, it is apparent that there are many ‘special vulnerabilities’ to take into account. Refugees fleeing persecution in foreign countries face a plethora of challenges, such as language, lack of access to legal assistance, housing, welfare and medical facilities, not to mention the tentative mental and physical state of the asylum seeker who often take long and arduous journeys to flee their country of origin. Guaranteed access to legal assistance, interpreters and translators are obvious preliminary safeguards to implement. However, in the context of this thesis, it is argued that the right to an appeal procedure that guarantees the right to produce new evidence before the review body and the right to an oral hearing are crucial to assure that special vulnerabilities of asylum seekers are taken into account when guaranteeing an effective remedy under Article 2(3) ICCPR. Often times, when an asylum seeker provides their account, the applicant will not provide complete accounts of their asylum journey for a multitude of reasons. For example, an applicant may have an inherent suspicion for authorities, having been persecuted by their own governments or female asylum seekers being guarded against male case officers. This deprives applicants from the opportunity to clarify or prove their asylum account. As asylum seekers, these individuals are subject to special vulnerabilities and it is crucial that any decision can be reviewed de novo before an independent review body, so that they are given a fresh opportunity to make their case. This concept is mirrored in ECtHR jurisprudence in cases such as MSS v Belgium and Greece, where the ECtHR considered whether the state parties had breached Article 13 ECHR. The ECtHR in MSS stated they must:

‘take into account that the applicant, being an asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously’

Further, the ECtHR confirmed in the MSS judgement that asylum seekers are an inherently ‘under privileged and vulnerable population group’ who were in need of special protection. This thesis is argues that depriving vulnerable applicants in need of special protection the right to produce further evidence and give an oral testimony at the appeal stage is contrary to the right to an effective remedy under Article 13 ECHR. Especially where claims are rejected on the basis of credibility, to not give vulnerable applicants the right to produce evidence and be given an oral hearing in order to prove their refugee claim appears to be a violation of the right to an effective remedy. The interpretation of ECHR colours that of the ICCPR due to the fact that the ICCPR is based on the ECHR. Therefore, it may have concluded that the standards of ECHR could be imported to ICCPR. As Article 2(3) ICCPR is modelled on Article 13 ECHR, this thesis argues that these measures also violate the right to an effective remedy under Article 2(3) ICCPR.

Second, while it is accepted by the HRC that the review bodies are free to give effect to the general obligation of effective remedies in a variety of ways, the HRC states that an administrative mechanism is particularly required to give effect the general obligation “to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies” and “a failure by a State Party to investigate allegations of violations could in and of itself give rise to a

---

96 UNHRC, General comment no. 31 [80], 'The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13


It is argued by this thesis that it is contrary to a state’s obligation to “investigate allegations of violation” to not consider an application de novo, not accepting new evidence and not providing an oral hearing.

Article 4 ICCPR states that states may take measures derogating from certain obligations under the Covenant "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed". This right to derogation is limited "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

Article 2(3) is not listed among the obligations from which derogation is prohibited. However, the Human Rights Committee confirmed that Article 2(3) ICCPR is an obligation which should apply to the Covenant as a whole and that a state may derogate from providing specific remedies, the country must nevertheless provide a remedy that is effective. Derogations and the justifications for derogation are further discussed in Chapter 4.

3.3.3. Article 13 ICCPR – Right to submit reasons and right to review by a competent authority

The scope of remedies provided under Article 13 ICCPR is much narrower than Article 2(3) ICCPR in nature, applying specifically to aliens lawfully present in the territory. Article 13 ICCPR states:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 13 ICCPR is very similar to Article 32 of the Refugee Convention as outlined in chapter 3.3.1. However this thesis, where possible will consider Article 13 ICCPR independently of Article 32 Refugee Convention in order to ascertain whether different safeguards can be derived between one or the other.

Scope

It is notable that the Australian government in relation to Article 13 ICCPR in Annexure A of the explanatory memorandum of the Amendment Act that unauthorised maritime arrivals are not considered ‘lawfully in the territory’ and hence obligations under Article 13 ICCPR do not apply to them.102

However, if the interpretation of ‘lawfully in the territory’ as established in chapter 0 is applied where the same terminology is utilised in the Refugee Convention, those undergoing the Australian fast-track procedure are also likely to be considered to be ‘lawfully in the territory’ under Article 13 ICCPR. Further, it should be noted that Human Rights Committee confirmed in relation to Article 13 ICCPR that where the legality of the entry and stay of an alien is in dispute, any decision of his or her expulsion must be taken in accordance with Article 13 ICCPR.103 The Human Rights Committee has

---

100 UNHRC General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13 para 15
101 Art 4 ICCPR
102 Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth), Explanatory Memorandum, Statement of Compatibility with Human Rights, p22
103 UNHRC, CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986, para. 9.
further stated that whether the alien is ‘lawfully’ within the territory is governed by domestic law.\textsuperscript{104} While the entry into Australia for unauthorised maritime arrivals was ‘unlawful’, the Australian Government has regularised their stay by providing Bridging Visas to these individuals. However temporary the visa may be, these individuals are ‘lawfully in the territory’ of Australia.

**Protection**

Article 13 ICCPR protects aliens lawfully in the territory of a state from arbitrary expulsion by the said state. There appears to be two limbs to this protection. The first being that a decision made on the expulsion of an alien should be made in accordance to law. The second is that any decision should be subject to review by a competent authority where the alien may submit reasons against his or her expulsion. This right is caveated by the exception of where there are compelling reasons of national security require the suspension of this right.

In the case of *Maroufidou v Sweden*\textsuperscript{105} the Human Rights Committee considered the meaning of ‘accordance with law’ in a case where the applicant argued that the state party had misinterpreted the Swedish laws in their decision-making process. It was held by the Human Rights Commission that ‘in accordance with law’ should be taken to mean in accordance with domestic law, and unless the decision was made in bad faith or if there is evidence that it was an abuse of power. Consequently, the Human Rights Commission held in *Maroufidou* that outside of these circumstances, it was up to the domestic courts to consider whether the procedure is in accordance with law.\textsuperscript{106}

The right to submit reasons against expulsion and the right to have the case reviewed by a competent authority provides a narrow but explicit set of rights which should be afforded to an individual facing expulsion. The Human Rights Committee is unambiguous in their emphasis of this right. An individual facing expulsion must be given all of the procedural safeguards for pursuing a remedy against expulsion so that this right will in all the circumstances of his or her case be an effective one.\textsuperscript{107} This includes ample time and notice for the applicant to submit reasons against the decision of expulsion, have the decision reviewed by a Court or administrative authority\textsuperscript{108} and be provided with the reasons for his or her expulsion, including the substance of the evidence used against the applicant.\textsuperscript{109}

It should be noted that Article 13 ICCPR provides little utility where the alien at risk of expulsion is being expelled for reasons relating to national security. The Human Rights Committee has been reluctant to make an assessment of an individual’s security risk, stating that it is “not for the Committee to test a sovereign state’s evaluation of an alien’s security rating".\textsuperscript{110} However, in the case of *Ahani v Canada*\textsuperscript{111}, the Human Rights Committee took the view that the state had violated Article 13 ICCPR in spite of the fact that there were national security concerns, because the individual had been deprived of an opportunity to submit reasons against her expulsion and have submissions reviewed by a competent authority in its entirety. It would appear from this view that the arbitrariness test would apply. That is, expulsion cannot be arbitrary and must be based upon an individual

\textsuperscript{104} UNHRC, CCPR General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, para. 4.

\textsuperscript{105} UNHRC, Communication no. 58/1979, *Maroufidou v Sweden*, 8 April 1981


\textsuperscript{107} UN Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986 para. 10.

\textsuperscript{108} Wouters (2009) p416


assessment, even if national security concerns exist. The view was based on the contrasting decision making process by the Canadian Supreme Court in the case of Suresh\textsuperscript{112} whereby the applicant was afforded the safeguards not provided in the case of Ahani. The distinction between the two cases is that in the case of Suresh, the applicant had made a \textit{prima facie} case for a real risk of harm and the applicant in Ahani had not. In essence, the applicant in Ahani had been put in a different procedure after a first instance decision was made that the applicant was not in a situation of real risk of harm if returned to her country of origin.

The case of Ahani reflects the importance of the obligation under Article 13 ICCPR, where even if a national security risk exists, this will not outweigh situations where the individual facing expulsion is completely deprived of the right to submit reasons and the right to have the matter reviewed by a competent authority, especially where a better procedural system is available to an applicant for international protection. In the case of the Australian fast-track process, the applicant is completely deprived of the right to submit reasons against his expulsion, often times the applicant is not even notified of the case going to the IAA. This is in spite of the fact that AAT procedures exist and the applicants are deprived of these procedures purely because of the mode of entry they used to arrive in Australia.

It should be noted that it is unclear from the wording of Article 13 ICCPR whether the reference to submission of reasons and the right to review is in relation to an expulsion decision after it has been made, giving the applicant an opportunity to give a counterargument to the initial decision maker, or to an expulsion decision before it has been made.\textsuperscript{113} However, in considering Ahani and Maroufidou, the submission of reasons against expulsion and access to review of a competent authority is always in relation access to subsequent review bodies and the ability to provide reasons before these competent authorities, following the expulsion decision being made by the initial decision maker.

Further, ‘review’ by a competent authority, in the context of Article 13 ICCPR does not necessarily require that the review should be made \textit{de novo}. The Committee has provided little guidance as to what is regarded as an effective review in accordance with Article 13.\textsuperscript{114} In V.M.R.B v Canada (1988) the Committee held that the provision of an oral hearing and the examination of witnesses was satisfactory in meeting Article 13 obligations.\textsuperscript{115} An oral hearing and the hearing of witnesses are, by nature, procedures to ascertain a question of fact and merits, not law. It is the author’s view that the wording ‘reasons against his expulsion’ would be excessively restricted if the ‘reasons’ were limited to legal reasons and not factual reasons against expulsion.

It is argued that the IAA and the fast track procedure lacks the procedural safeguards provided for in Article 13 ICCPR. Applicants within the fast-track procedure have no right to produce new evidence, which is in essence a deprivation of a right to submit reasons against expulsion. The consideration whether the fast track assessment procedure and the IAA is a violation of the right to review by a competent authority is not as clear. In the author’s view, if the individual facing expulsion does not have a right to \textit{de novo} merits review, then this review is ineffective and would not constitute a review by a competent authority.

### 3.4. Article 31 of the Refugee Convention

In interpreting relevant protection standards afforded by the Refugee Convention, Article 33 must be read in light of Article 31(1).\textsuperscript{116} Article 31(1) recognises that refugees may have to flee their country

\footnotesize
\textsuperscript{112} Suresh v Canada (Minister of Citizenship & Immigration) [2002] 1 SCR
\textsuperscript{114} Wouters (2009) p 417
\hfill 116 UN General Assembly, \textit{Convention Relating to the Status of Refugees}, 28 July 1951, United Nations, Treaty Series, vol. 189. Article 31(1) of Refugee Convention: Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of
of origin without documents and states should not prescribe a penalty for this reality. The phrase “coming directly from a territory where their life or freedom was threatened…” is largely accepted to mean Article 31(1) applies to a person who has briefly transited through other countries where they were unable to apply for protection. The main debate concerning Article 31 surrounds the meaning of ‘penalties’.

‘Penalties’ is not defined in the Refugee Convention and does not appear to have been extensively discussed in the travaux préparatoires. In understanding the text, ‘penalties’ should be read in light of the Vienna Convention, which mandates that the text of a treaty should be given the ordinary meaning in its context in the light of its object and purpose.

Goodwin-Gill takes the view that a restrictive interpretation of ‘penalties’ may circumvent the fundamental protection owed and may result in the withdrawal of the refugee’s rights. According to the UNHCR, the term ‘penalties’ includes, but is not necessarily limited to, prosecution, fine and imprisonment. The UNHCR in reference to the UN Human Rights Committee further extended its interpretation of ‘penalties’ by taking the view that any unfavourable treatment is considered to be a penalty. An example of where ‘unfavourable treatment’ was recognised as a penalty under article 31(1) was the United Kingdom’s attempt in 1996 to withdraw social security entitlements from asylum seekers who failed to submit an application for asylum immediately ‘on arrival’.

Furthermore, Hathaway, in his critique of the United Kingdom’s proposal in 2003 to subject all refugees arriving without travel documents to an accelerated offshore procedure, stated:

The case is strong that the assignment of refugees who arrive without proper documentation to abbreviated procedures is in essence a penalty inflicted for irregular entry. When a summary procedure is resorted to not on the grounds of the substantive insufficiency of a claim, but rather to sanction a refugee for his or her mode of entry, such procedures take on a decidedly punitive character. Because the essential purpose of art 31 is to insulate refugees from penalties for the act of crossing a border without authorisation, a refugee may not lawfully be denied access to ordinary legal entitlements to a complete refugee status inquiry simply because he or she has used false documents to enter the country, or otherwise contravened migration control.

---

119 Weis, P, UN High Commissioner for Refugees (UNHCR), The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis, (UNHCR, 1990)
122 Case No CIS 4439/98, Social Security Commissioner (UK) (25 November 1999)

190805 - Shota Hitomi -Thesis 28
If this interpretation of penalty is taken, an inferior RSD process that precludes applicants from presenting new evidence and the right to an oral hearing would most certainly be an ‘unfavourable treatment’, constituting a ‘penalty’.

In light of the above discussions, the procedural rules of the IAA may be considered a ‘penalty’ imposed on an individual based upon the mode of his or her entry into Australia. The imposition of a markedly inferior RSD system is an unfavourable treatment based upon the mode of entry into the territory and is most likely in contravention of Article 31(1) of the Refugee Convention.

3.5. Fair Hearing Guarantees

3.5.1. Article 16 Refugee Convention – Access to Court of Law

The Refugee Convention does not provide an express right to appeal a negative decision at the first instance. However, Article 16 of the Refugee Convention provides:

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.
2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from cautio judicatum solvi.
3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.’

Scope

Boeles argues that Article 16 of the Refugee Convention applies to all refugees, including refugee claimants, given that ‘habitual residence’ does not prescribe a requirement of legal status. While the text itself is ambiguous, the article is commonly understood to give refugees the right to unimpeded access to a Court where the refugee has a pursuable claim under the relevant law. Where a court has jurisdiction over a particular area of law, a refugee (or claimant) should have unimpeded access to the Court procedure. For example, a refugee can commence a claim in a local Court and seek compensation under tort law or sue a company for a breach of contract when the Court has jurisdiction to hear the refugees claim. However, Article 16 of the Convention does not stipulate subject-matter jurisdiction of a state’s courts, whereby a Court has specific jurisdiction in a particular matter (in this case asylum matters) and the state must provide a forum for a refugee to hear his or her claim. There may be cases where the state does not have a Court which has jurisdiction over the particular area of law. The Article only gives right to refugees to access an existing Court within a given jurisdiction.

However, Boeles argues that Article 16 and the right to access a Court of law is applicable to matters of inclusion and non-refoulement, giving refugee claimants the right to access a Court procedure to review a negative decision by an administrative authority. It is argued that considering the context and subject matter of the Refugee Convention and the fact that Article 16 appears in the second chapter of the Convention which considers the judicial status of a refugee. In addition, Hathaway states:

125 Boeles 1997, p. 71
126 Hathaway 2005 p647
127 Hathaway 2005 p 647

190805 - Shota Hitomi -Thesis
‘the efforts of an increasing number of countries to deny access to their courts to refugees seeking the review or appeal of a negative assessment of refugee status are prima facie incompatible with Art. 16(1) of the Convention’.

While it is unclear whether the UNHCR relies on Article 16 specifically, the UNHCR Handbook further confirms this view, confirming that where an applicant is not recognised as a refugee he or she “should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.” Article 16 of the Convention poses problems when considering access to a Court or Tribunal in a jurisdiction which does not have a forum for it. However, where the jurisdiction does have a Court or Tribunal with the authority to hear asylum cases, the text of Article 16, coupled with the UNHCR’s position on the matter, makes the interpretation of Article 16 unambiguous and suggests that Australia must provide asylum seekers with access to a court of law to uphold its obligations under Article 16 of the Refugee Convention.

Applicants under the fast track procedure have access to the IAA for review proceedings. However, a question remains as to whether the IAA is a ‘court of law’ as understood under Article 16 of the Refugee Convention. Grahl Madsen argues that a court of law is distinct to an administrative authority.

In this respect Article 16 provides little utility in delivering additional safeguards to applicants within the fast track procedure. Applicants do indeed have access to the Federal Court of Australia for matters of judicial review (only after a refusal by the IAA), where they have a narrower scope of review. As rights under Article 16 are clearly stated as the right to ‘access’, it is difficult distil further procedural safeguards which may be derived from it.

3.5.2. Article 14 ICCPR – Fair Hearing before a Tribunal

Article 14(1) of the ICCPR can provide further clarity to obligations owed by states to ensure procedural safeguards in giving access to a fair trial. The Article provides:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. […] (emphasis added)

The content of protection in Article 14(1) is that all persons should be entitled to a fair, public hearing before a competent, independent and impartial tribunal.

Scope

As stipulated under Article 14(1) ICCPR, all persons should have the right to have their suit at law to be heard before a fair and public hearing by a competent, independent and impartial tribunal established by law. The use of the term ‘all persons’ provides subjects with protection which otherwise may be precluded by requirements such as ‘lawfully in’ or ‘lawfully present’ as provided under the Refugee Convention.

The understanding of a ‘suit at law’, taken by the Human Rights Committee is broad, commenting that the term is in reference to the nature of the right at stake rather than the status of the parties.

---

128 UNHCR Handbook on Procedures p43 para 192
129 Grahl Madsen (1967) p 40
meaning that it is inconsequential whether the state or state ministry/department of immigration is a party to the proceedings. An expert study approved by the Human Rights Commission observed:

_Immigration hearings and deportation proceedings may be suits at law. The [UN Human Rights] Committee considered a Salvadoran’s claim that Canada violated his right to a fair hearing in deportation proceedings. Canada argued that deportation proceedings were not suits at law and thus not subject to Article 14(1). The Committee did not accept Canada’s argument and stated explicitly that such proceedings were suits at law._

Hathaway argues on the basis of the above Commission study that it would be inconceivable to exclude claims in relation to refugee status determination from the ambit of Article 14(1) when immigration hearings generally are accepted as suits at law.

However, the Human Rights Committee has been more explicit as to whether the decisions of refugee status determination and consequential expulsion decisions are considered suits at law. In _Zundel v Canada_, the Committee states:

_The Committee recalls, in addition, that the concept of a ‘suit at law’ under article 14, paragraph 1, of the Covenant is based on the nature of the right in question rather than on the status of one of the parties. In the present case, the proceedings relate to the right of the author, who was a lawful permanent resident, to continue residing in the State party’s territory. The Committee considers that proceedings relating to an alien’s expulsion, the guarantees of which are governed by article 13 of the Covenant, do not also fall within the ambit of a determination of ‘rights and obligations in a suit at law’, within the meaning of article 14, paragraph 1. It concludes that the deportation proceedings of the author, who was found to represent a threat to national security, do not fall within the scope of article 14, paragraph 1, and are inadmissible ratione materiae, pursuant to article 3 of the Optional Protocol._

The Committee does not motivate its view other than providing that the ‘right’ should be examined rather than the status of the applicant and that expulsion of aliens is already covered in Article 13 ICCPR. It is unclear whether the decision is based on whether protections covered under Article 13 is _lex specialis_, or simply that decisions of expulsion of aliens are generally not covered under a suit at law. Further, the analogous Article 6 ECHR also precludes migration proceedings from the right to a fair trial. However, the decision making in the seminal case of _Maaouia v France_ is the interpretation of ‘civil right and obligation’ or ‘criminal charges’, not a ‘suit at law’ and cites the existence of Article 1 Protocol 7 ECHR which provides procedural guarantees in the expulsion of aliens. It is acknowledged that Article 13 ICCPR this an express provision providing procedural guarantees in the expulsion of aliens.

In light of the opposing views of the Commission study and the case law of the Human Rights Committee, this thesis will proceed on the basis that RSD procedures (including the review stages) are within the scope of Article 14(1), whilst acknowledging Article 14 ICCPR’s tentative status within the views of the Human Rights Committee.

---

132 Hathaway (2005) p649
133 _Zundel v Canada_ Subsequently followed in _PK v Canada_ (1234/03), _Chadjjian v Netherlands_ (1494/06), and _Kaur v Canada_ (1455/06)
134 _Zundel v Canada_ Subsequently followed in _PK v Canada_ (1234/03), _Chadjjian v Netherlands_ (1494/06), and _Kaur v Canada_ (1455/06)
Taking these views, the relevant question then becomes one of “what constitutes a Tribunal?” and “can the IAA be considered a Court or Tribunal under the meaning of Article 16 Refugee Convention and Article 14 ICCPR?”. This thesis will consider these questions, regardless of the possible inapplicability of the Article 14 ICCPR, as it is interesting to consider how the IAA stacks up compared to the international standards set for a ‘tribunal’ and ‘fair hearing’ under Article 14 ICCPR. In this respect, Article 14 of the ICCPR provides a rich source of case law and academic commentary, as an illustrative guide in considering whether the IAA does in fact meet these international standards.

**Derogations**

Article 4 of the ICCPR allows for derogation from certain provisions in times of ‘public of emergency’, with exceptions to Articles 6, 7, 8 (paras 1 and 2), 11, 15, 16 and 18. It is noteworthy that Article 14 does not appear in this list. However, in the United Nation’s General Comment No 29 on the State of Emergency (Article 4), the UN states that the inderogability of Articles 6 and 7 confirms the importance of procedural guarantees for these provisions. Therefore, provisions relating to procedural safeguards such as Article 14, may not be circumvented in relation to the non-derogable rights of Articles 6 and 7. In its General Comment, the Committee states “[t]he Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency.”

3.5.2.1. **What constitutes a ‘Tribunal’ and a ‘Fair Hearing’?**

The question of whether an administrative body is a ‘tribunal’ is ordinarily a constitutional question within the domestic context. However, this thesis considers this question under the context of the views of the Human Rights Committee, drawing from international law standards to answer this question of whether the IAA can be considered to be a tribunal under Article 14 ICCPR and Article 16 of the Refugee Convention.

Article 14 ICCPR guarantees an extensive range of procedural safeguards to be provided by a tribunal and requires that rights and obligations must be provided by a competent, independent and impartial tribunal. A ‘tribunal’ ordinarily refers to national civil courts but may include independent administrative authorities. It must be competent, meaning that the tribunal’s ‘jurisdiction has been previously established by law, and arbitrary action so avoided’. Independence considers whether ‘the manner in which judges are appointed, the qualifications for appointment and the duration of their terms of office; the conditions governing their promotion, transfer and cessation of their functions and the actual independence of the of the judiciary from the executive branch and the legislature’. A Tribunal must be impartial, which has two aspects. First, the decision maker’s judgement must not be influenced by personal prejudice or bias, have no preconceived notions on the particular case and will not act in a way that improperly promotes the interests of one party over another. Second, the Tribunal must not only be impartial but also appear to be impartial in the eyes of a reasonable observer.

In addition to the structural requirements of a Tribunal, there also exists requirements of a Tribunal to ensure that a ‘fair and public hearing’ is capable of being delivered. First, access to the tribunal must be without undue delay. It must respect the principles of natural justice, which specifically includes

---

136 UNHRC, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001)
137 M Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1993) p228
139 UNHRC ‘Genera Comment 13/21, Procedural Guarantees in Civil and Criminal Trials’ UN doc HRI/GEN/I/Rev 1, 12 Apr 1984 para 3 cited in Gerald P Heckman
the right to submit and contest evidence and to a hearing before the decision maker. There must be procedural equality between the parties within the appeal procedures, meaning that the rules of procedures and the standards set by the Courts are equal (an ‘equality of arms’) between the state party and the applicant. For example in the Human Rights Committee views in Robinson v Jamaica considered that there was a violation of Article 14 where adjournments were granted to the state party but not the applicant. An applicant should have a reasonable opportunity to present their case “under conditions that do not place [the individual concerned] at substantial disadvantage vis a vis his opponent and to be represented by counsel for that purpose”. Lastly, outside of certain specific circumstance of public interests, the proceedings must be public in the interest of the individual and of the society at large. Some circumstances may justify the public being excluded from the hearing, at the very least, the judgement of the case must be made public.

3.5.2.2. Does IAA meet the requirements under Article 14 ICCPR?

The IAA is clearly established by law under the Migration Act 1958. There is no evidence to suggest that the body is not ‘competent’ to hear migration appeals proceedings, while what constitutes ‘competence’ is not further elaborated by the Human Rights Committee. The IAA is an independent review authority within the broader AAT structure, which oversees a variety of administrative law appeals in the first instance. The legitimacy of the AAT is well-established and is not be questioned. There is no indication or evidence to suggest that an IAA decision maker (known as a Reviewer) have personal vested interests in the matter before the IAA.

However, a problematic element of the IAA is that Reviewers who wield decision making authority are hired as ‘public servants’ rather than ‘statutory decision-maker’. This distinction is peculiar considering AAT decision makers are hired as ‘statutory decision makers’ who have greater independence from Australia’s executive branch of government. Consequently, an IAA Reviewer is hired as any other public servants and therefore is at a greater risk of political influence, as a separation of powers does not exist for these quasi-judicial officers reporting to the executive branch. Appointments and dismissals can be made for politically motivated reasons. This fact in itself is not enough to show non-compliance with Article 14 ICCPR, as there is no evidence to suggest that actual political interferences exist, it raises questions of independence and impartiality (or the perception of independence and impartiality) of the IAA and its Reviewers.

Being a part of the fast-track assessment process, undue delay to access the IAA is not a concern. However, the IAA’s procedural rules present glaring issues in meeting the requirement of a ‘fair and public hearing’. Most problematic are the procedural rules in question which do not allow applicants to produce new evidence and do not provide an oral hearing.

---

147 Migration Act 1958 s473JA
The IAA’s rules relating to the submission and contestation of evidence falls short of procedural standard under the IAA. In Vojnovic v Croatia, the Human Rights Committee stated that the evaluation of facts and evidence are generally within competencies of the domestic courts of the state parties to the ICCPR, “unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice”.\(^{149}\) The IAA does not give an opportunity for an applicant to present one’s case, unless it exercises its discretion to allow new evidence in ‘exceptional circumstances’. This thesis argues that where this discretion to allow new evidence is exercised in the way described in chapter 2, it is an arbitrary evaluation of the application for international protection and amounts to a denial of justice.

Further, these proceedings are not public and there is no obligation for the IAA to conduct an oral hearing at all. In most cases, these decisions are made ‘on the papers’ behind closed doors. It is the author’s opinion that the IAA does not meet many of the procedural requirements of a “fair and public hearing” and therefore cannot be considered a Tribunal under Article 14 ICCPR. If the Australian fast track procedure falls within the scope of Article 14 ICCPR, then the IAA should not be considered a ‘tribunal’.

3.6. Conclusion

It is clear from the above discussions that an analysis of international human rights and refugee law instruments give rise to important procedural safeguards, which should be followed in domestic proceedings. The Australian legislator’s comments within the explanatory memorandum of the Amendment Act makes clear the legislators have only considered the issue in a limited manner to create a veneer of engagement with international standards of procedural safeguards.

The proclamation that there is no requirement of merits review under the ICCPR and the CAT is misleading. While it is true that there is no explicit requirement of ‘merits review’ under the ICCPR, some analysis of the provisions makes clear that the procedural guarantees under the ICCPR make little sense without the guarantee of merits review.

It is also true that the Refugee Convention does not prescribe a procedure to be followed by contracting states. However, the Refugee Convention provides for minimum procedural safeguards both explicitly (Article 32 and 16) and implicitly (Article 33 and 31). Any level of judicial scrutiny before a court bound by these international instruments would find a violation of at least one of the above discussed items of international law.

Not all articles of the Refugee Convention, ICCPR and the CAT considered in this thesis produced procedural safeguard guarantees for applicants in the Australian fast track procedure. The applicability of Articles 16 Refugee Convention and Article 14 ICCPR is tentative and the utility of these articles in deriving procedural safeguards is questionable. However, this thesis argues the Australian fast-track process violates key obligations under these international instruments, such as the principle of non-refoulement. The principle should impose upon contracting states certain minimum procedural safeguards in RSD proceedings, such as the right to submit evidence and the right to an oral hearing at the review stage. It is the author’s opinion that this argument is particularly compelling, and is supported by other effective remedy guarantees. Article 32 of the Refugee Convention and Article 13 ICCPR are also violated by Australian in their use of fast track procedures if we are to accept the interpretation of ‘lawfully in’ as presented above. Regardless, it is argued that the principle of non-refoulement should provide greater guarantees than that of effective remedy guarantees outlined in Article 32 Refugee Convention and Article 13 ICCPR. Article 2(3) ICCPR reaffirms generally the importance of a guarantee of an effective remedy. Article 31 of the Refugee

Convention, while slightly more derivative, makes an important point of guaranteeing that all asylum seekers are treated equally and no difference in treatment should occur as a result of the mode of entry.

While some of the above arguments are tentative and are subject to interpretation (for example Article 14 ICCPR), the fast-track procedures violates several Articles of the Refugee Convention, ICCPR and the CAT. The ‘effectiveness’ of non-refoulement is an important source of procedural safeguards, especially considering the devastating effects of an incorrect decision made by the decision makers.
4. Chapter 4: The Justifications of Fast-Track Procedures: A Comparative Study

4.1. Introduction

In implementing the fast track system, the Australian government utilises several reasons to justify the suspension of procedural safeguards in the fast-track RSD process. The explanatory memorandum of the Amendment Bill explains that the fast-track process is fair because procedural fairness is guaranteed at the first instance at the initial application stage of examination at the Departmental level. It further explains that the objective and purpose of the fast track assessment is to deliver an efficient system to clear the backlog of asylum applicants.\(^{150}\) It is the opinion of the author that any justifications such as these or other justifications such as ‘public order’\(^ {151}\), ‘national security’\(^ {152}\) or ‘in time of public emergency’\(^ {153}\) are not boundless and must ultimately be balanced with the interest and the rights of the applicant to be afforded a fair hearing before a decision maker.

For example, this is reflected in the ICCPR, where derogations are afforded to some articles in the ICCPR in times of ‘public emergency’. This is also the case within certain other articles of the ICCPR and the Refugee Convention (for example, ‘national security and public order’ in article 32 Refugee Convention).\(^ {154}\) Further, the case of Ahani v Canada (introduced in chapter 3.3.3) is a good illustration of the consideration by the Human Rights Committee of the balancing of justifications, considering a balance between national security and procedural fairness.

It is interesting to note that while the ICCPR does not prescribe a procedure to be followed in expulsion cases, minimal safeguards and standards against arbitrary expulsion are guaranteed, where contracting states are limited in the circumstances and reasoning used in derogating from their ICCPR obligations. In its views, the Human Rights Committee noted that the distinct procedures between the domestic procedures of Ahani and Suresh, where higher procedural safeguards were provided in the matter of Suresh for seemingly arbitrary and purely procedural reasons, led to a violation of Article 13 ICCPR. A similar observation could be made between the procedures of the IAA and the AAT. With Australian courts unable to engage with international law, it is interesting to consider how these justifications would be dealt with by a court that is able to draw upon and engage in international law.

Accelerated procedures across many other jurisdictions in their varying forms use both similar and differing reasons to Australia in justifying their accelerated procedures which deprive applicants from safeguards which are otherwise provided in ordinary RSD processes. The EU and the US accelerated and expedited removal procedures (respectively) both cite the first instance procedural fairness and efficiency arguments to justify their respective procedures.\(^ {155}\) Additionally, the US cites ‘deterrence’ as a further reason to justify the lack of procedural safeguards. The US promotes the fact that one will not receive proper procedure and will be subject to an entry ban of two years if expelled through the expedited procedure.

In this chapter, the Common European Asylum System (“CEAS”) accelerated procedure used the EU and the expedited removal process in the US will be introduced as examples of fast-track procedures in other jurisdictions. Further, this paper considers how the ECtHR and the Supreme Court of the United States (“Supreme Court”) have assessed the justifications of lesser procedural safeguards. This

\(^{150}\) Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth), Explanatory Memorandum, Statement of Compatibility with Human Rights, p 19

\(^{151}\) Article 32 Refugee Convention

\(^{152}\) Article 13 ICCPR

\(^{153}\) Article 4 ICCPR

\(^{154}\) See Chapter 3.5.2

is to illustrate how certain justifications have been balanced by courts of other jurisdictions with concepts such as ‘justice’ and ‘fairness’. As discussed in the methodology chapter, the ECtHR was chosen as an example to illustrate a procedure whereby an international convention (ECHR) has a strong influence on domestic courts. The US was chosen as an illustration of an accelerated procedure that is somehow harsher and more limited in procedural safeguards than Australia, with the judicial branch being very active to keep the executive branch in check. To a lesser extent, this chapter will refer to UK examples, as the UK jurisdiction is similar to Australia and therefore such a consideration is useful for illustrative comparison. Each of these jurisdictions will be utilised to contrast the Australian position on procedural safeguards. These justifications and each respective court’s decisions relating to these justifications are examined in this chapter.

4.2. The CEAS Procedures (EU)

Chapter II of Directive 2013/32/EU of 26 June 2014 on common procedures for granting and withdrawing international protection (recast) (“recast Asylum Procedures Directive”) provides a right to an effective remedy which involves a full and ex nunc examination of both facts and points of law. Among the fundamental safeguards provided in Article 46, the right to submit evidence and the right to an oral hearing before a court or tribunal are explicitly provided for.\(^{156}\)

Under EU law, the extent of this right to an effective remedy under Article 46(3) in conjunction with Article 47 of the Charter was tested in the case of Alheto.\(^{157}\) In Alheto, the Court confirmed that the relevant national court or tribunal must conduct a personal interview with the applicant in appeal proceedings and where new evidence comes to light, the court or tribunal must give the applicant an opportunity to express his or her view when the evidence may affect them negatively.\(^{158}\)

4.2.1. Accelerated Procedures

The CEAS accelerated procedures were introduced in the Asylum Procedures Directive in 2005 and then reformulated in 2013 with the 2013 recast of the same directive. The CEAS accelerated procedures aims to give states the opportunity to apply special procedures where a swifter decision-making process is warranted. Like with regular CEAS procedures, contracting states have discretion to implement accelerated procedures within their own legal system.

As stated above, Chapter II recast Asylum Procedures Directive outlines the basic principles and guarantees which should be upheld by contracting states in their asylum procedures. Article 31(8) states that Chapter II procedures and guarantees cannot be deviated from in accelerated procedures, except for providing shorter deadlines.\(^{159}\) Therefore, these Chapter II procedural safeguards which are guaranteed in ordinary procedures should be upheld in accelerated procedures.

An applicant enters the accelerated procedure if he or she is subject to a category provided for under Article 31(8) of the recast Asylum Procedures Directive. It is notable that among these categories, there are provisions which have nothing to do with the merits of one’s case, but also administrative errors on the part of the applicant.

An important distinction was drawn in the 2013 recast Asylum Procedures Directive between ‘prioritised procedures’ and accelerated procedures, clarifying that prioritised procedures should entail a more rapid assessment of a claim for international protection “without derogating from normally applicable procedural time limits, principles and guarantees”.\(^{160}\) In contrast, accelerated

\(^{156}\) Art 46(3) recast Asylum Procedures Directive.
\(^{157}\) CJEU 25 July 2018, Case C-585/16 (Alheto)
\(^{158}\) CJEU 25 July 2018, Case C-585/16 (Alheto)
\(^{159}\) Art 41(2)(a) recast Asylum Procedures Directive.
\(^{160}\) Recital 19 and 20 recast Asylum Procedures Directive.
procedures allow for derogation from ordinary procedural rules by allowing for shorter but “reasonable” time limits for procedural steps. Prioritised procedures are recommended to be used for manifestly well-founded cases, while accelerated procedures are often reserved for manifestly unfounded cases.

While the recast Asylum Procedures Directive appears to provide far greater safeguards within their accelerated procedures than the Australian fast-track system, including the right to provide evidence and the right to an oral hearing on appeal, the CEAS accelerated procedures are not without criticism. The distinction between prioritised procedures and accelerated procedures allows for appeals with short time limits which give no suspensive effect over removal decisions. Further, while a distinction between prioritised and accelerated procedures exist under the Asylum Procedures Directive, this distinction is not necessarily drawn in national law when implemented by contracting states. Therefore, in some states such as Greece and Spain, both favourable applications with a high chance of success which should be prioritised and manifestly unfounded applications which should be accelerated are dealt with in the same system.

4.3. Expedited Removal Procedure (US)

The Expedited Removal procedure was implemented in the United States when the Clinton administration enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996. The Expedited Removal procedure has evolved throughout the years, but in essence, has remained consistent in providing border authorities (exercising executive power) with the decision-making power to remove non-citizens, with each iteration expanding the scope of where the expedited procedures can take place. While these procedures were only applicable at ports of entry, currently these expedited removal procedures can occur anywhere along the US border or within the US territory to those who have not been lawfully admitted to the territory. Further it imposes a five-year entry ban on those who have been removed under this procedure.

People apprehended under the Expedited Removal procedure will have an opportunity to declare whether they have a credible fear of returning to their home country. Once declared, a border officer will conduct a credible fear interview to assess whether their fear of returning is “credible”. If deemed credible, the applicant will be given an opportunity to present their asylum claim before an Immigration Judge. Applicants are subject to mandatory detention whilst going through the credible fear process and are provided with no right to a hearing, appeal or judicial review process if their claim is not deemed to hold a “credible fear”.

These removal decisions are outside of the jurisdiction of any Tribunal or Court and § 1252(e)(2) of the US Code prevents any judicial review of whether Department of Homeland Security complied with the procedures in an individual case, or applied the correct legal standards. Instead all decisions are reviewed by an “immigration judge” who are technically not independent members of the judiciary but are rather employees of the Attorney General’s office, who hire and provide...
directions to immigration judges. Consequently, numerous criticisms have been levelled against the lack of independence of these decision makers, to the point that the immigration judges themselves arguing for their independence from the Attorney General’s office.

The main justification for the implementation of the Expedited Removal procedure are twofold. First, the procedure promotes the efficiency and efficacy at the border, applying these procedures to “frivolous” asylum claims. Contemporary advocates for the Expedited Removal procedure argue that federal judges would hinder the object and purpose of Expedited Removal and would stifle the Attorney General’s ability to deliver on the overall intent of the statute, especially in cases where there are sudden influxes in the caseload, giving less flexibility to the Attorney General to make “managerial adjustments”. Second, the procedure was implemented in the hopes to act as a deterrent to those appearing at the border or entering the territory unlawfully to make an asylum claim.

The IIRIRA statute removed any scope for Federal Courts of jurisdiction to challenge the system. In the case of Rodriguez v US Customs and Border Protection a federal judge noted: "[t]he expedited removal statutes are express and unambiguous. The clarity of the language forecloses acrobatic attempts at interpretation". This is in spite of the heavy criticism made by human rights bodies and the judiciary alike, with one Federal Judge stating that the system is "fraught with risk of arbitrary, mistaken, or discriminatory behaviour...".

However, the idea that there can be no judicial review into an expedited removal procedure took a major turn in May 2019 when the Court of Appeal in the Ninth Circuit decided that the lack of judicial review process within the expedited removal procedure violates the suspension clause within the US Constitution. The Federal Judges in Thurassigiam v. U.S. Department of Homeland Sec unanimously allowed for a habeas corpus appeal to proceed on the basis that the applicant fell within the jurisdiction of the US Constitution and therefore were required to be given protection of the suspension clause of the US Constitution. This was an explicit rejection of the Court’s previous reasoning in Castro v. U.S. Department of Homeland Sec. The decision and the future of expedited procedures will be further discussed below in Chapter 4.1.2.

4.1. Justifications

4.1.1. Guarantee of First Instance Procedural Fairness

The first justification given by the Australian government in enacting the fast-track procedures is that because an applicant is given an opportunity to give a full account of their asylum claim through an interview and other evidentiary means in the first instance, there is no further need to guarantee

---

169 Title 8 U.S Code § 1001.1(l) (defining “immigration judge”)
174 Khan v. Holder, 608 F.3d 325, 329 (7th Cir. 2010).
175 Thurassigiam v. U.S. Dep't of Homeland Sec: No. 18-55313 CV 18-135 AJB p4
176 Thurassigiam v. U.S. Dep't of Homeland Sec: the suspension clause protects the right to not suspend the right to submit a Habeas corpus writ, being a writ which directs the custodian to bring the confined person before the court for examination into those reasons or conditions.
additional safeguards at the appeal stages. The state argues that this guarantee of procedural fairness in the first instance, means that the fast track system does not require full procedural fairness at the review stage.

As discussed in Chapter 2, this procedural rule presents many practical issues. It is clear that procedural fairness at the first instance is insufficient in delivering procedural fairness as a whole to applicants due to the very nature of asylum applications and the vulnerabilities of these applicants, particularly where credibility is at issue. However, the Australian government maintains that Article 13 ICCPR does not guarantee a right to merits review, and an oral hearing and right to submit evidence at the first instance is sufficient in delivering procedural fairness.

The ECtHR has grappled with this issue on numerous occasions. As stated previously, jurisprudence of the ECtHR may be helpful in considering the ICCPR, because the ICCPR was modelled on the ECHR. The ECtHR has considered whether they are required to consider new evidence which was before them and conduct an interview of the applicant, when the domestic courts have already conducted these procedures. The ultimate question here being: whether a guarantee of first instance procedural fairness in the lower, domestic proceedings is sufficient in delivering ‘rigorous scrutiny’ under the standards of Article 3 and 13 ECHR.

As foreshadowed above, in ECtHR case law, Article 13 ECHR and the “effectiveness” of Article 3 ECHR are relevant in considering the whether a lack of procedural safeguards within a domestic system violates the ECHR.

Article 3 ECHR is the prohibition against torture and ill-treatment and is also commonly interpreted as a non-refoulement provision as understood under Article 33 of the Refugee Convention. Given the irreversible nature of the harm which may occur if the risk under Article 3 ECHR materialised, the importance of Article 3 ECHR from a procedural sense is that a state’s obligation under Article 3 ECHR requires the close and rigorous scrutiny in order to preserve the effectiveness of Article 3 ECHR.

Article 13 ECHR provides the right to an effective remedy before a national authority where the individual has an arguable claim under a separate ECHR ground. Article 13 ECHR requires states to provide an independent and rigorous scrutiny in matters where substantial grounds for fearing a real risk of treatment contrary to Article 3 ECHR exists. In assessing an alleged risk of treatment in violation of Article 3 in respect of aliens facing expulsion or extradition, ‘a full and ex nunc assessment is called for’.

Whether the standard of scrutiny the ECtHR imposes onto itself should be applicable to domestic courts is unclear from the jurisprudence of the ECtHR. However, Spijkeboer provides a highly compelling explanation to this issue. Spijkeboer argues that if domestic courts are able to apply lower procedural standards than the ECtHR itself, then the principle of subsidiarity of the ECtHR would be incompatible due to the fact that the ECtHR would be applying a higher threshold of scrutiny than

---

177 Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth), Explanatory Memorandum, Statement of Compatibility with Human Rights, p 22, 26
179 Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth), Explanatory Memorandum, Statement of Compatibility with Human Rights p21
180 Soering v. The United Kingdom, 1/1989/161/217, Council of Europe: European Court of Human Rights, para 88
181 Jabari v. Turkey, Appl. No. 40035/98, Council of Europe: European Court of Human Rights, 7 July 1998 para 88
182 Soering v. The United Kingdom, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989 para 88
183 Salah Sheekh v. The Netherlands, Application no. 1948/04, Council of Europe: European Court of Human Rights, 11 January 2007 para 136
domestic courts. The subsidiary role of the ECtHR can only be compatible if the domestic courts maintain a more comprehensive and intense scrutiny of matter compared to the ECtHR. Therefore, domestic proceedings within the judicial scope of the ECtHR must apply the same standard of rigorous scrutiny as the ECtHR, meaning that domestic courts must allow for the submission of evidence at appeal stages and consider all evidence available to them from objective sources at the time of examination, not at the time of application.\textsuperscript{184}

However, there are several instances where the Court has accepted that procedural fairness has been delivered in the first instance and therefore the lack of procedural safeguards does not violate either Article 13 or Article 3 ECHR. It is noteworthy that this is divergent to the abovementioned requirement for Courts to apply ‘rigorous scrutiny’ in Article 3 ECHR cases.

In two cases in 1991: \textit{Cruz Varas v Sweden}\textsuperscript{185} and \textit{Vilvarajah and others v. the United Kingdom}\textsuperscript{186}, the ECtHR did not apply the standard of ‘rigorous scrutiny’ but rather supervised the national procedures in a distant manner. In \textit{Vilvarajah}, the Court considered the UK procedure where the remedy only permits the domestic courts to examine the legality of a decision and not the merits. However, the ECtHR was satisfied that the way in which judicial review had operated in the applicants’ case had permitted the UK courts to subject the decision to the “most anxious scrutiny”.\textsuperscript{187} In particular, courts determine whether such a decision is tainted with illegality, irrationality, or procedural impropriety. It was therefore considered to be an effective remedy. However, two judges, who were common law judges, dissented, extrapolating that a remedy which could not examine the merits could not be described as effective. In the case of \textit{Cruz Varas}, the Court also repeated the focus on the domestic procedure, this time in the Swedish system, and placed importance on the experience of the Swedish authorities and the fact that the national authorities had conducted a thorough examination.\textsuperscript{188}

Similarly, in the case of \textit{I.M v France}, the ECtHR dealt with a prioritized procedure on the French border where the applicant’s application was examined and rejected, and was then subsequently required to lodge a full written application in French within 5 days, without being given access to a translator. The French authorities were then required to make a decision within 96 hours of receiving the application. The ECtHR confirmed that while a prioritized procedure is legitimate in certain circumstances, it was not in this case. The Court goes on to state:

\textit{"It has already had the opportunity [in Sultani v. France] to determine that the re-examination of an asylum application in the prioritized procedure did not deprive a detained alien of a detailed examination when his first application was subject to a full examination in the framework of the normal asylum procedure...}

\textit{However, as the Court must underline, this was not so in the case of the [present] applicant. Indeed, the case concerns a first application, not a re-examination. Thus, the examination of the applicant’s application by OFPRA under the prioritized procedure would have constituted the sole examination of the merits of his asylum claim before his removal, had he not obtained in time a [Rule 39] interim measure from the Court."}\textsuperscript{189}

\textsuperscript{184} Salah Sheekh v. The Netherlands, Application no. 1948/04, Council of Europe: European Court of Human Rights, 11 January 2007 para 136
\textsuperscript{186} Vilvarajah and Others v. The United Kingdom, 45/1990/236/302-306, Council of Europe: European Court of Human Rights, 26 September 1991
\textsuperscript{187} Vilvarajah and Others v. The United Kingdom, 45/1990/236/302-306, Council of Europe: European Court of Human Rights, 26 September 1991 para 125
\textsuperscript{188} Cruz Varas and Others v. Sweden, 46/1990/237/307, Council of Europe: European Court of Human Rights, 20 March 1991 para 81
\textsuperscript{189} I.M. v. France, Application no 9152/09, Council of Europe: European Court of Human Rights, 2 February 2012 paras.142-143, unofficial translation from French original found in: UNHCR, The Case Law of the European Regional Courts: the Court of Justice of the European Union and the European Court of Human Rights, Refugees, asylum-seekers, and stateless persons, June 2015, 1st edition p 238
The distinction in the decision-making process between *I.M v France* and *Sultani v France* was whether or not the applicant was given an opportunity for a full examination in the first instance. Had the applicant in *I.M v France* been given an opportunity to present their case fully in the first instance, the ECtHR would have ruled in favour of the state party.

However, as foreshadowed above, subsequent case law of the ECtHR states that the test under Article 13 ECHR and Article 3 ECHR have evolved to require “independent and rigorous scrutiny” in both its ordinary and accelerated RSD procedures. It is the notable that the type of decision made in *Vilvarajah* and *Cruz Varas* have not been repeated since 1991.

The European Court has established that a substantive right under Article 3 ECHR includes a requirement of close and rigorous scrutiny of a violation under Article 3 ECHR upon expulsion. In the case of *Jabari v Turkey*, an ‘automatic and mechanical’ procedure deprived the applicant of any opportunity to present her case as a result of the applicant failing to register within 5 days. The ECtHR concluded in this circumstance, that: “the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention”. The ECtHR later states that an examination of the existence of a real risk of ill-treatment requires ‘rigorous scrutiny’, which entails a ‘meaningful assessment’ of the Applicant’s claim.

In *Salah Sheekh v Netherlands*, the ECtHR further emphasised this requirement of rigorous scrutiny. It considered that the ECtHR should consider all materials available at the time of the appeal hearing and not just the materials available to the domestic authorities. Considering the importance of Article 3 ECHR and the disastrous consequences which could follow a manifestation of a risk under Article 3 ECHR, the Court concluded that the they should consider all objective materials from other reliable sources.

The matter of *Hilal v the UK* is an interesting example of the Court applying their own rigorous scrutiny under Article 3 ECHR but also affirming that the UK provided an effective remedy under Article 13 ECHR. The claim made by the applicant was rejected by the UK authorities and domestic courts after only producing evidence of affiliation with a political organisation. At a later stage, the applicant produced further medical evidence, a police summons and evidence of his brother’s death to the Secretary of State, who ultimately refused to reverse the decision as they doubted the authenticity of the documents due to the fact that the applicant did not provide them in the first instance. During the ECtHR proceedings, expert evidence was submitted attesting to the authenticity of the document. It was unimportant to the ECtHR that the domestic authorities had assessed the applicant to lack credibility as the applicant had since produced further evidence to back up their claim. The ECtHR accepted all of the documents before them and assessed their evidentiary value accordingly, applying rigorous scrutiny under Article 3 ECHR, even where the domestic courts had refused to consider the evidence in question.

The ECtHR has in past cases found that fairness in the first instance can be sufficient. However, more recent ECtHR case law suggests that the standard of examination given at the review stage should be “rigorous scrutiny” of the facts, not at the date of application, but rather an ongoing examination of the facts as time goes on. The justification that a guarantee of procedural fairness at the initial stage is sufficient for the protection of the rights of asylum seekers is misguided, especially as reasoned in ECtHR jurisprudence. Any appeal proceeding should be conducted at the level of rigorous scrutiny of

---

190 *Jabari v. Turkey*, Appl. No. 40035/98, Council of Europe: European Court of Human Rights, 11 July 2000, para 40
191 *Jabari v. Turkey*, Appl. No. 40035/98, Council of Europe: European Court of Human Rights, 11 July 2000, para 40
192 *Salah Sheekh v. The Netherlands*, Application no. 1948/04, Council of Europe: European Court of Human Rights, 11 January 2007 para 136
193 *Hilal v. The United Kingdom*, 45276/99, Council of Europe: European Court of Human Rights, 6 June 2001 para 22
194 *Hilal v. The United Kingdom*, 45276/99, Council of Europe: European Court of Human Rights, 6 June 2001 para 63
195 *Hilal v. The United Kingdom*, 45276/99, Council of Europe: European Court of Human Rights, 6 June 2001 para 62
the merits, considering all of the available evidence before it. It is clear that examination in the Australian fast-track system at the appeal stage, which provides no oral hearing and no opportunity to adduce new evidence falls far short of “rigorous scrutiny” standard as set by ECtHR case law.

This reasoning by the ECtHR reflects the importance placed on the real and prospective harm that could be suffered by applicants who fall under the scope of Article 3 ECHR if an incorrect decision is made. Importance is also placed on how time can show how a country’s situation might unfold, how further evidence can show the true nature of the applicant’s asylum story and how an automatic and inflexible procedure is incompatible in ascertaining the refugee status of an applicant. Due to the fundamental nature of protections offered under Article 3 ECHR, the ECtHR deems that an ex nunc assessment of the matter is warranted, even when procedural fairness may have been provided in the first instance. It is this thesis’ submission that many of the applicants who are in the Australian fast-track system would also fall under the scope of the subject matter of Article 3 ECHR were they in a contracting state to the ECHR. The comparison is drawn between the ECtHR and the Australian system to highlight how a human rights court would deal with such a justification brought forth by a state government in implementing a RSD procedure with such low standards of procedural safeguards.

4.1.2. Efficiency and Efficacy

Like with many other accelerated procedures in other jurisdictions, the Australian fast-track system was implemented to process a large backlog of asylum applications and to do it in an efficient manner. However, the question remains as to what extent can safeguards be removed for the sake of efficiency.

The Procedural Standard for Refugee Status Determination under UNHCR’s Mandate (“the UNHCR Standard”) outlines the standards of RSD by the UNHCR. While this document is not binding on contracting states, the document provides insight into what the UNHCR perceives to be the minimum procedural standards in RSD proceedings.196

It is clear from the text of the UNHCR Standard that accelerated procedures are not designed to remove procedural safeguards, but the procedures exist to create avenues for priority processing (through reduced waiting times) for applicants with special needs.197 Procedural safeguards are never compromised in favour of efficiency under the UNHCR Standards. UNHCR guidelines clearly state that the only justification for excluding an applicant’s right to an oral interview is where the claim is going to be approved.198

The UK and EU fast-track systems closely mirror the UNHCR Standards. The recast Asylum Procedures Directive provides in the preamble, a prioritised procedure must entail a more rapid examination of claims “without derogating from normally applicable procedural time limits, principles and guarantees”.199

Despite the Australian government modelling its fast-track system on the UK model, the UK Detained Fast Track system (“DFT system”) provides far more procedural safeguard than the Australian model. The UK model is subject to the EU Asylum Procedures Directive in its form prior to the recast in 2013. However, it is interesting note that the DFT system is currently suspended due to a series of successful legal challenges, which are outlined below.

196 UNHCR Handbook on Procedures para 4.6
197 UNHCR Handbook on Procedures para 4.6 section 4.6.1
As a qualifying criterion, the UK model is only applicable to those matters where ‘it appears that a quick decision is possible’. This criterion appears to be consistent with the Asylum Procedures Directive, where fast track or “accelerated” processes are limited to asylum seekers whose claims are ‘manifestly unfounded’ or where the asylum seeker is from a country ‘generally’ considered to be safe. The UK model precludes applicants who are ‘vulnerable’ asylum seekers from the fast track system, further enforcing the idea that the fast-track system should be reserved for applications where the risk of making an incorrect decision is low.

The UK model requires ongoing consideration and application of flexibility in timetable and processing, whereby removal from the fast-track system to the regular process (and vice versa) is available with minimal administrative hindrance where fairness demands. The sustained detention of applicants during the DFT procedures for the sake of speed and convenience was heavily criticised by the domestic court. Further, the time-frames for applicants and the Home Office were excessively short, whereby applicants must apply for review within two days of receiving a decision, the Home Office must respond within two days and the hearing would be required to take place three days later.

Notably, on 12 June 2015, the High Court of England and Wales found that the Fast-Track Rules which governed the fast track appeal process in the UK was ultra vires in nature. The High Court ordered these rules to be quashed, with Nichol J stating in the leading judgement:

‘In my judgment the [Fast Track Rules] do incorporate structural unfairness. They put the Appellant at a serious procedural disadvantage.’

‘...What seems to me to make the [Fast Track Rules] structurally unfair is the serious procedural disadvantage which comes from the abbreviated timetable and curtailed case management powers together with the imposition of this disadvantage on the appellant by the respondent to the appeal.’

This decision was appealed by the UK Government to the Court of Appeal of England and Wales. The appeal was rejected by the Court of Appeal. While it accepted that the Fast Track Rules were in place to promote speed and efficiency, it concurred with the High Court that the fast-track process is inherently and structurally unfair and unjust as the process does not adequately take into account the complexities of the asylum appeals.

Further, in commenting on the objective of the fast-track rules and the extent to which safeguards can be removed from the system, the Court of Appeal stated:

‘... the tension is more apparent than real: the rules must secure that the proceedings are handled quickly and efficiently, but in a way which ensures that justice is done in the

---

200 United Kingdom Government, UK Visas and Immigration, Detained Fast Track Processes: Instruction: Asylum Instructions, 11 June 2013
203 Court of Appeal, R (on the application of Detention Action) v Secretary of State for the Home Department [2014] EWCA Civ 1634.
204 The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 SI 2406 Schedule rule 5, 7, 8 and 10.
205 United Kingdom Government, UK Visas and Immigration, Detained Fast Track Processes: Instruction: Asylum Instructions, 11 June 2013
206 Detention Action v Lord Chancellor [2015] EWHC 1689 at 57
207 Detention Action v Lord Chancellor [2015] EWHC 1689 at 61
208 The Lord Chancellor v Detention Action [2015] EWCA Civ 840
particular proceedings and that the system is accessible and fair. Speed and efficiency do not trump justice and fairness. Justice and fairness are paramount.209

In the ECtHR, the French accelerated procedure has come under close scrutiny in cases such as M.E v France210 and K.K v France211, each time invoking Article 3 ECHR and Article 13 ECHR arguments. However, each case has been found to not have violated Article 13 ECHR in relation to the short time limits, as the applicants had delayed in making an asylum application after arriving in France. In turn, the ECtHR utilises the principle of rigorous scrutiny under Article 3 ECHR, to find in both cases violation of Article 3 ECHR in light of a fresh view of the evidence before them. The same principles of the standard of procedure apply in this case, just as they did in subchapter 4.1.1. The ECtHR, as it often does, avoids the question of the legitimacy of the domestic procedure and applies its own standards of rigorous scrutiny to the case. When the Court conducted its on examination of the facts, it found in favour for the applicants under Article 3 ECHR by considering evidence which were allowed in the French accelerated procedure. This shows the Court’s unwillingness to comment directly on France’s domestic system directly, but will conduct its own examination to ensure the protection of the applicant under Article 3 ECHR. In theory, the level of scrutiny provided by the court should be applied to domestic proceedings, meaning that ‘efficiency’ is not a legitimately justification for curtailing procedural safeguards.

In the US expedited procedure case of Thugassium, the applicant argued that the US expedited procedure and the credible fear screening process deprived applicants from a “meaningful right to apply for asylum” and “not providing him with a meaningful opportunity to establish his claims, failing to comply with the applicable statutory and regulatory requirements, and in not providing him with a reasoned explanation for their decisions.”212 Despite the explicit deprivation of safeguards as written into statute, which deprives the applicant the right to a hearing, appeal or judicial review, the Court still found in favour of the applicant, overturning previous precedent established in Castro, relying upon a constitutional argument. The case is illustrative of a highly procedurally mandated system, which in the US case provides an explicit prohibition for applicants to apply for appeal or judicial review, but the higher Courts invoking a higher law (in this case the US Constitution) in arguing for the prescription of procedural safeguards in the appeal procedure.

It is apparent from this sub-chapter that while ‘efficiency’ is used by states in order to curtail procedural safeguards to asylum seekers, courts in various jurisdictions have been resistant in ceding these guarantees in favour of state efficiency due to fundamental and devastating nature of the consequences of an incorrect decision. Examples in each of the above jurisdictions accept the importance of allowing an applicant to put forth his or her application and the right challenge an incorrect decision.

4.2. Conclusion

While there are certainly circumstances where a state can curtail procedural safeguards for the sake of efficiency or public order, what we have seen in the above chapter is that there are clear limits that domestic courts will tolerate in the examples of the EU, the UK and the US.

The ECtHR case law illustrates the difficulty in maintaining that procedural fairness in the first instance is enough to justify procedural fairness as a whole, in light of the obligations owed by states to provide fundamental protection to applicants in cases involving non-refoulement. The ECtHR case law emphasises the importance of the high level of safeguards owed to applicants under the

209 The Lord Chancellor v Detention Action [2015] EWCA Civ 840 at 22
210 M.E v France, no 71398/12, Council of Europe: European Court of Human Rights, 3 November 2012 (English translation found at https://www.asylumlawdatabase.eu/en/content/ecthr-me-v-france-application-no-5009410#content)
211 K.K v France, 18913/11, Council of Europe: European Court of Human Rights, 10 October 2013 (English translation found at https://www.asylumlawdatabase.eu/en/content/ecthr-kk-v-france-application-no-1891311#content)
212 Thugassium v. U.S. Dep’t of Homeland Sec
benchmark of ‘rigorous scrutiny’ which must come with the assessment of non-refoulment matters. Australia’s justification: that procedural fairness is delivered in the first instance, would therefore be unacceptable in the ECtHR in light of the state’s obligation of non-refoulment, if Australia were to come under the jurisdiction of the ECtHR.

The UK court in assessing the legitimacy of their DFT procedure assessed that its procedure (which had considerably more procedural safeguards than the Australian system) was ‘structurally unfair’ because the shorter time limits imposed a serious procedural disadvantage to the applicant. The UK courts were unswerving in their conclusion that efficiency must always be secondary to justice. As stated in the judgement, justice and fairness are paramount. This example is illustrative of how the justification of efficiency and expediency is not acceptable if it comes at the cost of justice and fairness to the applicant.

The seminal US judgement of *Thugassium* further shows a domestic court’s willingness to put justice and fairness over efficiency where applicants face procedures lacking basic safeguards, even where the ‘unfair’ procedure is explicitly provided for within domestic law. The US Supreme Court took a bold step in relying upon constitutional arguments to safeguards these rights for applicants and illustrates an example of how the Australian High Court could consider similar issues but exercising a certain ‘creativity’ to protect vulnerable applicants.

Simply citing justifications such as ‘first instance procedural fairness guarantees’ and ‘efficiency and expediency’ are not sufficient to preclude applicants seeking international protection from procedural safeguards. It is argued that the Australian system must engage with its international obligations owed to refugees and must balance these justifications which are in the ‘national interest’, with its international obligations in a fair manner.
5. Bibliography

**Primary Sources**

**ECtHR Case Law**


*Hilal v. The United Kingdom*, no 45276/99, Council of Europe: European Court of Human Rights, 6 June 2001

*I.M. v. France*, no 9152/09, Council of Europe: European Court of Human Rights, 2 February 2012

*Jabari v. Turkey*, no 40035/98, Council of Europe: European Court of Human Rights, 11 July 2000

*K.K v France*, 18913/11, Council of Europe: European Court of Human Rights, 10 October 2013

(English translation found at [https://www.asylumlawdatabase.eu/en/content/ecthr-kk-v-france-application-no-1891311#content](https://www.asylumlawdatabase.eu/en/content/ecthr-kk-v-france-application-no-1891311#content))

*M.E v France*, no 71398/12, Council of Europe: European Court of Human Rights, 3 November 2012

(English translation found at [https://www.asylumlawdatabase.eu/en/content/ecthr-me-v-france-application-no-5009410#content](https://www.asylumlawdatabase.eu/en/content/ecthr-me-v-france-application-no-5009410#content))

*M.S.S. v. Belgium and Greece*, no 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011

*Mamatkulov and Askarov v. Turkey*, no 46827/99 and 46951/99, Council of Europe: European Court of Human Rights, 4 February 2005

*Salah Sheekh v. The Netherlands*, no 1948/04, Council of Europe: European Court of Human Rights, 11 January 2007 para 136

*Soering v. The United Kingdom*, no 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989

*Tarakhel v. Switzerland*, no 29217/12, Council of Europe: European Court of Human Rights, 4 November 2014

*Vilvarajah and Others v. The United Kingdom*, no 45/1990/236/302-306, Council of Europe: European Court of Human Rights, 26 September 1991

**UN Human Rights Committee**


UNHRC, Communication No. 470/1991, Kindler v Canada, 18 November 1993
UNHRC, Communication No. 1416/2005, Alzery v Sweden, 10 November 2006
UNHRC, Communication No. 1234/2003, PK v Canada, 3 April 2007
UNHRC, Communication No. 1494/2006, Chadzjian v Netherlands, 5 August 2008
UNHRC, Communication No. 1510/2006, Vojnovic v Croatia, 30 March 2009

**Australian Case law**

*BMB16 v Minister for Immigration and Border Protection* (2017) 253 FCR 448, 456

*M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16


**UK Case law**

*Case No CIS 4439/98, Social Security Commissioner (UK)* (25 November 1999)

Court of Appeal, R (on the application of Detention Action) v Secretary of State for the Home Department [2014] EWCA Civ 1634.

Detention Action v Lord Chancellor [2015] EWHC 1689 at 57

The Lord Chancellor v Detention Action [2015] EWCA Civ 840

**US Case law**

*Khan v. Holder*, 608 F.3d 325, 329 (7th Cir. 2010).

*Thurassigiam v. U.S. Dep't of Homeland Sec* No. 18-55313 CV 18-135 AJB p4

**CJEU Case law**

CJEU 25 July 2018, Case C-585/16 (Alheto)

**ComAT**
ComAT, Concluding Observations on Canada, 7 July 2005, UN doc. CAT/C/CR/34/CAN, para. 5 (c).

**Legislation**

**Australia**

*Administrative Appeals Tribunal Act 1975 (Cth)*

*Migration Act 1958 (Cth)*

*Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth)*

*Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth), Explanatory Memorandum, Annexure: Statement of Compatibility with Human Rights*

**European Union**


**US**

Title 8 Aliens and Nationality, United States Code of Federal Regulations
Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996

**UK**

United Kingdom Government, UK Visas and Immigration, Detained Fast Track Processes:
Instruction: Asylum Instructions, 11 June 2013
United Kingdom Government, UK Visas and Immigration, Detained Fast Track Processes: Timetable Flexibility: Asylum Instructions, 11 November 2012
The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 SI 2406

**International Instruments**

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950

UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85


UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999,


190805 - Shota Hitomi - Thesis
UN Human Rights Committee

UN Human Rights Committee, CCPR General Comment 13/21, Procedural Guarantees in Civil and Criminal Trials ¹ UN doc HRI/GEN/1/Rev 1, 12 April 1984

UN Human Rights Committee, CCPR General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, 2001

UN Human Rights Committee, CCPR General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13

UN Human Rights Committee, CCPR General Comment No. 13: Administration of justice ¹ (1984), UN Doc. HRI/GEN/1/Rev.7, 12 May 2004,

UN Human Rights Committee, CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986

UN Human Rights Committee, CCPR General Comment No. 27: Article 12 (Freedom of Movement), CCPR/C/21/Rev.1/Add.9, 2 November 1999

UN Human Rights Committee, CCPR General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004

Secondary Sources

Books


Grahl-Madsen A, The Status of Refugees in International Law Vol II Asylum Entry and Sojourn (Leiden, AW Stijhoff, 1972)

Goodwin-Gill, G and McAdam J, The Refugee in International Law (Oxford University Press, 3rd ed.)


Weis, P, *UN High Commissioner for Refugees (UNHCR), The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, (UNHCR, 1990)

**Book Chapters**


**Articles**


Michelle Foster and Jason Pobjoy, ‘A Failed Case of Legal Exceptionalism - Refugee Status Determination in Australia's Excised Territory’ , (2011) 23 Int'l J. Refugee L. 583


**Dissertation**


Wouters C.W, International legal standards for the protection from refoulement: A legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture 24 April 2009

**Speeches**

Çukaj, Lisjana. (2015). Non-Refoulement principle according to article 3 of ECHR. 156-158. 10.18638/arsa.2015.4.1.763.

**Other**

Ad Hoc Committee on Statelessness and Related Problems, 'Proposed Draft Convention Relating to the Status of Refugees', UN doc. E/AC.32.L38, 15 Feb. 1950, Annex I (draft art. 26); Annex II (comments, 57)

Executive Committee of the High Commissioner’s Programme, Determination of Refugee Status No. 8 (XXVIII) - 1977, 12 October 1977, No. 8 (XXVIII)


**Other UNHCR Publications**


UNHCR, ‘Conclusion on Protection Safeguards in Interception Measures’ in *Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees*, UN GAOR, 58th session, Supp No 12A, UN Doc A/58/12/Add.1, 1-5 October 2003

UNHCR, Global Consultations on International Protection, 2nd Mt& Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/0/12, 31 May 2001

UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001

UNHCR, Submission by the United Nations High Commissioner for Refugees in the Case Between *Mir Isfahani and Netherlands* - Application 31252/03, May 2005, Appl. No. 31252/03


**Websites**


